Legal Pad

With Roger Parloff

SEPTEMBER 10, 2007, 6:14 AM

Did SCO get Linux-mob justice?

By rparloff

Once in awhile a judicial ruling comes down that's so wrong at such a basic level that you're just left scratching your head.

When U.S. District Judge Dale A. Kimball of Salt Lake City threw out most of SCO Group's (SCOX) case against Novell (NOVL) on August 10 — effectively dooming most of SCO's claims in closely related cases against IBM Corp. (IBM), AutoZone (AZO), and Red Hat (RHT), too — his 102-page ruling was greeted with widespread rejoicing and I-told-you-so's. (I was headed out of the country for vacation at the time and am only now digging out from under.)

Understandably, few people mourned SCO's humiliating defeat. In a series of incendiary lawsuits and letter demands in 2003, SCO sought licenses from at least 1,500 companies that used or distributed Linux, claiming that, by doing so, they were either breaching UNIX-related contracts or infringing UNIX copyrights, both of which SCO claimed to own. The demands enraged not just the Linux developer community, but many Fortune 500 companies that had become big Linux users and champions. (For a feature story I wrote about the disputes in May 2004, click here.)

Still, as a piece of judicial craftsmanship, Kimball's work falls squarely within that rare category I describe in the first sentence of this post. Here's Kimball's ruling. (Novell and SCO declined to comment for this article, citing the imminence of the trial of the few remaining issues in the case, which starts September 17.)

The problem is not that Judge Kimball's view of the facts is wrong; it might not be. His judgments about which testimony to believe and which not to believe are, in fact, plausible. So are the inferences he draws from that testimony about how he should interpret the monumentally gnarly, self-contradictory, and, in my humble opinion, ambiguous 1995 contract that lies at the heart of the case. If SCO had asked to have its case tried before a judge (a "bench trial"), and if judge Kimball had then held that trial — so he could see the witnesses testify in the flesh and make informed judgments about their live demeanor — his ruling would make perfect sense and I'd have no objection to it.

But SCO didn't ask for a bench trial, and Judge Kimball never held one. SCO asked for a jury trial, and Judge Kimball was, therefore, only ruling on Novell's pretrial motion for summary judgment. And as any second-semester law student knows, a judge can grant such a motion only when, as innumerable courts in every state and federal jurisdiction have repeatedly written, "the evidence, viewed in the light most favorable to the party opposing the motion [i.e., SCO, in this situation], shows there are no genuine issues of material fact." (If that weren't the rule, our Seventh Amendment right to a civil jury trial would be a hollow joke.)

In ruling on such a motion, a judge cannot "act as the jury and determine witness credibility, weigh the evidence, or decide upon competing inferences," according to the well-worn case law. You will find these or equivalent boilerplate recitations of the applicable law pasted somewhere into damn near every summary judgment ruling you will ever come across, with one conspicuous exception: Judge Kimball's August 10 ruling in the SCO case. (After the ruling, the only claims left in the case were of a nature that do *not* entitle a party to a jury, and on Friday, September 7, Kimball granted Novell's request to hold a bench trial on those. But there's no dispute that SCO would have been entitled to a jury on the claims that were tossed out.)

For those who came in late, the case is principally about an "asset purchase agreement" signed in September 1995 in which Novell sold something — nobody's sure exactly what any more — to a company called Santa Cruz Operation for $125 million plus certain royalty streams. (Santa Cruz later sold whatever-it-was-that-it-obtained-from-this purchase to a company called Caldera, which later changed its name to SCO.) SCO says Santa Cruz (and, ultimately, SCO) got from Novell the entire UNIX operating system business, including copyrights, while Novell says that Novell actually withheld the UNIX copyrights at the last minute, and only sold Santa Cruz, essentially, a license to take the UNIX code, use it, and make and sell new products out of it.

The then-CEOs of both Santa Cruz and Novell (yes, of *Novell* too) each supported SCO's position in their testimony — i.e., the position Judge Kimball rejected without even letting a jury hear it. Each former CEO said that it was his understanding that Novell had sold Santa Cruz the entire UNIX operating system business, *including* copyrights. Here's how Novell's then CEO Robert Frankenberg testified:

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Q. Was your initial intent in the transaction that Novell would transfer copyrights to UNIX and UnixWare technology to Santa Cruz?

A. Yes.

Q. Was that your intent at the time when the APA was signed?

A. Yes.

Q. Was it your intent when that transaction closed?

A. Yes.

Q. And did that remain your intent, as you view it, at all relevant times?

A. Yes.

Q. That never changed?

A. No.

That was also the view of Novell's (yes, *Novell*'s) then chief negotiator, Ed Chatlos. In fact, it appears to have been the understanding of nearly every negotiator on both sides of the table, with two important exceptions.

The exceptions were Novell's then-general counsel David Bradford and Novell's then outside counsel Tor Braham, of Wilson Sonsini Goodrich & Rosati, who each testified that toward the end of the negotiations Bradford told Braham to withhold the Unix copyrights from the deal, either because Santa Cruz couldn't pay enough money or because they feared Santa Cruz might go bankrupt.

This understanding was news to Burt Levine, another member of Novell's inhouse legal team, however, who said he had also reviewed and revised drafts of the contract.

Q. Mr. Levine, from the time of the [asset purchase agreement] in 1995 until you left Santa Cruz in 2000, did you ever hear anyone, whether inside or outside of Santa Cruz or inside or outside of Novell, say that Novell had retained the UNIX or UnixWare copyrights?

A. No.

Q. If you had heard anyone make such a statement, would that have been a surprise to you?

A. Very much so, yeah.

The Bradford/Braham recollection was also contradicted by a member of Santa Cruz's inhouse legal team at the time, paralegal Kimberlee Madsen, who was closely involved in the meetings and negotiations. "It was always my understanding," Madsen wrote in her declaration, "that the UNIX source code and its copyrights were part of the assets Santa Cruz purchased and were transferred to Santa Cruz at the closing in December 1995. I do not recall anyone in the negotation teams ever saying, or suggesting, that Novell would retain any UNIX copyrights. The negotiation team for Santa Cruz never discussed the possibility, as far as I am aware, that Novell sought to retain any UNIX copyright."

Again, in choosing to believe that Bradford and Braham were more credible, closer to the action, remembered the situation better, or what have you, Judge Kimball drew plausible and defensible inferences — for a juror. But a judge isn't allowed to do that in ruling on a summary judgment motion.

Likewise, Judge Kimball weighed the credibility of then-Novell CEO Frankenberg's testimony, and found it wanting. He writes that Frankenberg was "self-contradictory" at times (he cites no examples), and that portions of his testimony were contradicted by certain board minutes. Fine. Then let a jury sort out those contradictions. As a judge ruling on a summary judgment motion, Kimball's not allowed to make determinations about credibility.

Similarly, Judge Kimball appears to have discounted then-Novell-chief-negotiator Chatlos's credibility because, as the judge noted, Chatlos's wife currently works for SCO. Okay, I can see why you might reach that (rather cynical) conclusion — but only if you're a juror.

Kimball also appeared to discount paralegal Madsen's testimony because she was a lowly paralegal, whereas Bradford was a general counsel and Braham a partner at a big firm. Fine, but only if you're a juror.

Were there any conceivable reasons why a juror might have chosen to give former-Novell-general-counsel Bradford — who, Judge Kimball says, "oversaw the negotiation and drafting" of the contract — less credence than Judge Kimball chose to? Well, come to think of it, there was. Though he doesn't mention it, Judge Kimball did have before him a May 17, 2007, declaration from Lee Johnson, a longtime friend of Bradford's, who swore that he had repeatedly asked Bradford about the 1995 contract after the dispute first arose. "Without exception," Johnson wrote, "[Bradford] has told me that he was not significantly involved in that transaction and did not know much about it. . . . I even . . . specifically recall asking, 'How could you not know who owns the copyrights given your position at Novell at the time?' David's response was . . . : 'I was busy on more important things and was not involved in that level of detail in the Santa Cruz transaction.'

"The Johnson affidavit then goes on to allege that, after Johnson found out about Bradford's testimony in the case — the testimony that Judge Kimball ultimately so heavily relied upon — Johnson confronted Bradford about the apparent shift in his recollection. "In response," Johnson wrote, "he left me a voice message where he specifically stated that he did not remember any of this but he had gone back and read the agreements a few times and concluded that this must have

About This Author

Roger This blog is about legal issues that

been what happened. In other words, he does not remember this at all but has now convinced himself that this is what happened."

Would a juror be entitled to disregard Johnson's testimony? Of course. Maybe Johnson's a crank. Maybe he has some sort of pecuniary interest in the case. And why didn't Johnson save the voicemail message if this really happened? Those are all good questions for the *jury* to ask and answer.

It's not hard to predict what any appellate lawyer hired to defend Judge Kimball's ruling would say in its defense. He'd argue that, notwithstanding some unnecessary verbiage, all Judge Kimball really did was decide that the contract itself was so unambiguous on its face that all of the "extrinsic evidence" — the testimony from the CEOs, the other negotiators, Bradford, Braham, Johnson, Madsen — was all irrelevant. Kimball does, in fact, reach that conclusion in the end. Since the contract language was not in question, and not reasonably susceptible to any other interpretation than the one Novell now gives it, Judge Kimball ruled, he could properly grant Novell summary judgment.

But that argument is wrong for at least two reasons: First, from the opinion it's apparent that Kimball didn't have the foggiest idea what the parties were up to with this contract — and who could blame him? — until he waded deeply into all the extrinsic evidence. Having done so, he then decided that Bradford's and Braham's testimony seemed to make the most sense over all. But having used the extrinsic evidence to figure out a plausible hypothesis for what the contract might mean, he can't then proclaim the contract to have been "unambiguous" all along, entitling him to disregard all the diametrically conflicting evidence he had to discount and discard in the process of reaching his conclusion. That's like using a rope ladder to climb up into a helicopter, and then pulling up the ladder so no one else can climb up after you. (Okay, not a perfect metaphor, but I think you see what I'm getting at.)

Second, the language of the contract *is* ambiguous. What it gives in one provision, it takes back in the next. It's not fully consistent with *either* party's claims, and never will be.The asset purchase agreement says that Novell sold to Santa Cruz "all rights and ownership of UNIX … including source code . . ., such assets to include without limitation" a long list of specific products. SCO argues (and presented an industry expert who said) that if you're buying "all rights and ownership" of a software business "without limitation," you're obviously buying the copyrights. This contractual language is also *inconsistent* on its face with Novell's claim that it was only selling a license to use UNIX for limited purposes.

On the other hand, Novell rightly points to another page of the contact, which lists five categories of assets that are to be "excluded" from the deal. Three of the first four categories concern NetWare products — a software business that Novell was unquestionably retaining control of — while the fifth says "all copyrights and trademarks, except for the trademarks UNIX and UnixWare." SCO claims that "all copyrights" here was supposed to mean "all *NetWare* copyrights," and that the rest of the contract would make no sense if Novell was also retaining the *UNIX* copyrights, too. Novell, on the other hand, says "all copyrights" means "all copyrights," and, therefore, we just don't need to worry about what "all rights and ownership of UNIX . . . without limitation" could have meant on the earlier page.

Looks like ambiguity to me, confirmed in spades by the highly conflicting extrinsic evidence that Judge Kimball allowed into evidence and then laboriously waded into and picked his way through before deciding in the end that, you know what?: This contract really has only one possible interpretation!

Readers may have long ago wondered why I'm getting so worked up about this. After all, you may be thinking, if Kimball's ruling is really as bad as I say, won't it just get reversed on appeal? Well, that's the thing. SCO's got about $10 million in cash and it's burn rate seems to be about $1 million per quarter. It's not just fighting Novell and IBM, it's fighting the clock. Kimball's ruling could be the coup de grâce. (On Friday Judge Kimball squelched SCO's long-shot attempt to seek an immediate appeal of his August 10 ruling, so SCO will need to wait until the trial is complete before it can start the appeals process.)

Litigants, especially unpopular ones, are entitled to their day in court. In this case, the last word on SCO's controversial claims should have been delivered by a jury, not by Dale Kimball.

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Filed under Legal Pad, Linux, Novell, SCO, copyright

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Pardon me, and if I'm wrong *please* correct me, but didn't the case of Alpex Computer v. Nintendo at one point hinge on Nintendo's appeal on the grounds that it was unconstitutional to settle an intellectual property dispute in a jury trial (the jury having ruled against them)? And didn't Nintendo win that appeal?

Alpex Computer Corp. v. Nintendo Co., 34 USPQ2d 1167

"our Seventh Amendment right to a civil jury trial would be a hollow joke"

Since when do corporations have civil rights? They are a a piece of paper. One step up from a literary character and figment of someone's imagination, not by inalienable rights endowed by God, but by mere law alone. They possess the means for artificial immortality and have none of the limits on power and wealth that mere humans are born with. There are not people! Don't they have enough advantages already?
I've never heard a soldier say, "I want to hurry up and win this war and get back home and see my corporation."

a hollow joke indeed

Posted By Robert Reeves, Eureka, State of Jefferson : December 16, 2008 7:26 pm

Parloff matter to business people, and it's geared for nonlawyers and lawyers alike. Roger Parloff is Fortune magazine's senior editor (legal affairs). He practiced law for five years in Manhattan before becoming a full-time journalist.

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Posted By Robert Reeves, Eureka, State of Jefferson : December 16, 2008 7:26 pm

How much SCOX stock DO you own? Really? How much did you own when you wrote this protective POS? A whole lot, I'd guess. No one else agreed with you (that didn't own stock…)

Posted By Bob Villam,Elkhart,IN : May 13, 2008 1:17 am

Documenting everything is what a wise inventor, businessman, and lawyer would do to prevent speculation, misunderstandings, and disputes from breaking the business.

SCO must deal with a world which is about more than profit by looking at the future. Patents, copyrights, and trade secrets are not as certain or strong and many would like to believe. In both patents and copyrights I have seen public domain works which came before them and appeared to invalidate the more recent patents or copyrights.

Do businessmen and lawyers take the time to truly understand what is in the public domain or protected by someone else before making big decisions? No, it seems they often hope to deal with it after the fact or let someone else clean up the mess. When things are not certain, it seems that being a bully replaces sound judgment as demonstrated by SCO.

As an inventor I have given away inventions to the public domain, like the parabolic discone, because it was not worth my time to protect and enforce a specialized patent. If I did patent, then lawyers and businessmen would worry about their share like SCO, leaving little for the actual intelligence which designed the product.

Decisions like made by SCO carry costs which can outweigh any gain they could imagine. For example, laws may be re-written to change the outcome of future similar issues in their business. Requiring better documentation would help those acting in good faith be better protected from those looking for loopholes to make easy money.

The SCO situation is something I can tell my congress people. We need to try harder on ethics, or the real inventors will simply give up. Then what will business and lawyers do, or our national security?

Posted By Michael Lake, Toledo, Ohio : April 6, 2008 5:17 am

The title reference to Linux-mob mentality is a reference to something that, in its intensity, emotion and insularity, is real and distinctive about a segment of the Linux community. There is a portion of that community that listens only to itself, and that passes innumerable emails and postings and comments to one another to reassure each other that they are right and that SCO is evil incarnate and that anyone who says something that could be seen as useful to SCO in any remote way must also be evil incarnate, on the take, owned by MSFT or some such silly thing.,

Well, Ron you're really taking the high road by resorting to name calling: "the linux mob" Give me a break. PJ at Groklaw is the most even tempered, fair reporter covering the SCO saga, and the information that she has provided was instrumental in derailing the public perception of SCO's viability, and her weapon was: the truth.

What is happening is this: a new form of production has arisen called open source. It is deeply threatening to companies like Microsoft, in that it is in the process of demonetizing PC operating system and application suite market. So there is a huge amount of money that will be lost to a clear example of creative destruction. Get over it.

Posted By enigmafoundry : February 5, 2008 11:25 pm

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If Section 204(a) of the Copyright Act, requiring a written instrument to convey the copyright, was as decisive as some people are arguing, Kimball's ruling would be 3 pages long, not 102 pages long.

I beg to differ. Just *listing* the eight motions and cross-motions he had to deal with ran over onto page two. By the end of the background section, he was on page 42.

Whether your statement was sincerely meant, resulted from careless typing, was an exercise in flippancy, or whatever, I can't take it seriously, and it leaves me disinclined to address the remainder of your comment, other

than to express appreciation for its improved civility.

Posted By Ted, Pt. Roberts, WA : December 8, 2007 4:02 pm

ted–
If Section 204(a) of the Copyright Act, requiring a written instrument to convey the copyright, was as decisive as some people are arguing, Kimball's ruling would be 3 pages long, not 102 pages long. SCO had argued (and presented caselaw tending to support the contention) that if a contract is a "bill of sale" of a business, the copyrights that are part of that business don't have be listed and identified individually, and Judge Kimball APPEARS TO HAVE AGREED. That's why he never even brings Section 204(a) up until after he has finished discussing the APA (having construed it to confer a mere implied license to use Unix software and not a bill of sale of the Unix business) and has begun discussing Amendment No. 2, which is signed almost a year later. (See pp. 57-59 of his opinion.) He then rules that Amendment No. 2 is insufficient to meet the demands of Section 204(a), but he appears to realize and acknowledge that the APA would be. Here's the key language (p. 59): "Unlike the APA, Amendment No. 2 was not accompanied by a separate "Bill of Sale" transferring any assets. Nor did Amendment No. 2 purport to retroactively change the
scope of the assets transferred by the Bill of Sale that was executed in connection with the APA in December 1995. Amendment No. 2 states that it 'amended' the APA '[a]s of the 16th day of October, 1996.' Thus, Amendment No. 2 did not retroactively cause the Bill of Sale to transfer copyrights that were expressly excluded from transfer by the APA and Amendment No. 1."
Kimball's opinion that the APA was a bill of sale that did not include the Unix copyrights, however, was informed by his early forbidden analysis of pages 16-24 of the ruling, and elsewhere, in which he makes judgments about the credibility of the witnesses who testified before him and draws adverse factual inferences against SCO that aren't permitted on a motion for summary judgment.
(i actually posted this comment previously, but i somehow inadvertently appended it to the wrong post.)

Posted By rparloff : December 7, 2007 10:03 pm

Show us the **204(a) writing**.

Even if Judge Kimball were, inappropriately, to admit the parol evidence at issue, and
even if he were to give weight to recollections from before it became apparent that Santa Cruz could not afford the originally-proposed deal, and
even if he were to find that evidence favored The SCO Group,
that *still* would not mean that the excluded copyrights had transferred.
Copyrights simply do *not* transfer without a **204(a) writing**.

Instead of cherry-picking intemperate remarks from the comments (and making some of your own), how about addressing the issues brought up by serious commenters?

How about explaining to us why you feel that the parol evidence rule does not apply in this case, or at least giving some evidence that you actually *understand* the parol evidence rule(s)?

How about demonstrating that you at least understand what a **204(a) writing** *is*, even if you can't exhibit a relevant one?

Both the requirement for a 204(a) writing and the parol evidence rule were brought up in these comments back in September, by people who were quite civil about it. You have not addressed either. I trust that you would if you could, but the facts appear to be against you. Why don't you surprise us, though, and:

Show us the **204(a) writing**.

Posted By Ted, Pt. Roberts, WA : December 7, 2007 9:32 pm

Roger,

I have an engineering degree and software is my big deal, my bread and butter.

SCO set out to scam IBM and citizens of the wider planet earth, they are criminals, they are liars and thieves. They coveted IBMs bank balance and tried to make some easy bucks. If there were a law that said that the CEO and those board members who voted to initiate the scam, must be line up before the gallows and hung by the neck until dead, should their scam fail:: Would SCO have been so bold?

Roger, you are a guy that must have two winkies because you can't be that silly and play with one.

I have a huge difficulty understanding you because the situation is so black and white. I cannot help get the feeling that somewhere in the shadows, there is a Microsoft in the background funneling $1,000 bills into your pocket. When someone comes out with the rubbish that you just did, I immediately start looking for another angle. Its possible that you are just plain ignorant when it comes to this area of engineering, its possible that you are just plain stupid and like to hear your own voice. You could be like the double minded researcher who observes something for 30 years but never comes to the knowledge of truth. The last option is that you are on the take and your article was designed to please who ever is paying you?? I don't know what to think.

Kevin

Posted By Kevin, Perth, WA : December 7, 2007 6:18 pm

… there certainly is a mob mentality in a certain segment of the Linux community and it is deplorable.

The deplorable mentality is that of the executives of SCO who would like to claim assets which do not belong to them.

It is no different than claiming that you have the deed to another person's home, your only evidence being that you traded baseball cards with the original owner of the home when you were both in kindergarten.

SCO never produced PROOF OF OWNERSHIP of the copyrights, therefore SCO can not claim to own it.

Take this as another example:
I claim I own your car Mr. Parloff, because I have a contract with CarCompany A who you also bought a car from. I claim I have the title to your car to prove it. At court I don't produce the title to the car. Should you have to continue to defend (spending time and money) my baseless claim? Or should you get a summary judgment dismissing my complaint?

You have completely missed the mark with this article.

Posted By Maxwell NY : December 6, 2007 9:26 am

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Posted By Maxwell NY : December 6, 2007 9:26 am

"How SCO got screwed?"… really??

What evidence did they EVER have?

They never had any evidence to begin with?

Allow me to correct your title: "How could SCO have been screwed, by anyone but themselves?"

Posted By Gilles Leger, Montreal : December 6, 2007 8:42 am

The title reference to Linux-mob mentality is a reference to something that, in its intensity, emotion and insularity, is real and distinctive about a segment of the Linux community. There is a portion of that community that listens only to itself, and that passes innumerable emails and postings and comments to one another to reassure each other that they are right and that SCO is evil incarnate and that anyone who says something that could be seen as useful to SCO in any remote way must also be evil incarnate, on the take, owned by MSFT or some such silly thing. Since you are exposed only to your own distortions and misunderstandings, your views harden and become progressively more adamant and angry, whether they stood originally on a sound basis or not. Any message or messenger from the outside that threatens to require reassessment throws the world into an uproar. If you look back at the first 100 or so comments to this article you'll see what I'm talking about. (E.g., " we ALL know who pays YOUR wages," "I have never read such a load of spin-doctored bovine excrement in my entire life," "Tim Forbes [sic] and his puppies have been anti-linux since I can remember and they obviously know so little about it," ; "This is the most moronic coverage of SCO yet. I bet the author was buying stock"; "The author of this article has obviously been talking to Darl!"; "The author apparently skipped class the last four years";"of all the articles that I have read about the SCO case this is probably the clearest 'bought and paid for' one that I have seen to date. I hope you enjoy your 30 pieces of silver and fortune.com just lost an avid reader. Absolutely unbelievable that your tripe should make it past the editors"; "I maintain that Parloff's opinion piece is part of an orchestrated press campaign. . . . Parloff has telephone access to David Boies . . . I think it is defendable supposition that Parloff's opinion piece on Judge Kimball decision was vetted through David Boies"; "By the way – how much is Darl paying you?"; "Oh dear Roger, trying to garner microsoft pr dept karma and a free laptop ?"; "the above article is just more FUD. That is all the feeding of this Troll I will do"; " You just don't care about little facts like that instead trying to spin out useless FUD"; "If you're simply trolling for hits, then please post something on 'Britney sucks' or 'my cat ate my toaster' etc."; "Why havn't you read Judge Kimball's rulings, and all the documents it was based on before blogging about it? Was it too much work?"; "I noticed that SCOX stock was up 12% today. . . . I then went looking for news that could have affected the stock price and discovered with this, um, work of journalism"; "I just want to know one thing, and I KNOW you won't answer it… exactly how much did you get for selling your soul and your journalistic integrity?"; "Do you get paid to drive the stock price up??? There is no there other reason anyone would be so naive"; "You troll for hits with cheap, lazy, attention getting titles and you'll be outed as an idiot who doesnt grasp basic terms in the english language."; "I sure hope people do not rely on Forbes [sic] for accurate analysis of any topic that they bet their own personal money on. Their record in loudly backing SCO (starting at when they were worth $30 a share, till now, as they approach delisting) has been quite dismal."; "SCO and its allies are furiously spewing out misinformation about the recent decisions in this case, and it appears that Mr. Parloff has fallen for it."; "His emphasis on this is a good indication that this article was coached as part of a broader press campaign playing out in other forums.. . . I am most interested in learning if this press campaign is a Utah exclusive , or if Boies' law firm has a hand in conducting it"; "I would also suggest you look at the background on the hack, Roger Parloff, that Fortune had write the latest dribble."; "This factually inaccurate article by Fortune is incompetent"; and so forth and so on.)

The refusal to read or consider seriously, let alone credit anything that might tend to support SCO's position on any matter no matter how trivial, and, indeed, the refusal to seek comment from SCO or its lawyers before assuming the worst about any action it takes or allegedly took, leads to systematic distortion and to basic misunderstandings, like the ones I discuss in the special Addendum to Groklaw Readers in the post at http://legalpad.blogs.fortune.cnn.com/2007/11/29/stay-lifted-in-sco-v-novell-case/

So there is a mob mentality. The term Linux-mob is certainly overbroad, since at this point almost everyone except Microsoft is a champion and user of Linux, including most Fortune 500 companies. Still, I think people know what I'm talking about.

Originally I called the piece "How SCO got screwed," but an editor thought that was coarse so I looked for somethiing else. Maybe i should have stayed with the original.

Some people have asked how the Linux-mob as i have defined it could have possibly played any role in the outcome of the case. This is a fair criticism, because my train of mind on that had been, indeed, highly speculative–maybe too speculative. But when I saw an experienced judge making such clearly forbidden credibility judgments — like noting that Chatlos's wife worked for SCO and suggesting that, therefore, he wasn't worthy of belief — i thought something unusual had clearly happened. many federal judges are overworked and heavily reliant on clerks, who are fresh out of law school. law students are young and idealistic and they do know about sites like Groklaw and they know who 's working for which judge and which cases they're working on, and they are still young enough to care about peer pressure. i was a law clerk and i remember the heady feeling, and remember the thrill of trying to do Right and single-handedly save the world. So i could see a young, idealistic law clerk saying to himself, gee, maybe i can single-handedly save the Linux community with a clever, envelope-pushing, summary judgment ruling right here and now. But that would be a mistake. It's vital that an emotional case like this one — which has been the subject of so much misinformation and disinformation and gossip and rumor — be decided by 12 people (or maybe 6 to 8, for a civil case) who have never heard of Groklaw and, preferably, never heard of SCO or Linux.

Did anything like that thinking process really happen inside Kimball's chambers? i have no idea. something unusual happened. maybe i should have kept the title "How SCO got screwed."

but there certainly is a mob mentality in a certain segment of the Linux community and it is deplorable.

Posted By rparloff : December 6, 2007 8:19 am

Mr Parloff
you are entitled to fair and reasoned argument. You are not entitled to malice aforethought.
Your headline association of Linux users and mob justice is unnecessary, deeply offensive and nothing less than malice. Shame on you.
Anthony.

Posted By Anthony McNamara, Perth, Western Australia : December 6, 2007 4:43 am

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Posted By Anthony McNamara, Perth, Western Australia : December 6, 2007 4:43 am

“Linux” is a piece of software, not a corporation. Therefore “Linux” had no place in SCO’s demise. Frankly, SCO shot itself in the foot, asserting ownership over property to which it had no rights, and claiming infringements and violations of its intellectual property which were baseless and did not exist.

I am sure that the many Fortune-reading investors who held SCOX and rode it to the floor may be unhappy with the Judge’s ruling, but it does not change the facts of the case. SCO didn’t need a lynch-mob (Linux or otherwise), it managed that step all by itself.

Posted By Dave, Sydney, Australia : December 6, 2007 1:50 am

I stopped reading when you started quoting testimony from the former CEOs as to their intent in drafting the agreement.

The agreement was drafted by lawyers in deeply accented legalese ™. It’s well established that while intent of the signers overrides the actual wording of a contract between laymen, when both parties are represented by competent council and the agreement is drafted and reviewed by both sets of attorneys, what’s on paper is all that matters.

SCO would now have to sue it’s former attorney for misconduct in drafting an agreement which goes contrary to their wishes and advising them to sign. It’s a tough call and one that would also be thrown out but that’s how far off they are at this point.

Posted By Kevin Forge, Kinston, Jamaica : December 6, 2007 1:26 am

I find it amazing how much better informed those making comments are than the author of this blog. He should read them, perhaps he can learn some of the actual FACTS regarding this case.

I would also suggest that Roger Parloff owes some folks an apology, especially since his blog is supposed to be about legal matters, which Mr. Parloff is clearly not discussing.

Of course if his real desire was to generate page hits, well done! I hope it impresses your bosses (just don’t let them read the comments because they make you look rather clueless).

Posted By gregory trawsed, ontario, california : December 6, 2007 12:04 am

Roger, every law student familiar with summary judgment is also familiar with the parole evidence rule. You should be angry that Judge Kimball let this case, particularly discovery, get out of hand and inappropriately addressed it where the parole evidence rule should have applied.

Posted By Nick, Farmington : December 5, 2007 10:48 pm

The contract is plainly unambiguous, as Kimball rightly found. I note that you included a lot of foggily-remembered testimony by people who in many cases were not directly involved in the negotiations, but not the clear text of the asset purchase ammendment, which is very plain in context.

Posted By Chris, Schaumburg IL : December 5, 2007 6:10 pm

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Posted By Chris, Schaumburg IL : December 5, 2007 6:10 pm

Of course FORTUNE’s legal hack had to whine about the ruling, after all it offends his employer. The idea that a consortium that gives away code can defeat a for-profit corporation is abhorrent to his political sensibilities.

Parloff, of course, sees no problem with the fact that SCO of 2003 wasn’t at all an operating systems company, having failed at that business. Instead it was merely a shell company taken over by Utah money-men specifically for the purpose of serving as a base from which to serve thousands of companies with legal blackmail.

What raises Parloff’s ire is really the fact that for once for-profit legal harassment has failed. After all it constitutes such a huge economic engine, why should issues such as the gross misuse of the judicial system bother a legal commentator?

I’m just happy that SCO’s defeat has irritated Parloff so much. Serves him right.

Posted By Enjoy Yourdefeat, San Jose, CA : December 5, 2007 5:59 pm

Once in awhile a pundit is so wrong at such a basic level that you're just left scratching your head.

"Did SCO get Linux-mob justice?"
Are you asking if SCO got lynched by a mob of people? How was Linux involved with this decision? It is disgraceful that you would compare this decision with mob justice. Do you understand that mob justice is strongly associated with lynchings of black men in the south?

Posted By tom, fudd, alabama : December 5, 2007 5:21 pm

you haven't explained why you disagree with my critique.

In the absence of a **204(a) writing** your "critique" is nugatory.

Show us the **204(a) writing** — then we'll talk.

Posted By Ted, Pt. Roberts, WA : December 5, 2007 5:06 pm

What complete and utter tripe. As an attorney, I am disgusted that a fellow J.D. would so willingly ignore the actual merits of the case – and for what? Sensational journalism?

You should be ashamed of yourself. Times like these show whether you are truly an independent thinker, or a tool for others.

Posted By Steven B, Las Vegas, NV : December 5, 2007 4:58 pm

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Posted By Steven B, Las Vegas, NV : December 5, 2007 4:58 pm

"the evidence, viewed in the light most favorable to the party opposing the motion [i.e., SCO, in this situation], shows there are no genuine issues of material fact." (If that weren't the rule, our Seventh Amendment right to a civil jury trial would be a hollow joke.)

Judge Kimball followed the Federal Rules of Civil Procedure to the T. The plaintiff produced no valid evidence to bolster its arguments nor rebut the arguments of the defendants. The defendants were entitled to summary judgment as a matter of law.

This article is a hollow joke. Over analysis of something you don't understand.

Posted By Maxwell NY : December 5, 2007 4:52 pm

Mr. Parloff,

Your "critique" does not follow the law. "Memories" cannot be used to contradict written contracts.

Further, judges decide matters law. Contracts are matters of law. Juries decide facts.

Kimball's ruling cites how SCO was asking for the copyrights from Novell, revealing clearly that SCO themselves did not own them.

Lastly, as other posters have asked, since you claim SCO's owns the copyrights, where is the 204(a) document that clearly shows the transaction, as this documentation is required by law.

Posted By gary gilbody, charlotte NC : December 5, 2007 4:38 pm

I don't disagree with Mr Parloff's position here. But as one of the millions of people who have effectively been denied their day in court because of inability to wait the endless months and years with the clock ticking down, it pains me not at all that the same thing happened to SCO. Let's get down to brass tacks: SCO's use of the courts was, in the end, merely a business tactic. As such, they should have based their action on a business plan that allowed their use of the courts to come to fruition.

Posted By Jeff Berkowitz Portland OR : December 5, 2007 4:10 pm

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I'm not going to disagree with your interpretation of the ruling. It's a free country and heaven knows you're entitled to your opinion, but wasn't the basis of the case on who owned the copyrights?

In this case it seems clear who owned the copyrights to UNIX and UnixWare, that being Novell. You even have the statement about it ; "…while the fifth says "all copyrights and trademarks, except for the trademarks UNIX and UnixWare." It no more, or less, matters what SCO wants or thinks the contract should say, it's what the letter of the contract is that matters. That's what Novell was arguing and they were correct.

Posted By T.K. Moore, Atlanta, GA : December 5, 2007 3:49 pm

"Just another Microsoft shill looking for way to spin the losing issue."

Jeez, Roger. You should know better than to criticize someone's religion.

Posted By Joe, Castro Valley, CA : December 5, 2007 3:41 pm

OT: perhaps light grey text on a white background is **not** the best choice of colors?

Posted By Jason, Wilmington DE : December 5, 2007 3:22 pm

Donovan–
your comment merely repeats Kimball's conclusion; we all know what kimball concluded. i explained why i disagree with his analysis. you haven't explained why you disagree with my critique.

Posted By rparloff : December 5, 2007 2:50 pm

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Posted By rparloff : December 5, 2007 2:50 pm

So your problem is that the Judge is not following due process to the letter of the law when it is abundantly obvious that the parties involved are co-operating outside of reach of the letter of the law.

Is is not the judges responsibility to strive to achieve the spirit of the law within rational constraints???

Posted By Kevin Holmes, London : December 5, 2007 2:48 pm

Randy Rumormill states:

But the fact remains that SCO whether anyone likes it or not, purchased UNIX and all rights.

Really? then they can provide the 204(a) writings transering copyright?? when where they entered into evidence? See, there's the rub. There are **no 204(a) writings**. The APA (as amended) doesn't rise to the level of a 204(a) writing.

No 204(a) writting, no copyright transfer. Period. Ergo, Santa Cruz didn't purchase "all rights". Further, there should be additional 204(a) writtings between Santa Cruz (nee Tarantella, now a Sun Microsystems subsidary) and Caldera (DBA The SCO Group).

And as James Graves points out, Novell didn't really own significant parts of the codebase – much of that was written pre-Berne Convention and failed to contain a copyright notice. This is why the USL v. Board of UC Regents was settled so quietly.

No, Novell couldn't sell the copyrights – that could be considered fraud. But they could sell the rights to continue development, and to service the existing UNIX market, and allow the Santa Cruz Operation to gain new clients. That's what they bought.

Further, the notion that Santa Cruz bought the whole thing for $125-150 million when Novell had paid roughly $1 **billion** only 4 years earlier strikes me as…unreasonable.

Posted By I R A Darth Aggie, Havana, Cuba : December 5, 2007 2:45 pm

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Posted By I R A Darth Aggie, Havana, Cuba : December 5, 2007 2:45 pm

Roger, I'm really sorry but your conclusions about the Hon. Dale Kimball's decision in SCO v. Novell, and tangentially SCO v. IBM, are completely wrong. Judge Kimball correctly ascertained that SCO has absolutely no claims to make, that SCO does not own any of the copyrights they claim to own, and that therefore there are no issues to bring before a jury. There was, and is, no question about what the APA and its amendments transferred to SCO *re* Unixware: the right to *sell*, and that is about it. Since the APA and amendments are quite clear about SCOs lack of standing due to their lack of ownership of any copyrights involved, there is nothing for a jury to hear.

Let me repeat that: THERE ARE NO CLAIMS for a jury. All of SCOs claims were clearly meritless from the

outset, and all Judge Kimball did was give us the benefit of not dragging this case out any longer than it needed to go.

Your assessment is completely off-base, given that there are no claims for a jury to even examine, and I think you should probably write a retraction and apology to PJ, Groklaw, the Free/Open Source (nee “Linux”) community, and all Americans everywhere for the tripe you trot out as “indignation.”

Posted By Donovan, Tucson, AZ : December 5, 2007 2:34 pm

this sounds like FUD! so, why slur linux community when its all about IBM , Novell, unix ? you have an extremely poor knowledge about the case. its really ironical that SCo did not even to this day produce the millions of lines of code that was supposed to be in linux. where is it mr. smarty pants ?

Posted By ashok pai, Bangalore, India : December 5, 2007 1:59 pm

Since when does a CEO actually know the definitive details of what a company actually owns ?

Just another Microsoft shill looking for way to spin the losing issue.

Posted By Bill Smith, Lansing, Michigan : December 5, 2007 1:43 pm

I hear little violins.

Posted By Anonymous : December 5, 2007 1:33 pm

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Posted By Anonymous : December 5, 2007 1:33 pm

We all know who you are in bed with.

Posted By Don, Traverse City, MI : December 5, 2007 1:30 pm

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Look, we get it, Fortune magazine loves SCO. I should hope that Parloff, a writer who makes money from the Copyright of his words, would understand Copyright 101. There is no such thing as an “implied transfer of copyright”. this is not a matter for a jury to decide, it is quite clear in the law that unless there is a specific, written transfer of copyright, then there is no transfer. period.

Why is Fortune and every other business magazine so determined that SCO must be right? Are you required to check all common sense and knowledge of elementary intellectual property law at the door and issued stock options and cheerleader uniforms?

Posted By Nathaniel, Houston, TX : December 5, 2007 1:26 pm

Judge Kimball has ruled based on questions of law; not questions of fact. Yes, he discusses facts in order to explain his legal conclusions, but the only subject of disagreement seems to be that SCO says “We bought copyright” and Novell says “No you didn’t.” This is not a question of fact. It is a question of law. It is entirely appropriate for a judge to rule on a question of law, and I really hope that the parties will disagree on a question of law before approaching a court.

Posted By Jonathan, Tuscaloosa Alabama : December 5, 2007 1:08 pm

Many people and companies are sued or threated with lawsuits and settle or are unable to appeal unfavorable decisions for financial reasons. This is the fault of our civil judicial system, not individual judges. This is where reform is needed.

Posted By Tom, Ann Arbor, Michigan : December 5, 2007 12:38 pm

In defense of Parloff, it's more than a bit hasty to jump from the fact that he did not accurately summarize Judge Kimball's ruling to the supposition that he is bought and paid for by SCO (or other entities).

1) SCO's press releases on trial matters have far exceeded Novell plus IBM plus AutoZone. In 2004, Roger was in the SCO waiting room and found evidence that they are press fetishists.
2) Roger Parloff simply doesn't have the time to do in-depth coverage of reading the hundreds of pages of Pacer filings.
3) It's more work to be your own editor as with a blog. Roger's May 17, 2004 article reads as much more balances with more of the opinion content coming from named sources.

So I think that the evidence shows that in contrast to the above guesses that Roger is "evil" or "bought and paid for" or "trolling for web hits," is that he is simply not applying the highest possible standards to his blog postings. In short, he is being lazy to a normal human extent. (And not the good type of lazy that Larry Wall writes about.) So please try to forgive your fellow human and we can hope he once again sees the following points.

1) Copyrights cannot be transfered by a mere contract.
2) California law that excludes extrinsic evidence in contract interpretation trumps any witnesses.
3) The witnesses presented by SCO were not of a very good quality. The were more character witness than eyewitness.

Posted By R Penner, Sunnyvale, CA : September 25, 2007 5:18 pm

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I have never read such a load of spin-doctored bovine excrement in my entire life. Innuendo regarding vague wordsmithing, biased perspectives, selective references and unsupported witness testimony aside, the APA was a well-crafted legal document. "Excluded Assets" are exactly that – can this be defined any clearer?

May I suggest for those who wish an better understanding of this case, with all available documentation (that which SCO hasn't attempted to hide under court seal), as well as supporting legal references and resources – peruse http://www.groklaw.com
This article so reeks of another SCO [hmmmm, M$?] "Get the FUD" campaign….

Posted By M. Echer, Vancouver, BC : September 25, 2007 3:01 pm

You see, Mr Parloff – we ALL know who pays YOUR wages

Posted By Stephen Norton, Belfast,UK : September 25, 2007 1:14 pm

It's actually quite simple. Why SCO brought up so much oral testamony, it never mattered at all.

What mattered was that the language of the contract didn't say that the copyright transfered. That was without doubt and there are rules that the language of the contract prevails anything anybody could say about intent.

So the judge had an easy time, because after step 1, review of the contract, everything was clear already.

Posted By Kay Hayen, Germany : September 25, 2007 5:21 am

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Posted By Kay Hayen, Germany : September 25, 2007 5:21 am

I have to say it, I wonder how Tim Forbes and Dan Lyons are going to spin this one?

I guess Roger Parloff is going to handle the pouting for them.

Tim Forbes and his puppies have been anti-linux since I can remember and they obviously know so little about it.

What about all of us 'Crunchies' that 'didn't know how real business works'.

Where is the bravado of all of those ZD-Net and Forbes spin-meisters?

It's interesting how four years later all of the 'Sandal wearing crunchies' who are 'brain washed religious zealots' for daring to demand a choice on what OS we use are going about our lives and SCO is pretty much the recipient of the karmic retribution they so richly deserve.

Translation: It was a bad business idea to attempt to co-opt something you didn't create as opposed to working

on your software and services offerings.

I put SCO right up there with people that create those 'One off' websites that are misspellings of popular websites to get people to click on them and try to sell them airline tickets and viagara. From the looks of things, young Darl (and perhaps a few pouting journalists) will be needing both soon.

Cheers,

Nick

Posted By Nick Donovan – New York : September 19, 2007 1:34 pm

I can see your point, but the inflammatory lead is just the type of baiting that SCO was (in)famous for in the Linux community. The SCO legal team has recourse, as you know, through the appeals channel, and could in due time reverse this decision based on the points you've summarized. The unfortunate fact you've left out is that SCO has made its own bed and now must lie in it.

Had SCO produced the evidence of the alleged theft of code back when it was asked for, this would not be an issue. To now blame the "Linux-mob" for SCO's situation is more than disingenuous; it is blind to history.

Consider this my last month of my Forbes subscription.

Posted By Marv Swett, Richland Washington : September 17, 2007 11:06 pm

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hmmm Darl attempts to hold everyone hostage and extort monies and lost.

Most of this could have been avoided with some due diligence before hand with Novell. One would think that one would want to have one's facts straight BEFORE trying these billion dollar payday law suites.

Really with the logic SCO was holding out, there is no reason to go bankrupt. They OWE Novell big and they should pay up NOW NOW NOW. Darl, get your mower tuned up and report to Novell to start mowing the lawn till your debt is payed. Then on to every SCO shareholder you just hoodwinked.

I for one ain't buying that they paid all that money to buy the house (Unix) only to discover later they only leased it essentially. SCO legal resources were asleep at the wheel??????? Sorry Roger, I can't buy that.

Posted By Barry Shawgo Pekin Illinois : September 17, 2007 5:15 pm

Perhaps you're right. Maybe Judge Kimball should have let the copyright issue go before a jury. But even if SCO owns the copyrights, it doesn't make much difference. They still haven't proved copyright infringement against IBM, and they still owe Novell 95% of the royalties, and they still end up in bankruptcy.

So it really doesn't much matter in the end. The bankruptcy court's duty is to ensure that the creditors get paid, and not to let SCO waste money appealing a moot point.

Posted By Nell, Pittsburgh, PA : September 15, 2007 7:05 pm

Some of this is beyond silly.

1) What on earth could

“all of Seller’s right, title and interest in and to the assets and properties of Seller relating to the Business (collectively the “Assets”) identified on Section 1.1 (a) hereto. Notwithstanding the foregoing, the Assets to be so purchased shall not include those assets (the “Excluded Assets”) set forth on Schedule 1.1 (b):”

mean except that what follows notwithstanding dominates what precedes it? It is in no way unclear or ambiguous. I don’t think it even rises to the level of unusual. It’s not hidden, either, since it’s the following sentence.

2 The argument that the exclusion of all copyrights is vague, because it doesn’t say which copyrights is an attempt to turn the 402 writing requirement on its head, but if you actually read the APA, there’s no mystery. the included asset schedule 1.1(a) and the excluded asset schedule 1.1(b) have a parallel structure, which makes sense if b is intended to exclude from what a includes so in 1.1 (a) we have:

“V. Intellectual property – Trademarks UNIX and UnixWare as and to the extent held by Seller (excluding any compensation Seller receives with respect of the license granted to X/Open regarding the UNIX trademark).”

and in b an equivalent IP section:

“V. Intellectual Property:

A. All copyrights and trademarks, except for the trademarks UNIX and UnixWare.

B. All Patents”

SCO has never argued it received any patents or additional trademarks, so clearly they didn’t get all right title and interest to the IP. SCO had no good answer for why this exclusion that works so well for the other IP, fails for copyrights.

Santa Cruz wasn’t a believer in the APA conveying the copyrights, or they wouldn’t have had it amended to read:

“V. Intellectual Property:

A. All copyrights and trademarks, except for the [...] copyrights and trademarks owned by Novell as of the date of the Agreement required for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies. However, in no event shall Novell be liable to SCO for any claim brought by any third party pertaining to said copyrights and trademarks.

B. All Patents ”

While this has a number of legal problems, it isn’t a joke to argue it conveyed copyrights, merely wrong.

But arguing the original APA did – that’s a joke. Let’s just let it die along with whatever enormous sum SCO payed Novell for UNIX, when really Santa Cruz bought it for stock and SCO (then called Caldera) bought it from them for what ended up being around $27 million which bought not just SVRX, but OpenServer, the channel and the physical assets. So Darl has at the very least added a zero to what SCO payed for SVRX.

Posted By Codswallet, Cambridge MA : September 15, 2007 3:57 pm

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when u sell something it is lock stock and barrel that means unconditional just the options becareful of the contract also when selling anything make sure the contract is unconditional
mike

Posted By 3067 : September 14, 2007 9:24 pm

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Posted By 3067 : September 14, 2007 9:24 pm

Randy R. dusts off the tired old insinuation that Santa Cruz must have got more value “for a price tag of $125 million.” The APA is clear that the only price was 6,127,500 newly-minted shares of Santa Cruz stock, which IIRC was valued at just under $38 million on the day of the transaction. I think he must be spreading the mistake that the additional royalty payments made through SCO, which were Novell’s before and after the deal was cut, were somehow part of the price.

It’s a bit of fast-talking that has confused more than one casual listener. But the principle is simple: you can’t buy something by paying someone their own money. If I sell you my wallet for $30, but tell you that you have to give back me the $100 bill inside it too, would you go around saying that you spent $130 on the wallet? Apparently, Darl would.

That said, let’s put the actual price tag in perspective. The Novell-AT&T deal for the copyrights (such as they were) was reported to be worth around $1 billion.

Novell’s asking price for the business with copyrights was reported to be $600 million.

If Novell had sold everything to Santa Cruz, they would have marked it down by more than 96%. If a car lot discounts a car by 96%, you’ll be lucky if it has a chassis and tires. Do *not* expect an engine.

An interesting thing to impugn Novell’s character. Novell does have a history of a particular kind of allegation against its executives — that they try to talk down one or more of the company’s assets, get them sold out of the company for a song, and somehow end up on the receiving end of them. I don’t know if that’s what happened in this case, but if it did, it was not the last time for Novell. So then, why is it you’re shocked that someone might have looked out for Novell’s stockholders for a change?

And what’s with this 9 witnesses to 2? What a laughable measure! While you’re at it, why not point out a taller stack of motion papers served? Or more lawyers? Or flashier bow-ties?

Randy R. sounds familiar. Do you do investor relations?

Posted By Dave, Austin, TX : September 14, 2007 5:53 pm

I'll have to agree with Novell that "all copyrights" means "all copyrights".

SCO's attorney wasn't on the ball if he or she read that part of the contract and didn't interpret it correctly.

Legal contracts are written in either black or white and no Grey areas unless explicitly noted in that contract.

There was only one exclusion in that contract and it was for "Trademarks" for Unix "not" copyrights.

This exclusion is clear and irrefutable but SCO can use the rest of its' money trying to make it disappear.

SCO's McBride should have been replaced long ago with someone willing to take care of business and profit with the tools they had instead of trying to profit by litigation.

Posted By Myles Winston, Boston, MA : September 14, 2007 5:14 pm

Did SCO get Linux-mob justice?

No, no they didn't.

Posted By Bob, Philadelphia PA : September 14, 2007 4:35 pm

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SCO files for Bankruptcy, Friday Sept 14 at about 1 PM EDT. Trading halted.

Posted By Pan Glozz, Mojave Ca : September 14, 2007 3:50 pm

This is the most moronic coverage of SCO yet. I bet the author was buying stock.

Posted By Steve Garp, Nashville TN : September 14, 2007 3:43 pm

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How come SCO had to pay 95% of the money from Unix sales to Novel if they owned it all.

Posted By Jim Buffalo NY : September 14, 2007 3:21 pm

I don't understand the reliance in the article on the phrase "without limitation". As used in context, that phrase is clearly referring to the list of products being listed, NOT the rights being conferred.

It is also not ambiguous to have one part (Schedule 1.1(a)) list some assets, while another part (Schedule 1.1(b)) take some of those assets off the table. What would be the purpose of 1.1(b) if it didn't take away some of what was listed in 1.1(a)? All you'd do is list 1.1(a) and by implication anything not on it is "excluded". The ONLY reason for a list of excluded assets (such as the copyrights) is to REDUCE the scope of the list of included assets. No ambiguity involved whatsoever.

In 1.1, where it references 1.1(a) and 1.1(b), it clearly says, in the same section, "notwithstanding the foregoing, the Assets to be purchased shall not include … [what's listed in 1.1(b)]". Again, how is that in any way ambiguous?

Posted By Steve Peltz, Champaign, IL : September 14, 2007 2:58 pm

I'm not a lawyer, but I can read (ahem).

U.S. Copyright Law states:

"§ 204. Execution of transfers of copyright ownership

(a) A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent."

So, if SCO wishes to prove they purchased the copyrights to UNIX, they merely have to produce this "instrument of conveyance" and enter it as evidence. Slam dunk, they win.

Uh, oh… it appears that, like the "millions of lines of stolen UNIX code," unicorns, bigfeet, little green men from Mars, and principled legal writers at "Fortune," this "instrument of conveyance" has gone missing. Too bad. And it was just what SCO needed, too. Isn't that the damnest luck?

Posted By RonB, Bedford TX : September 14, 2007 3:56 am

In recent weeks there has been much debate over SCO Group vs. Novell regarding the purchase of UNIX. Throughout these debates there has been much confusion, emotion, and most of all misinformation. I have yet to see any column or report by a qualified contract/tort attorney and many have misinterpreted Judge Kimball's ruling. In some of these discussions, the term license, transfer, and conversion are used without regard for their actual meaning in terms of the Asset Purchase Agreement (APA). One thing is for certain, not one person can

explain this huge quagmire of differing public opinion.

I have read so many posting and viewed many of the court documents, including the APA. One thing keeps coming back around and continues to cause questions to be raised. If the APA signed in 1995 was not for the purchase of UNIX and it was not a license to use, develop, and sell UNIX derivatives, then what exactly was the purpose for the APA? Quite frankly, I haven't the foggiest idea. However, I have put into words my views and questions for rhetorical purpose, and present them for everyone to read and ponder.

1) The term, "All rights and ownership" is used in the APA under Schedule 1.1(a) Assets. While this may seem pretty straight forward wording, it is quashed by a later section, Schedule 1.1(b) Excluded Assets where it states, "All copyrights and trademarks, except for the trademarks UNIX and UnixWare". After typing the "all rights and ownership" into a search engine, I found quite a number of contracts, and agreements which use this exact wording. Moreover, this term is most often found where somebody is passing on or allowing ownership of something to pass on to another. For an example, in work-for-hire contracts where an independent designer or developer is doing work for a company and the company wants to retain ownership of that work. This is quite common in the IT world. I have found numerous entries in SEC filings where the term is used when a company purchases assets of another. I have found this terminology in land rights, software rights, and financial rights documents. If this wording is not strong enough to demonstrate ownership of a purchased asset in the case of SCO Group vs. Novell, then what force does this terminology have in virtually every other contract or official document? In other words, what rights are obtained or retained if the Federal Courts view it as unenforceable?
2) The wording of the Schedule 1.1(b) Excluded Assets where it states, "All copyrights and trademarks, except for the trademarks UNIX and UnixWare" does not specifically state the copyrights to anything. It is probably one of the most ambiguous parts of the APA. Is Novell claiming copyrights of Stephen King's novels? Perhaps it is referring to the copyrights to John Fogerty's recent album (watch out John, we know what happened last time). This "claim" is vague at best. The only specificity is the reference to "trademarks UNIX and UnixWare". That is a far cry from the copyright of "UNIX". If "UNIX" and "UnixWare" were specifically noted in the Trademark exclusion, why not note it for the Copyright? Was that intentional? Is that not considered ambiguous?
3) The Federal Parks Service (FPS) web site, http://npsfocus.nps.gov/docs/guide/PublishingPolicy_Copyright.html recognizes and acknowledges "contractor" rights to copyright. However, they believe that if the "Contract specifies that all rights and ownership are transferred to the NPS" that, "metadata" is "public domain". In other words, the Federal government views copyright passed on by the terminology "All rights and ownership" does in fact include copyright. This may seem to some a leap of faith; however, the FPS continues to use work that was contracted out to non-employees on their web site (e.g. Pictures) and claims public domain base on that specific wording.
4) If Judge Kimball's ruling is allowed to stand, that would open the doors for many, many others to file claims against former employers, management companies, and even the federal government for copyright violations. As it appears under Judge Kimballs ruling, any contract or agreement that relies strictly on the wording, "All rights and ownership" could in fact be ruled as not including copyright. Once again, using Judge Kimball's reasoning, that particular wording is moot if there fails to be compelling evidence that the entity who believes they are covered by "All rights and ownership" does not have explicit rights to copyright.
5) There has been debate whether Novell had performed a "transfer" of the copyright to SCO Group of UNIX, as referred to in "1.1 Purchase of Assets (a) Purchase and Sale of Assets. On the terms and subject to the conditions set forth in this Agreement, Seller will sell, convey, transfer, assign and deliver to Buyer and Buyer will purchase and acquire from Seller on the Closing Date (as defined in Section 1.7), all of Seller's right, title and interest in and to the assets and properties of Seller relating to the Business (collectively the "Assets") identified on Schedule 1.1 (a) hereto." It goes on to state, "Notwithstanding the foregoing, the Assets to be so purchased shall not include those assets (the "Excluded Assets") set forth on Schedule 1.1 (b)". Now this is where it gets tricky. In the included "Assets" under Schedule 1.1(a) Assets it clearly states, "…and all technical, design, development, installation, operation and maintenance information concerning UNIX and UnixWare, including source code…" If one does not own the source code, that is, as the Federal Courts have stated, "…Source code represents the same instructions in a specialized programming language, such as BASIC, C, or Java…" , "…individuals fluent in a computer programming language, source code is the most efficient and precise means by which to communicate ideas…", "Likewise, computer source code, though unintelligible to many, is the preferred method of communication among computer programers." (Peter D. Junger v. Secretary of State et al). In gerneal, source code is a text or "…programming statements that are created by a programmer with a text editor…" Novell's copyright registration is for "Text of computer program" (see http://www.novell.com/licensing/indemnity/legal.html). Therefore, using the same degree of reason as the courts, Novell owns the "text" of UNIX. However, that "text" is also called "source code" and it was specifically transferred to SCO Group (Caldera) by the APA as noted previously. Here is where Judge Kimball erred in his summary judgment. The Copyright Act clearly states, "A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent." In other words, when Novell transferred the "source code", they inadvertently transferred that copyright, though they did not use the word "copyright". In fact, there is no requirement under the Copyright Act to specifically state copyright.
6) If Novell were the actual owner of UNIX, and claims that SCO Group is required to pay royalties under California law, there are a few issues that first need to be ironed out. Under California Business and Professions Code, section 21752 in regards to royalties, there "shall" be certain conditions. Those conditions are that the contract "be in writing", "be signed by the parties", and must include "proprietor's name and business address", name and location of "each place of business", the "duration of the contract" and a "schedule of rates and terms of the royalties". This could pose some difficulty for Novell since as far as I have read; there are a couple elements that were not addressed in the APA (which technically is not a contract for royalties) which should have been included such as duration of the contract. This all depends on whether Novell is even entitled to royalties payments over the SVRX.

It is apparent to me that Judge Kimball is merely a bench judge. He has no background in computer science, nor does he have any experience in Copyright or Patent law as a professional attorney. He is a Political Science major and was "appointed" to the bench. His lack of experience in technical matters related to technologies is obvious. There is at least one case that was overturned by the Federal Court of Appeals for his ruling which would have allowed pharmaceutical companies to produce and market drug as a "dietary supplement" and bypass FDA regulation and approval. The Court of Appeals overturned Kimballs ruling and stated, "The district court based its decision on the determination that § 321(ff)(3)(B) refers unambiguously to finished drug products, rather than their individual constituents. Thus, it was unnecessary for the district court to reach a number of issues raised by both parties." Sound familiar? It seems once Judge Kimball convinces himself, there is no need to listen any further. Furthermore, Judge Kimball seems to have a problem with ambiguous and unambiguous wording in federal law and contracts. I have now doubt that this case, if properly argued in the Federal Court of Appeals will be overturned and integrity will once again be awarded to the federal court system. Furthermore, it is imperative that his ruling be overturned if organization such as Microsoft, Novell, and Sun Microsystems want to protect their outsourced software development from claims of copyright violation by contracted authors.

Posted By Mucca, West Hills, Ca : September 13, 2007 7:33 pm

TYPO IN TITLE?
"Did SCO get Linux-mob justice?"
should surely have read
"Did the (SCO) mob get Linux justice?

This was a bogus lawsuit if ever there was one, with an extortion racket, and stock pump scam thrown in.

Posted By SPM, UK : September 13, 2007 2:29 pm

The author of this article has obviously been talking to Darl! Sounds like the same story Darl has been telling since the crushing ruling.

All SCO presented were a bunch of witnesses that were not involved in the actual drafting of the agreement that

thought they were getting copyrights, when the signed agreement specifically excludes copyrights!

What a hoot!

Posted By Jeff, New Orleans, LA : September 13, 2007 12:31 pm

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The sad part is that this whole case – and all the time and resources that it has consumed – is merely a sideline to determine whether SCO even has the standing to continue its lawsuits against IBM and others.

Over four years ago SCO claimed in no undertain terms that they had proof of multiple blatant cases of code being copied from UNIX to Linux and sued not only the alleged perpretrators but also third parties who could not have known that the products they were using might be infringing. They also leveraged Fear, Uncertainty and Doubt to extract money from Linux users and provide cover for Linux adversaries like Microsoft to fund an anti-Linux campaign without attracting more antitrust attention.

Yet four years and countless man-hours of discovery later, SCO has yet to publicly disclose any of the allegedly blatant infractions or show any hint of readiness to try their claims in court.

At the very worst, SCO's actions could be nothing more than a kamikaze attack on Linux on behalf of Microsoft and Sun (before they found the Linux religion.)

At the very least, their earlier claims were misleading, if not fraudulent.

In the mean time, McBride & co. are exaggerating the value of a troubled company and, I'm sure, collecting a nice salary for their efforts. If any of them have been selling their stock at current artificially inflated prices, then the SCO Group would be my favorite candidate for the title of "Most Elaborate Pump-and-Dump Scam."

One thing is for certain: win or lose this case, there will be lawsuits from SCOX shareholders when they find out that they have been conned into investing in a shaky – and shady – company.

Did SCO get Linux-mobbed? That question is irrelevant. The better question is whether the SEC and Justide Department should be putting together a case against McBride & co. for fraud, stock manipulation, deceptive business practices, and extortion over the past few years… perhaps a RICO charge would be approrpiate.

Posted By Geoffrey Welsh, Richmond Hill, Ontario, Canada : September 13, 2007 11:48 am

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There's so much wrong, it's hard to know where to begin, but here's Kimball on the copyrights.

" The Copyright Act requires a signed written instrument to transfer ownership of copyrights. Section 204(a) states: "A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent. 17 U.S.C. § 204(a). This requirement is meant to "enhance[] predictability and certainty of copyright ownership." Effects Assoc. v. Cohen, 908 F.2d 555, 557 (9th Cir. 1990).

Section 204 is a prerequisite to a valid transfer of copyright ownership, and not merely an evidentiary rule. A transfer of copyright is simply "not valid" without the required written instrument. Konisberg Int'l, Inc v. Rice. 16 F.3d 355, 357 (9th Cir. 1994). Further, unlike a statute of frauds, Section 204 is not subject to equitable defenses, such as estoppel, because such defenses would "undermine the goal of uniformity and predictability in the field of copyright ownership and transfer." Pamfiloff v. Giant Records, Inc., 794 F. Supp. 933, 937 (N.D. Cal. 1992).

"As with all matters of contract law, the essence of the inquiry here is to effectuate the intent of the parties. Accordingly, even though a written instrument may lack the terms `transfer' and copyright,' it still may suffice to evidence their mutual intent to transfer the copyright

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interest." Nimmer on Copyrights § 10.03[2]. SCO contends that, under the applicable authority, the language identifying the Assets by reference in Section 1.1(a) of the APA, as amended by Amendment No. 2, meets the statutory requirements.

Amendment No. 2 does not include any provision that purports to transfer ownership of copyrights. It merely

revised the definition of the intellectual property category of the Excluded Assets schedule. Unlike the APA, Amendment No. 2 was not accompanied by a separate "Bill of Sale" transferring any assets. Nor did Amendment No. 2 purport to retroactively change the scope of the assets transferred by the Bill of Sale that was executed in connection with the APA in December 1995. Amendment No. 2 states that it "amended" the APA "[a]s of the 16th day of October, 1996." Thus, Amendment No. 2 did not retroactively cause the Bill of Sale to transfer copyrights that were expressly excluded from transfer by the APA and Amendment No. 1.

Furthermore, Amendment No. 2 also did not amend Schedule 1.1(a). It is undisputed that the Bill of Sale transferred the Assets contained on Schedule 1.1(a). Even after the execution of Amendment No. 2, however, Schedule 1.1(a) did not include any language regarding copyrights.

Also, significantly, Amendment No. 2 did not identify which copyrights, if any, were "required for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies." The written instrument required by Section 204 should contain sufficient information "to serve as a guidepost for the parties to resolve their disputes." Konisberg Int'l, 16 F.3d at 357. Amendment No. 2 does not meet these standards. SCO now claims that Santa Cruz required ownership of all of Novell's UNIX and UnixWare copyrights to exercise its rights regarding the UNIX assets it acquired under the APA. Novell, in contrast, contends that Santa Cruz did not need to own these copyrights because Santa Cruz already had a license to the

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copyrights.

Where the plain language does not resolve the issue, among the relevant extrinsic evidence courts review to determine such "mutual intention" is "the surrounding circumstances under which the parties negotiated or entered into the contract" and "the object, nature and subject matter of the contract." Morey v. Vannucci, 64 Cal. App. 4th 904, 912 (1998). The contract may be explained by reference to the circumstances under which it was made. Cal. Civ. Code § 1647.

In this case, the extrinsic evidence surrounding Amendment No. 2 strongly favors Novell's position that Amendment No. 2 was merely affirming Santa Cruz's implied license to use the UNIX and UnixWare copyrights. Santa Cruz's in-house counsel, Steve Sabbath, approached Novell's in-house counsel, Allison Amadia, about obtaining the UNIX and UnixWare copyrights. Amadia testifies that she then reviewed the APA and spoke with Braham to learn about the history of the agreement and the intent of the parties.

Santa Cruz's first proposed draft of Amendment No. 2 referred to copyrights "owned by Novell as of the date of this Amendment, which pertain to the UNIX and UnixWare technologies and which SCO has acquired hereunder." This proposed language clearly intended to transfer the UNIX and UnixWare copyrights through the amendment. However, Novell rejected Santa Cruz's proposed language. Amadia testifies that she told Sabbath that while Novell was willing to affirm that Santa Cruz had a license under the original APA to use the UNIX and UnixWare copyrights in its business, it was not willing to transfer ownership of the copyrights. As a result, the final version of Amendment No. 2 does not refer to any specific copyrights and does not refer to Santa Cruz's "acquisition" of any copyrights.

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This extrinsic evidence is consistent with the language of the Amendment, which reads like an implied license. It is also consistent with the fact that the parties did not amend Schedule 1.1(a) when they executed Amendment No. 2. No specific copyrights were, therefore, included as Assets to be transferred on Schedule 1.1(a). As in interpreting the original APA, "the whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Cal. Civ. Code § 1641. Construing the language of Amendment No. 2 to be an affirmation of an implied license to the copyrights does not put the amended Excluded Assets Schedule at odds with the transferred Asset Schedule 1.1(a).

There is also significant evidence that Santa Crux did not "require" the UNIX and UnixWare copyrights. Santa Cruz had been able to pursue its UNIX business from December 6, 1995 until October 16, 1996, without any problems due to its lack of ownership of the copyrights. Santa Cruz indisputably did not own the copyrights during those ten months. While SCO has submitted testimony from witnesses stating generally that the copyrights were necessary to running a software business, none of those witnesses give specific examples of how a lack of copyright ownership impeded Santa Cruz's ability to exercise its rights under the APA. The APA conferred an implied license on Santa Cruz to use Novell's copyrights as needed to implement the purposes of the APA. That implied license allowed SCO to license the copyrights to others. Because Santa Cruz already had that license, it did not require ownership of the copyrights. Therefore, even if Amendment No. 2 had a means of conveyance or conveyance language, Amendment No. 2 would not have transferred the UNIX and UnixWare copyrights as there is no evidence that any of the copyrights were "required."

For these reasons, the court concludes that Amendment No. 2 did not transfer the UNIX

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and UnixWare copyrights to SCO. Even if the Amendment met the requirements of Section 204, the extrinsic evidence demonstrates that the parties intended only to affirm the implied license granted under the original APA. Furthermore, SCO has not provided evidence that it required ownership of the copyrights to exercise its rights under the APA. Accordingly, the court concludes that Novell is the owner of the UNIX and UnixWare copyrights.

This court's conclusion that Novell owns the UNIX and UnixWare copyrights impacts several of the claims asserted by both parties and several pending motions. Novell's motion on the copyright issue is brought with respect to SCO's First Claim for Relief for slander of title and Third Claim for Relief for specific performance. Novell is entitled to summary judgment on SCO's First Claim for Relief for slander of title because SCO cannot demonstrate that Novell's assertions of copyright ownership were false. First Sec. Bank of Utah v. Banberry Crossing, 780 P.2d 1253, 1256-57 (Utah 1989). In addition, Novell is entitled to summary judgment in its favor on SCO's Third Claim for Relief seeking an order directing Novell to specifically perform its alleged obligations under the APA by executing all documents needed to transfer ownership of the UNIX and UnixWare copyrights to SCO. Neither the original APA nor Amendment No. 2 entitle SCO to obtain ownership of the UNIX and UnixWare copyrights. "

Posted By Codswallet, Cambridge MA : September 13, 2007 8:05 am

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copyrights.

Where the plain language does not resolve the issue, among the relevant extrinsic evidence courts review to determine such "mutual intention" is "the surrounding circumstances under which the parties negotiated or entered into the contract" and "the object, nature and subject matter of the contract." Morey v. Vannucci, 64 Cal. App. 4th 904, 912 (1998). The contract may be explained by reference to the circumstances under which it was made. Cal. Civ. Code § 1647.

In this case, the extrinsic evidence surrounding Amendment No. 2 strongly favors Novell's position that Amendment No. 2 was merely affirming Santa Cruz's implied license to use the UNIX and UnixWare copyrights. Santa Cruz's in-house counsel, Steve Sabbath, approached Novell's in-house counsel, Allison Amadia, about obtaining the UNIX and UnixWare copyrights. Amadia testifies that she then reviewed the APA and spoke with Braham to learn about the history of the agreement and the intent of the parties.

Santa Cruz's first proposed draft of Amendment No. 2 referred to copyrights "owned by Novell as of the date of this Amendment, which pertain to the UNIX and UnixWare technologies and which SCO has acquired hereunder." This proposed language clearly intended to transfer the UNIX and UnixWare copyrights through the amendment. However, Novell rejected Santa Cruz's proposed language. Amadia testifies that she told Sabbath that while Novell was willing to affirm that Santa Cruz had a license under the original APA to use the UNIX and UnixWare copyrights in its business, it was not willing to transfer ownership of the copyrights. As a result, the final version of Amendment No. 2 does not refer to any specific copyrights and does not refer to Santa Cruz's "acquisition" of any copyrights.

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This extrinsic evidence is consistent with the language of the Amendment, which reads like an implied license. It is also consistent with the fact that the parties did not amend Schedule 1.1(a) when they executed Amendment No. 2. No specific copyrights were, therefore, included as Assets to be transferred on Schedule 1.1(a). As in interpreting the original APA, "the whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Cal. Civ. Code § 1641. Construing the language of Amendment No. 2 to be an affirmation of an implied license to the copyrights does not put the amended Excluded Assets Schedule at odds with the transferred Asset Schedule 1.1(a).

There is also significant evidence that Santa Crux did not "require" the UNIX and UnixWare copyrights. Santa Cruz had been able to pursue its UNIX business from December 6, 1995 until October 16, 1996, without any problems due to its lack of ownership of the copyrights. Santa Cruz indisputably did not own the copyrights during those ten months. While SCO has submitted testimony from witnesses stating generally that the copyrights were necessary to running a software business, none of those witnesses give specific examples of how a lack of copyright ownership impeded Santa Cruz's ability to exercise its rights under the APA. The APA conferred an implied license on Santa Cruz to use Novell's copyrights as needed to implement the purposes of the APA. That implied license allowed SCO to license the copyrights to others. Because Santa Cruz already had that license, it did not require ownership of the copyrights. Therefore, even if Amendment No. 2 had a means of conveyance or conveyance language, Amendment No. 2 would not have transferred the UNIX and UnixWare copyrights as there is no evidence that any of the copyrights were "required."

For these reasons, the court concludes that Amendment No. 2 did not transfer the UNIX

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and UnixWare copyrights to SCO. Even if the Amendment met the requirements of Section 204, the extrinsic evidence demonstrates that the parties intended only to affirm the implied license granted under the original APA. Furthermore, SCO has not provided evidence that it required ownership of the copyrights to exercise its rights under the APA. Accordingly, the court concludes that Novell is the owner of the UNIX and UnixWare copyrights.

This court's conclusion that Novell owns the UNIX and UnixWare copyrights impacts several of the claims asserted by both parties and several pending motions. Novell's motion on the copyright issue is brought with respect to SCO's First Claim for Relief for slander of title and Third Claim for Relief for specific performance. Novell is entitled to summary judgment on SCO's First Claim for Relief for slander of title because SCO cannot demonstrate that Novell's assertions of copyright ownership were false. First Sec. Bank of Utah v. Banberry Crossing, 780 P.2d 1253, 1256-57 (Utah 1989). In addition, Novell is entitled to summary judgment in its favor on SCO's Third Claim for Relief seeking an order directing Novell to specifically perform its alleged obligations under the APA by executing all documents needed to transfer ownership of the UNIX and UnixWare copyrights to SCO. Neither the original APA nor Amendment No. 2 entitle SCO to obtain ownership of the UNIX and UnixWare copyrights. "

Posted By Codswallet, Cambridge MA : September 13, 2007 8:05 am

Well, the author may have read the decision, but he obviously failed to read the APA.

This "intent" that these CEOs so fervently attest to was disclosed in a series of depositions falling under the heading "extrinsic evidence". And as Judge Kimball goes to great length to explain, "extrinsic evidence' may only be considered when the language of the agreement is unclear or ambiguous.

And there was nothing ambiguous about the transferred assets including everything except the exclusions in the aptly named excluded assets list. And there was nothing unclear or ambiguous in the part of that list that specifically excluded "all copyrights and patents".

Goodbye intent, goodbye extrinsic hearsay. Kimball nailed that one on the head.

The author apparently skipped class the last four years.

Posted By Rob Gowan, Jackson CA : September 12, 2007 11:07 pm

The reason the APA was so strangely worded was that initially Santa Cruz did intend to buy Unix from Novell as part of the deal. However when it turned out that Santa Cruz could not cough up enough money to buy the copyrights, they were excluded from the sale not by rewriting the contract, but by adding an addendum which excluded copyrights, patents etc.

Also the reason why the judge took Novell's witnesses as correct and SCO's witnesses as false is because Novell's witnesses were actually involved in the negotiation and drafting of the contracts, and their statements agreed with what was actually written in the contract, and also with what all parties to the contract indicated they understood by the contract by their actions (eg: paying Novell 95% of Unix royalties and keeping a 5% collection fee, not transferring copyrights etc.). On the other hand, none of the witnesses SCO called were actually involved in the contract drafting or negotiations but only claimed to know of it second hand.

The reason the Judge rejected a jury trial, was because the issues remaining to be contested in the trial are inherently equitable claims which do not warrant a jury trial.

I think the Judge did a very good job . are

Posted By SM, UK : September 12, 2007 6:29 pm

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Posted By SM, UK : September 12, 2007 6:29 pm

"Novell tranfers all rights to SCO except copyrights"

What it gives in the first six words of the sentence, it takes back in the last two words.

Posted By C. Larson, Long Beach CA : September 12, 2007 5:17 pm

of all the articles that I have read about the SCO case this is probably the clearest 'bought and paid for' one that I have seen to date. I hope you enjoy your 30 pieces of silver and fortune.com just lost an avid reader. Absolutely unbelievable that your tripe should make it past the editors.

Posted By Jacques Mattheij, Amsterdam, Netherlands, CEO ww.com : September 12, 2007 3:09 pm

To quote Brad Lam from lamlaw.net

You know you hired a dumb or **fraudulent lawyer when you are only left to defend how much you owe the other party. And you brought the law suits. Or, worse yet, you paid your lawyers a huge fee to get you into serious liabilities.**

This was simply a fraudulent lawsuit. Period… End of Story… and they got caught…. BAD.

Posted By Gilles Leger, Montreal, Quebec : September 12, 2007 1:58 pm

The article states: 'The asset purchase agreement says that Novell sold to Santa Cruz "all rights and ownership of UNIX … including source code . . ., such assets to include without limitation" a long list of specific products."

This quote from the APA is taken from Schedule 1.1(a) which outlines what IS being transferred.

However the first reference to Schedule 1.1(a) is in Article I, The Acquisition, 1.1 Purchase of Assets:

"(a) Purchase and Sale of Assets. On the terms and subject to the conditions set forth in this Agreement, Seller will sell, convey, transfer, assign and deliver to Buyer and Buyer will purchase and acquire from Seller on the Closing Date (as defined in Section 1.7), all of Seller's right, title and interest in and to the assets and properties of Seller relating to the Business (collectively the "Assets") identified on Schedule 1.1 (a) hereto. Notwithstanding the foregoing, the Assets to be so purchased shall not include those assets (the "Excluded Assets") set forth on Schedule 1.1 (b)."

Obviously, not all of the Assets were transferred and some were excluded.

SCO even admitted that Patents were not transferred, and they are listed just before Copyrights.

There is nothing "inconsistent" or "ambiguous" about the APA, only SCO's attempts to re-write it to meet their needs.

As far as the witnesses having more impact than the written document, the Judge had this to say on page 53 of the Decision:

'The parol evidence rule precludes SCO from relying on extrinsic evidence to try to rewrite the exclusion of "all copyrights" from APA because the language is unambiguous and not reasonably susceptible to SCO's interpretation. Moreover, even if the court considered the extrinsic evidence, there is significant evidence that the exclusion "all copyrights" was deliberate and consistent with the basic objectives of the APA. While there is no specific evidence that business executives negotiated the issue of copyrights, the changes to the drafts of the agreement show that a significant change occurred. Novell has provided extrinsic evidence supporting the change in the language and the fact that it was relayed to SCO, whereas SCO has failed to present any evidence from witnesses on its side of the transaction who had any involvement with the actual drafting or

negotiation of the language in the contract.'

The Judge even noted on page 27 of the Decision that 'The Assignment Agreement states that Santa Cruz "has no knowledge of any fact that would prevent [Caldera's] registration of any Rights related or appurtenant to the Inventions and Works or recording the transfer of Rights hereunder (except that Assignor may not be able to establish a chain of title from Novell Inc. but shall diligently endeavor to do so as soon as possible)."'

So when Caldera sold the "Business", there was a clear doubt about the "chain of title".

Also, SCO knew BEFORE they started the legal actions that they were on thin ice. On page 28 of the Decision, the Judge noted:

'On January 4, 2003, McBride received an email from Michael Anderer, a consultant for SCO retained to examine its intellectual property. Supp. Brakebill Decl. Ex. 12. Anderer stated that the APA "transferred substantially less" of Novell's intellectual property than Novell owned. Anderer noted that Santa Cruz's "asset purchase" from Novell "excludes all patents, copyrights, and just about everything else." Id. Anderer cautioned that "[w]e really need to be clear on what we can license. It may be a lot less than we think."'

Posted By Ron Kirkpatrick, Cornelius, OR : September 12, 2007 1:50 pm

There are contract issues between SCO and Novell that are under arbitration. Judge Kimball is not ruling on those.

Some points about the Unix copyrights:

1. A lot of Unix was not copyrighted by ATT, therefore was not sold to Novell, and couldn't be sold to SCO. See BSD.

2. In order to transfer whatever copyrights Novell had to SCO, there would need to be a legal writing doing that. There was not, so whether or not the amendments to the APA required the transfer, it was not done.

3. SCO couldn't afford an outright purchase, so Novell retained a lot of rights and SCO gave up some (95%) of the existing revenue stream. The original APA definitely did not call for transfering copyrights to SCO. The amendments to the APA were more ambiguous, but did not explicitly transfer the copyrights.

Posted By Bengt Chicago, IL : September 12, 2007 1:14 pm

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Posted By Bengt Chicago, IL : September 12, 2007 1:14 pm

I maintain that Parloff's opinion piece is part of an orchestrated press campaign. SCOX and Boies were temporarily disorganized and demoralized by Kimball's August decision; but since August 29th they have been attempted to spin their defeat through interviews and leaked briefs. http://news.google.com/news?q=mcbride+sco

Parloff has telephone access to David Boies. This is to be expected in a pre-eminent business law journalist. However the recent context of Parloff's interaction with Boies is disturbing.

In late April 2007, Parloff blogged about trying to arrange a business engagement between Boies and MSFT General Counsel Brad Smith to fight Google acquisitions. http://legalpad.blogs.fortune.com/2007/04/24/in-google-doubleclick-inquiry-david-boiess-firm-represents-att/

Following that incident, Parloff published a magazine and blog account of MSFT patent claims against Linux. This account included high level and detailed interviews and briefs with Ballmer, Brad Smith and a second tier executive. Parloff's article is nuanced and impartial (it includes profiles of Moglen and Stallman); but the initiative to arrange legal engagements demonstrates a certain comfort with MSFT. http://legalpad.blogs.fortune.com/tag/microsoft/

I think it is defendable supposition that Parloff's opinion piece on Judge Kimball decision was vetted through David Boies. The selection of the obscure Lee Johnson declaration by Parloff is perhaps best explained if he received a brief on the opinion authored by SCO's lawyers.

Posted By Pan Glozz, Mojave Ca : September 12, 2007 11:56 am

Just to provide an alternate to John Bailo's speculation. In 1995 Linux was barely heard of so it would not have been part of Novell's thinking. Novell bought Unix (I suspect) because:-
1) They needed a 'real' operating system to compete with Microsoft (these were the days of NT 3.x).
2) They needed a future for Netware which was seen as "file & print" not an application platform.
3) With the increasing power of Intel 32 processors they were becoming an alternate to dedicate servers from HP, MIPS, Sun et al.

However the Unix on Intel world lacked the "all the wood behind one arrowhead" focus of the Unix workstation/server vendors.

Thus Novell found Unix a distraction and needed to get someone to take it on. SCO had a successful, but relatively small business selling it's version of Unix which was used almost entirely for small business servers. Unixware gave them an additional product for the Unix on Intel workstation market and for those servers that wanted "true" Unix (SCO's version was never quite as good).

When Caldera bought SCO they were a 100% Linux company and they thought they were buying a customer base to migrate to Linux. However the customer base remained loyal to SCO as they all had established business models.

The internet bubble burst and Caldera ceased to be a multi-billion dollar company.

Daryl McBride arrived and the rest is history.

So:-

When SCO bought Unix everyone knew what they were doing.
When Caldera bought SCO, it knew what it was doing.
It was only when the bubble burst that tSCOg started looking to find a new revenue stream.

I know this has little relevance in law, but it cuts through some of the drivel SCO puts out about the what and why of past events.

IMHO

Posted By Paul Milligan, London, UK : September 12, 2007 5:02 am

Roger and Randy both seem to be confusing "Santa Cruz Operation" of Santa Cruz, CA with "The SCO Group" of Lindon, UT. This is a common mistake, as it is part of the SCOG/BSF "Confuse-a-Cat" strategy. The Santa Cruz Operation bought the rights to the Unix business and further development from Novell in 1995. The SCOG bought **NOTHING** from Novell. Ever. As referenced in Kimball's earlier decisions on PSJ's, McBride and Yarro, as well as other SCOG underlings, approached Novell in 2003 begging for the copyrights. Why would they do that if they knew they already had them? Why would one blog and comment here that "I do declare, SCOG bought the copyrights from Novell!" when (a) it is not physically possible, (b) SCOG admitted to Novell that the copyrights were not part of the deal, and (c) the only guy who matters, Kimball, as already decided as a matter of law, that they did not transfer? Is this some sort of bizarre historical revisionism? Is this the semi-adult equivalent of stuffing your fingers into your ears and yelling *"la la la la"*? Seriously, as a criminal lawyer, you probably just sucked but as a civil lawyer, you would have been disbarred. Especially Randy who conflates "Contract Law" and "Torts" – I could not think of a better way to demonstrate zero knowledge of either. Breaches of contract are never tortious.

And you people think the Groklaw crowd is legally ignorant? *Yow!*

Hey Randy – I'm a SCOX investor too! A short investor, that is, because I understand the fundamentals. And I don't run Linux; I run Unix – BSD. Search for McBride's comments about the USL v. BSDi and UC Regents settlement and compare them to the actual settlement released by a FOIA request. Talk about all hat and no cattle.

Posted By Raoul Duke, Austin TX : September 12, 2007 12:14 am

Mr. Parloff should try harder to understand the context of "buying the UNIX business" from Novell. At the time, Novell was likely aware of the extremely confusing copyright mess that was UNIX at the time of the sale. They likely did not feel it was reasonable to pay for the legal research necessary to determine the actual copyright ownership of the various contributions to the system.

Note further that the original SCO deal in 1995 included Novell's UNIX **Customer list**. A pre-qualified, high value set of business connections would have been just what original SCO would want. They had the Xenix product line which is very nice, but imagine the market power of all those UNIX customers, and those customers' existing use of UNIX!

So the copyright picture was muddy, nobody wanted to do the hard legal research, so originalSCO agreed to non-ownership of the copyrights.

Mob rule? You haven't studied this case. The judges (both Judge Kimball and Magistrate Judge Wells) have been extremely careful to grant SCOX **years** worth of leeway in discovery with both the IBM and Novell cases. The closest thing to "mob rule" that has occurred in this situation is the large number of developers who participated *personally* in the development of these technologies from their inception, and were forthcoming with their evidence, IN PUBLIC. Contrast that to SCOX's reports of "millions of lines of infringing code" that were so secret (despite being in the most openly developed OS kernel available today) that SCO could not produce them in court. The only mob I see are the Lyons, the Didios, the Parloffs, and the "DeToqueville"s of a press uninterested in the actual history of the technology.

Posted By Lenski, Columbus, Ohio : September 11, 2007 11:55 pm

For those who think that the Witnesses should have had more input into the Judge's Decision, I'd like to point this part of the APA out:

"9.5 Entire Agreement. This Agreement, and the Schedules and Exhibits
hereto: (a) constitute the entire agreement among the parties with
respect to the subject matter hereof and supersede all prior agreements
and understandings, both written and oral, among the parties with
respect to the subject matter hereof; (b) are not intended to confer
upon any other person any rights or remedies hereunder, unless expressly
provided otherwise; and (c) shall not be assigned by operation of law or
otherwise except as otherwise specifically provided."

In other words, it didn't matter what anyone thought, the APA is what was agreed to.

Posted By Ron Kirkpatrick, Cornelius, OR : September 11, 2007 10:26 pm

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Posted By Ron Kirkpatrick, Cornelius, OR : September 11, 2007 10:26 pm

Your commentary regarding what various parties *thought* the APA/contract meant is utterly irrelevant – as were SCO's similar arguments that you appear to be parroting pretty much verbatim.

Under federal rules, when evaluating the meaning of a contract, a court may only consider extraneous evidence when the plain language of a contract can be held to be ambiguous.

There is nothing ambiguous about the APA – it states that Novell retained "all copyrights" to their Unix property.

You could prove conclusively, beyond all doubt, that Novell thought they were selling the copyrights.

You could put every person ever employed by Novell, from the office cleaner to every chairman of the board, and have them swear an oath that they thought they'd sold the copyrights to SCO.

It would be utterly meaningless – the contract is what the contract says: "Novell retains all copyrights".

Judge Kimball is not *allowed* to interpret the relevant piece of paper in any other way.

By the way – how much is Darl paying you? Better make sure the check doesn't bounce – he hasn't got much money left.

Posted By Simon Lyon, London, UK : September 11, 2007 8:09 pm

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While one can raise questions on legal interpretations, the most important fact is that SCO used their litigation as a vehicle to generate revenue for their corporation by attacking an operating system that was designed and modified repeatedly over time to be available as a freely available product for anyone. That is the basis of AT&T's, Berkeley's, and GPL's motivation for development. To argue for the defendant who illegitimately tried to pervert the system for their own benefit begs the ethical question and concentrates on legal mumbo-jumbo Honesty is then removed from the equation and the setting is transferred to the legal world, where any truth, no matter how obvious, can be twisted to suit the perspectives of lawyers and their ilk.

Posted By Richard Bentley, Tucson, Arizona : September 11, 2007 7:41 pm

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My take on it was that you have to understand it was 1995.

Novell had no idea how valuable Unix would become with Linux taking off…and the people handing the deals had bigger fish to fry.

SCO knew all too well how valuable they were.

Ok, so here's where it gets tricky — SCO was wily, they knew Novell didn't really understand its own asset…so, they twisted the wording of their side of the deal such that at some later point they could do exactly what they did in court.

Novell, on the other hand, was ignorant, or distracted…only later on did they realize the fast one that SCO was pulling and throw in some poison pills just in case something transpired later on.

So, you're talking about a judge who — yes, taking on the written documents into play — may have erred on the side of Novell — BUT taking in

a) common legal contract practice
b) the overall expected intents of the parties
c) the current behaviors

Only a fool could not now see that SCO was trying to hoodwink them.

It almost worked, but luckily the entire world saw through it all.

Posted By John Bailo, Kent, WA : September 11, 2007 6:10 pm

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Posted By John Bailo, Kent, WA : September 11, 2007 6:10 pm

Mr Randy of LA Ca is wrong. There is no lynch mob mentality, nor was there any lynch mob justice. SCO's Mcbride, like the CEOs of current and emerging patent and copyright trolls (companies with a litigation based business model), went after the big bucks and failed…miserably, due only to their own lack of due diligence.
If Mcbride and company had done their homework, they would have seen there was no specific transfer of copyright, as required by law. Oops, too bad, so sad.
Patent and copyright trolls depend the fine points of law, the details, the correctness of documentation and accuracy of records to land their fish. It's that very attention to (and predatory use of) the fine details and points of law SCO and Mcbride failed to pay attention to, or else thought no one else would.
Rumormill and Parloff lament the fact that SCO wasn't able to get its ship of holes in front of a jury, based on a faulty argument about what SCO *SHOULD* have done when it was at the table with Novell, and what it *THOUGHT* it was buying, but as any patent or copyright troll would argue, if the situation was reversed, woulda, shoulda and thought are nothing, when not backed up by the facts and evidence.
Micorsoft lost this round, and one of its foot soldiers is about to be sacrificed. Now M$ is having to do it's own

dirty work againtst Linux, through patent threats and more FUD. Face it, you can't reinvent the wheel and every coin has two faces to it. You live by the litigation, you can die by the litigation, as SCO is about to find out.

Posted By Thom E. Geiger, Columbus, MS. : September 11, 2007 5:21 pm

Randy Rumurmill writes: "The judge allowed Novell witness testimony to be included in his ruling, but did not give SCO due process in allowing their witness' testimony to be used to argue their case."

He completely ignores the other witnesses: Robert Frankenberg, David Bradford, James Tolonen, Ed Chatlos, Duff Thompson, Ty Mattingly, Burt Levine, William Broderick, Alok Mohan, Doug Michels, Jim Wilt that were discussed on pages 18-24 of the Judges Decision.

He also write: "He did not rule it was clear… go read his ruling before you make comments like this."

But Page 52 of the Decision says "Thus, the language of the APA and Amendment No. 1 at the time of the Bill of Sale is clear: all copyrights were excluded from the transfer."

"Robert Frankenberg, then-President and CEO of Novell, testified in a deposition that his initial intent in entering into negotiations, intent at the time the APA was signed, and intent when the transaction closed was that Novell would transfer copyrights to UNIX and UnixWare technology to Santa Cruz." (Page 18)

Copyrights may not be tangible like a set of keys, but "The Copyright Act requires a signed written instrument to transfer ownership of copyrights." (Page 58)

Further, he states: "Novell did intent to transfer copyright excluding NetWare copyrights."

But he ignores the Judges Decision: "Furthermore, SCO's attempt to rewrite 'all copyrights' in Schedule 1.1(b) to mean 'NetWare Copyrights Only' is contrary to the plain language of the Schedule 1.1(a) and Schedule 1.1(b)."

Posted By Ron Kirkpatrick, Cornelius, OR : September 11, 2007 3:53 pm

Mr Parloff … as a former criminal litigation lawyer, you don't appear very familiar with civil litigation or contract law where IP rights are involved. Am I correct in understanding that if you're no longer practising, it's not an ethical violation to opine on legal matters for which you are not an expert?

Posted By Anonymous : September 11, 2007 3:47 pm

I don't see a problem. When you quote CEO Frankenburg's interrogatory, the key word that keeps appearing is "intent". When it comes to contracts, lawyers don't just represent their clients (translating intent to legalese), they must also protect their clients' interests. So, it is quite plausible to me to have a disconnect between what CEOs and paralegals recall, and what the lawyers involved say actually occurred.

Posted By A. Pang, Hamilton, ON : September 11, 2007 3:33 pm

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Posted By A. Pang, Hamilton, ON : September 11, 2007 3:33 pm

Alan Milnes writes :
"Judge Kimball read the contract and ruled it was clear"
He did not rule it was clear… go read his ruling before you make comments like this.

I believe "Anonymous" is correct. It is the diehard Linux users/developers who continue to take the side of Novell. But the fact remains that SCO whether anyone likes it or not, purchased UNIX and all rights. Again, in this article and as I quoted in a previous post, "What it gives in one provision, it takes back in the next". That seems very suspicious… and yes SCO should have been more diligent during the contract negotiations and signing. However, that does not excuse Novell from pulling a fast one.

The problem now for Linux, is if in the end SCO convinces a jury that it had in good faith, purchased UNIX and "all rights", many companies, including the one I work for may have to pay SCO for use of Unix code.

Other than allowing me to vent my frustrations with the Linux movement, these posts have very little value. I along with many who believe SCO is the true owner of UNIX and any derivative, including Linux, will never convince the Linux community to take of their blinders and see the whole story.

A few more notes/observations:

Summerhays writes: I read it, SCO had 9 witnesses, Novell had 2.

The judge allowed Novell witness testimony to be included in his ruling, but did not give SCO due process in allowing their witness' testimony to be used to argue their case. Quote: "Braham testified that to his knowledge, and based on his review of the Wilson Sonsini files, at least four representatives of Novell reviewed and approved the excluded assets provision."

To allow this kind of testimony without allowing SCO to introduce sworn testimony by their witnesses is hard to comprehend in terms of the law. I'm not an attorney, and I certainly do not play one on TV, but common sense tell me that if one witness testimony is entered, then all witnesses with relevance should be permitted.

George Mitchell states: "copyrights in question were never actually transferred" and "It would seem logical that if Santa Cruz HAD purchased the copyrights, that, considering their immense value, they would have made sure at the time of purchase that those transfers were completed."

Copyrights are not something tangible… in other words it not like handing over a set of key to a car you just purchased. I for one have read the APA several times and it would seem that Novell did intent to transfer copyright excluding NetWare copyrights. So why would SCO need to take any kind of physical possession when you got a contract that states you own all rights?

Paul Milligan states that the rule in contract law is "what you say is what you get". This is the farthest thing from the truth. You should take a course in Torts.

Oh, and yes I am a shareholder in SCO… just in case any of you have that question.

I also have shares in other United Online, NetSol, and a few others which I am sure use Linux or UNIX in some form or another.

This is not about stock prices (though it is nice to see the stock price rise); it is more about contractual integrity and good faith. I cannot emphasize that enough. Nobody want to find themselves purchasing something, only to find later that what you thought you purchased is now being challenged solely on ambiguous wording.

Posted By Randy Rumormill, Los Angeles Ca. : September 11, 2007 2:29 pm

Mr. Anon:

You have no clue what you are talking about.

Any reasonable person that has studied the facts of the case, filings freely available on the web, the history of UNIX, etc. would clearly see that SCOX *had nothing* when they started this case and, as a result, are about to *have nothing* when they finally pay Novell what SCOX has owed them for some time now.

Mr. Parloff, btw, you may be a lawyer or even a former one, but you obviously know nothing about civil lawsuits, slander-of-title, copyright law, etc., or your intent was to specifically *ignore* such areas of law and just write an article which is basically one big troll-fest. The only “mob-justice” in regards to SCOX is MSFT’s hand behind the scenes in and with various publications shouting from the roof tops how *right* SCOX is and has been in regards to UNIX and Linux, only to be soundly refuted time and time again in the press, on the web and, where it counts, in the court room. You should be ashamed of yourself.

Posted By George Frenher, New Port Richey, Florida : September 11, 2007 2:26 pm

Oh dear Roger, trying to garner microsoft pr dept karma and a free laptop ?

Take a look at Sun, there still here but then if you really think Sco where a good company then that argument won’t wash with you will it?

Fud does not innovate, Fud companies like sco meet there demise in the end and (microsoft’s cash injection via Baystar)

Perhaps somebody should take you to court and waste four or five years of life with no evidence and perhaps you might feel a little different.

Posted By bananasfk : September 11, 2007 2:15 pm

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Posted By bananasfk : September 11, 2007 2:15 pm

While the credibility of various witnesses is always an interesting point, the main fact is the text of the APA. US copyright law says that copyrights can only be transferred explicitly (I presume the intent of the law is to protect authors.), and the APA and its amendments do not do so. Mere mention of “all assets” is not sufficient to transfer copyrights.

Posted By Mike Amling, Lisle, IL : September 11, 2007 2:11 pm

Mr. Parloff, Esq. should have studied
contract law in college. Apparently he
didn’t, or he slept through it.

Whenever I seel my copyrights to somoeone, I include a “Transfer Of Copyrights” document, and I DEMAND such
a document whenever I buy copyrights.
Because, without that document no transfer occurs. Plain and simple, there is no ambiguity, either you transfer them or you don’t and Novell never did. End of story. the above article is just more FUD. That is all the feeding of this Troll I will do. Sad to see from a magazine I used to respect and read. ah well there’s still the WSJ.

Posted By Jack, Liberty, MO : September 11, 2007 1:56 pm

As others have pointed out I willjust add a few numbers.

When Novell bought out AT&T in late 1993 Novell spent $265 million in CASH. We know this because NOvell’s coffers were that much less in 1994.

In 1995 Novell sold lock stock and barrell to Santa Cruz for a measely $100 million. That means all of Unix was devalued by 62% in just ONE YEAR. Does that make sense to you? How about if Santa Cuz just bought an exclusive contract for Unix. 38% of the value suddenly makes a lot of sense. In 1996 IBM went to NOVELL not Santa Cruz when IBM wanted to buy out their contract. Santa Cruz is authorised to collect Unix fees and then pay 95% of that back to NOVELL.

If you had Half a brain you would question why Santa Cruz would be required to tranfer 95% of all Unix royalties back to Novell. If Santa Cruz actually bought Unix copyrights then that line shouldn’t exist.

You just don’t care about little facts like that instead trying to spin out useless FUD.

Posted By David Turnbull Rochester, NY : September 11, 2007 12:17 pm

Yes, it is interesting how an anonymous post has been pushed through by the admin, isn’t it? But on to the core of Parloff’s philosophy, that being that every frivolous, baseless, unsubstantiated civil claim be given free rein in open court. That’s preposterous.

The US civil court system has been trying to deal with overload for years, from the factual and well-grounded to the idiotic and insane.

Motions exist for a specific reason, to streamline the judicial process, to validate the things that have the minimal foundation required by the FRCP, and dispense with those where no due diligence and other rules violations have ocurred.

Being a “former” attorney, it is only natural, though self-serving, Parloff would want to expand the role his former profession plays in every civil action, but that is one reason rules exist, to prevent wasted courtroom time on things that can be resolved before a trial even starts.

Posted By Thom E. Geiger, Columbus, MS. : September 11, 2007 12:09 pm

You write:

“Second, the language of the contract is **ambiguous**. What it gives in one provision, it takes back in the next. It’s not fully consistent with either party’s claims, and never will be.”

(Emphasis added.) You also quote from the depostion of Robert Frankenberg, Novell’s CEO at the time the APA was executed, to the effect that the intent was to assign copyrights.

SCO quotes the same passage from the same depostion in its memorandum [259] supporting summary judgment on the copyright-related claims. But right after the quotation, SCO draws a legal conclusion:

“In all, the intent to transfer the copyrights reflected in the **unambiguous** language of the APA is confirmed by the deposition testimony of no fewer than nine witnesses, including the CEOs, responsible executives, and chief negotiators for Novell and Santa Cruz, as well as the parties’ conduct in the years that followed the APA.”

(Id. at 7.) Later in the same brief, we find:

“The APA **unambiguously** provided for the transfer to Santa Cruz of all right, title, and interest and all rights and ownership of UNIX and UnixWare. The Bill of Sale **unambiguously** effectuated that transfer and complied with the Copyright Act. Based on the **plain language** of the APA and its Bill of Sale, SCO is entitled to partial summary judgment on the transfer of the UNIX and UnixWare copyrights to Santa Cruz under the APA.”

(Id. at 32.) This is not an argument in the alternative, but SCO’s sole position on the question of ambiguity in the APA as to the transfer of copyrights.

So who’s wrong here — you, or SCO?

Posted By Oronyx, Newport Beach, CA : September 11, 2007 12:08 pm

It is very interesting that Mr. Parloff never seems to touch on the point that the copyrights in question were never actually transferred. It would seem logical that if Santa Cruz HAD purchased the copyrights, that, considering their immense value, they would have made sure at the time of purchase that those transfers were completed. In this regard, the facts of history seem to testify against SCO’s position rather loudly. This would almost certainly be a factor that would be examined in this case of an appeal.

Posted By George Mitchell, Eureka CA : September 11, 2007 11:15 am

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“Well, that’s the thing. SCO’s got about $10 million in cash and it’s burn rate seems to be about $1 million per quarter. It’s not just fighting Novell and IBM, it’s fighting the clock. Kimball’s ruling could be the coup de grâce.”

I have serious problems with that comment:
a) SCO has dragged this legal action out so long that they only have themselves to blame on this point.
b) SCO has issued threatening legal letters to companies – either they pay up or SCO would sue, causing financial hardship for a long period of time (ev1/autozone and a large number of others).

To claim that somehow SCO is a ‘poor guy’ getting trampled on by the law is a gross misrepresentation.

My second problem is that there appears to be an ‘anonymous’ poster, although this form claims to not allow such? My guess is that his comment has been pushed through the backend/admin interface?

If you’re simply trolling for hits, then please post something on ‘Britney sucks’ or ‘my cat ate my toaster’ etc.

Posted By Jim, Cornwall, England : September 11, 2007 11:04 am

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Posted By Jim, Cornwall, England : September 11, 2007 11:04 am

Anonymous must be a pretty inept IT consultant, as well as a shareholder in SCO (or a pure Microsoft person)if he has such a poor understanding of Linux. His is the first article in this thread that is vitriolic, the rest have relied

on facts. I suspect that Judge Dale Kimball also knows a thing or two about the law, and perhaps just a bit more than Roger Parloff. In contract law the rule is “what you say is what you get”. “What you meant” is excluded just so that contracts can’t be subject to re-interpretation over time. At the time of the SCO purchase of Unix(ware) I worked for the largest European distributor of both SCO and Unixware and nobody was in any doubt about what SCO has bought -the Unix on Intel “shrink-wrap” business. Othwerwise they could not have got it for less than a third of the price Novell paid to AT&T. This entire debacle is the ranting of a megalomaniac spurred on by dodgy support from Microsoft to undermine the success of Linux.

Posted By Paul Milligan, London, UK : September 11, 2007 10:35 am

To the anonymous poster who thinks the Linux community is filled with terrorists, I offer these words of wisdom from Mark Twain: All generalizations are false, including this one. I would agree that some members of the Linux community are immature, but not all. I would suggest you find new hang-out spots if you want to rub shoulders with the heart of Linux. A great place to start (although it’s a very technical hang-out spot) is the Linux Kernel Mailing List. This is where the Linux Kernel development is discussed. It will most likely offer a completely new view into Open Source.

As an IT professional myself, I had to make a transition from the traditional software company model to Open Source. It was not an easy transition. As human beings we tend to shun away from change. Open Source provides a great deviation from the norm that is very hard to swallow at first. However, those who take on the challenge of thoroughly exploring the new possibility find new rewards and opportunities. It’s not all bliss in LinuxLand, but I find it just as good (and often better) in most situations than the commercial software world.

During my transition I have also found some who don’t want to make the transition. They fight it as if it were a plague. They often justify their opinions with silly remarks like “Linux doesn’t work like Windows” or “the Linux community is full of zealot terrorist militants.” What’s worse, many in this camp are IT professionals. Whenever I hear an IT “professional” (especially those who are trying to sell me something) speak so uneducated about Open Source I stop listenting. They are often as unreasonable as the other unreasonable people they blame for their own irrationality.

Posted By AT, Provo, UT : September 11, 2007 10:25 am

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Posted By AT, Provo, UT : September 11, 2007 10:25 am

Very interesting post Mr. Anonymous

Couple things

1. Judge Kimball has a law degree also. I would think he knew what he was doing when he handed down this verdict.

2. As a consultant, immediately taking out of the equation a supported, enterprise class OS from your clients is bad form. I would think that you would be doing everything possible to get the best solution for your clients irregardless the technologies involved. Very close minded and remind me not to use/recommend you.

3. Twist an argument to fit your agenda – guess who has been doing that since 2003? SCO. They have been the biggest perpetrator of this since the beginning.

4. Zealots – Spend much time with the Vista or Mac fanboys lately? They exist everywhere…

So, in closing, thanks for the waste of time Captain Obvious. I really appreciate it.

Posted By Unix Admin : September 11, 2007 9:53 am

Who come that Anonymous could post? No other post is anonymous.
By the way. Why havn’t you read Judge Kimball’s rulings, and all the documents it was based on before blogging about it? Was it too much work?

Posted By B Drefeldt Lund Sweden : September 11, 2007 9:39 am

Why the comments about Linux?
This case isn’t about Linux. It’s about Unix.
If SCO wins this it’ll only mean they get a chance to face IBM.

As for SCO’s financial situation, they have brought this on themselves. How many times have they not extended the litigation?

Let’s only hope there will be some useful effects of the outcome of the SCO cases.

Posted By William, Little Rock, Arkansa : September 11, 2007 8:40 am

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Posted By I R A Darth Aggie, Havana, Cuba : September 11, 2007 8:24 am

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Posted By Alan Milnes, Fife, KY7 6NJ : September 11, 2007 6:59 am

I think nearly all of the comments here prove Mr. Parlov's article. I am AMAZED at the vitriolic attitude of Linux militants. ANY negative comments about Linux and you are beheaded by the Linux terrorists. This is the very reason, as an IT consultant, that I cannot recommend Linux to customers. It is motivated, pushed, and propagandicized by zealots you can't reason with. You twist the facts to fit your arguement. I think this article was accurate in its representation of the facts. Mr. Parlov has a law degree. He practiced. I know most everyone here, including the Groklaw fools think they are the experts. In reality, their approach is killing Linux. Did you see the report today that Linux adoption is declining? I've worked for some of the big software companies and frankly, they cheat to get ahead. Whether its IBM, Microsoft, Novell or whomever. They will cheat and they do. It's time they get caught. And frankly you are all being used by these cheats to obtain their PR purposes. IBM and Novell are riding you like a rented mule and laughing all the way to the bank. Judge Kimball appears to be either lazy, incompetent, or corrupt. The facts show that he simply handed SCO (especially with the denial of the jury trial) the perfect, guaranteed appeal. If he had let a jury decide and SCO lost, they would have had a very difficult time appealing. Not now.

Posted By Anonymous : September 11, 2007 1:24 am

This is more mis-information, containing half truths and important exclusions.

Those two witnesses cited who supposedly did think the copyrights were transferred were both far from the negotiating table, a point noted in groklaw's coverage of this. (see http://www.groklaw.net)

Furthermore, SCO never put forward the evidence they said they had–"millions of lines of infringing code"

The many volunteers at groklaw covered this case as no one else could–and the mis-information and lies that SCO put out were immediately dispatched with mountains of research by open source advocates.

That is the real story–that those who oppose open source will dramatically increase the cohesion and motivation of the open source community.

Posted By enigma foundry, st. louis, missouri, : September 10, 2007 11:40 pm

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I noticed that SCOX stock was up 12% today. That really surprised me given Judge Kimball's rulings from 7-Sep-07.

I then went looking for news that could have affected the stock price and discovered with this, um, work of journalism. It would seem some folks have elected to invest in SCOX based on the good news as presented by Lawyer Parloff.

The problem is, Parloff is dead, flat wrong in this instance. For reasons described accurately elsewhere in the comments, the APA did not and could not possibly have transferred the copyrights.

Because the copyrights were not transferred as a matter of law, any testimony to the contrary is irrelevant to the case and must necessarily be excluded. In spite of Lawyer Parloff's protestations, Judge Kimball could not reasonably have decided otherwise. No lynch mob here; only the orderly application of relevant law.

As far as the APA itself goes, anyone who believes it was especially poorly written has probably not seen a lot of negotiated software contracts. Shrink-wrap agreements tend to be much cleaner because there's only party involved in the drafting. With a two party negotiation, most software agreements take on characteristics like the APA.

So good fortune for the folks who finally got out of SCOX on a uptick but not so good for the folks who just got in!

Posted By John, Ann Arbor, MI : September 10, 2007 10:45 pm

It has now come down to this – SCOX has failed repeatedly to show any evidence in court of IBM doing anything wrong; they have failed miserably at trying to get their frivolous case against Novell in front of a non-tech-savvy jury, and the AutoZone case garnered them absolutely nothing but scorn and ridicule from the court (not to mention the Open Source community); so SCOX is reduced to feeding their favorite yellow journalists – old familiar faces like Maureen O' Gara, Laura DiDio, Rob Enderle, Rudy De Haas (aka Paul Murphy), and, of course, our favorite fake journalist, Dan (FakeSteveJobs) Lyons – and now new yellow journalists like Mr. Parloff – who take their utterly false pablum as the Gospel Truth, according to Darl Mc Bride, spreading the Microsoft-funded FUD far and wide, deliberately ignoring all the evidence that destroys every aspect of these worthless cases for SCOX.

I just want to know one thing, and I KNOW you won't answer it… exactly how much did you get for selling your soul and your journalistic integrity?

I have news for you, sir – it wasn't nearly enough. I pity you and your ilk, but not Darl and his cronies. The only thing they deserve more than utter contempt, is utter destruction; considering their mentor, Ralph Yarro, has already predicted this in advance, I say he should have it, and the faster, the better.

The only good SCOX is a destroyed SCOX.

Posted By Saltydogmn , Maplewood, MN : September 10, 2007 9:46 pm

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Posted By Saltydogmn , Maplewood, MN : September 10, 2007 9:46 pm

Do you get paid to drive the stock price up???

There is no there other reason anyone would be so naive…..

Posted By Darl, Provo, Utah : September 10, 2007 9:22 pm

Obviously, SCO should have had a better lawyer! But what you call ambiguity is 'life' to the Open Source surviving; futhermore is not clear that SCO in their claim really provide any evidence on the Copyright violations, but rather just use the license agreement as its shield. I for one think that if there is money to be made, SCO will get additional monies. But at hart is what was the intent of Novel and this is just an ambiguity which SCO attempted to exploit to its own benefit.

Posted By Al, Austin, Texas : September 10, 2007 8:35 pm

I guess Mr Parlov has as much problem proving 'mob justice' as SCO had proving their 'millions of lines of infringing code'.

We know what SCO is, but what about the author?

You troll for hits with cheap, lazy, attention getting titles and you'll be outed as an idiot who doesnt grasp basic terms in the english language.

Posted By Robuka Kenderle, St.Felicien QC : September 10, 2007 6:19 pm

This is basic contract law. Who said what when really doesn't matter. What matters is what's in the contract, Read the APA. Read its ammendments. Was it an awful contract for SCO to have signed, from the standpoint of SCO 2007, indeed it was. But, it is the contract that the very different SCO of the mid-90s signed.

Posted By Steven Vaughan-Nichols, Asheville, NC : September 10, 2007 6:03 pm

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Judges are responsible to not only make sure that justice is done, but to ensure that the resources of the state are not unduly squandered on frivolousness. The SCO case was and is that. If I want to sue you because you wrote a sentence that was close to a sentence I wrote for a freshman English class, I can do so, but I can expect that the judge is going to throw it out on the fact that I have not met the burden of proof needed to prove my case. Such is the case here. SCO has underestimated the due diligence done by IBM, Novell, and all the multitudes involved in the writing of Linux code in the sole purpose of trying to boost stockholder value and justifying bonuses paid to the management group. They have failed to do so and must now pay the price.

Posted By Ed Hodge, Hinesville, GA : September 10, 2007 5:42 pm

I am not a lawyer.

First, Novel CEO was not present at all the sale contract meetings, so he did not know of the details at the end when the contracts were signed.

It is stated with the signed contracts that Novell was keeping the copyrights. This is a solid fact that. A solid fact overshadows any witness testimony since the witnesses were not at all contract meetings. The ones that were there for all the meetings did say that it was at the very end when the decision was made to exclude the sale of the copyrights, thus the ruling Novell owns the copyrights.

Posted By Randy, Fullerton, NE. : September 10, 2007 5:15 pm

Mr Rumormill, unfortunately you're whistling in the dark.

You're basically saying this is simply a contract dispute – correct? Contracts are written and signed – both sides live by the written word, and if they don't, the other side gets to sue – for contract performance. (Why sue for Slander of Title?). It gets settle d by looking at the written contract and having the court decide. And yes, contracts can be complex, but you can't ignore sections to please you or claim that's not what we thought it said.

If you choose to say "HEY, I thought it said xxxxx!" when if fact what you signed and agreed to said "yyyyy", whose fault is it? When SCOX asked Novel, well after the fact, to assign the copyrights, and Novell said 'NO', why not sue on those grounds? The answer is quite simple – SCOX knew what the APA said, what was written, and its not what they needed for their new business plan – i.e. litigation.

I agree, Legal proceedings can be damaging and expensive – for both sides. SCOX is finding that out. Too bad they didn't get good counsel, or perhaps they did but chose to drive their litigators down the wrong path.

And then there's the lawsuits against IBM, and Daimler and Autozone. And we have RedHat in the wings – so you can feel assured that we really are seeing the true story of SCOX.

Posted By JimmyP, Newton, MA : September 10, 2007 5:05 pm

They had their case dismissed and you wonder if it's mob justice? I think you must not be very familiar with the internet. If SCO really had provoked "mob justice," all of their employees and executives would have had their bank accounts drained, their credit cards maxed, their penii enlarged beyond belief, thousands of pounds of Viag/ra and Ci4l15 delivered to their mailboxes, their identities entered on no-fly lists, and their facebook pages redirected to goatse.

They brought a frivolous complaint, and they had it dismissed. By a federal judge. I think that's about as far from "mob justice" as you can get.

Posted By tekel : September 10, 2007 4:50 pm

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Jim from Concord's statement below is spot-on. Mr. Parloff phrases parts of the contract so that it seems to be contradictory. However, the way the contract is actually written there are no contradictions. Let's look at that actual contract:

1.1 Purchase of Assets
(a) Purchase and Sale of Assets. On the terms and subject to the conditions set forth … seller will sell … all of Seller's right, title and interest in and to the assets and properties of Seller relating to the Business (collectively the "Assets") identified on Schedule 1.1(a) hereto. **Notwithstanding the foregoing**, the Assets to be so purchased shall not include those assets (the "Excluded Assets") set forth on Schedule 1.1(b). (my bold)

1.1(a)

1. 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…
1.1(b)
V. Intellectual Property:
A. All copyrights and trademarks, except for the trademarks UNIX and UnixWare.
B. All Patents …

Santa Cruz got everything in list A; NOTWITHSTANDING THE FOREGOING, it gets nothing in schedule B. Taken from the contract, it's much clearer and certainly not ambiguous once the "notwithstanding" phrase is included. (Whatever ambiguity there is can be found in Amendment 2, but Mr. Parloff doesn't discuss it, so I won't go into it here.) We won't even go into the lack of a 204(a) writing….

Funny thing is, this entire copyrights issue is actually one of the minor parts of the decision. Let's look at the contract, section 4.16:
(b) Buyer shall not, and shall have no right to, enter into new SVRX Licenses except in the situation specified in (i) of the preceding sentence or as otherwise approved in writing in advance by Seller…

SCO sold licenses that contain at least some SVRX code (even SCO admits to this, although they claim it is an incidental amount permitted in (i)) to Sun and Microsoft in 2003 for $25 million, without the approval of the seller. SCO may be correct and it may not owe anything, or it may owe all of the $25 million, or (most likely) some number in between; this is one of the issues to be determined at trial. As Mr. Parloff mentions, SCO has only $10 million left; SCO may well be fighting Novell with Novell's own money.

Worse for SCO, there is the following bit of 4.16(b):
at Seller's sole discretion and direction, Buyer shall amend, supplement, modify or waive any rights under, or shall assign any rights to, any SVRX License to the extent so directed in any manner or respect by Seller.

This little bit gives Novell the authority to waive all claims against IBM, Autozone, etc. that arise from SVRX. Thus, most of SCO's other cases are also wrecked by this decision. IBM's countersuit, however, lives on….

Posted By Brian, Pittsburgh, PA : September 10, 2007 4:47 pm

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Pan Glozz writes:

"Rumormill" harps on the trust and integrity of Novell. He uses metaphors, similes, idioms and language that have already been employed by SCOX executives in published interviews. That is a very curious coincidence, given his pseudonym.

My name has nothing to do with SCO or anything related… it's a domain I bought as a joke, but that is another story for another time.

This is a matter of trust and integrity. Novell has even admitted at one time that SCO owned the copyrights, but once it was obvious the "language" was not clear, they refused to acknowledge any further that SCO owned the copyrights. Perhaps because come deals with IBM or other Linux developer would be jeopardized by a legal action by SCO. Perhaps Novell just prefers Linux over Unix. Perhaps they felt they would not get one red cent from legal action taken by SCO, a company Novell only valued at $125-$150 million vs. the billions SCO could potentially make in licensing Unix (something Novell couldn't do with Unix which is why they sold it to SCO in the first place).

After reading several more postings, I can see the Linux lovers are not going to see the true story of SCO. I can say with certainty that if anyone of us had purchased a product thinking we would make millions of dollars only to find that we do not have all the right we thought we did, we would be taking the issue into courts just as SCO is doing.

It is unfortunate that many people do not see the reality of this judgment. For those of us who do, we know that this kind of judgment does not help anybody. Even Novell could be damaged by such a judgment in future litigation. That judgment basically took a jury trial case and disregarded the law and the judge made the ruling by himself. Confused or not, the judge should have set it for jury trial. What if the civil judge in the OJ Simpson vs. Browns case (a $30 million dollar wrongful death suit) had made a summary judgment in favor of OJ… what would you all be saying then???

Legal precedence can be damaging to other companies who find themselves in a similar situation where only a

court trial can settle a contractual disagreement. I work for a small company which has its own patents and uses others as well (paying royalties of course). If one day they had to defend what they felt was their right, right or wrong, they could be in the same boat. That affects others in the company and could lead to complete ruin. Loss of jobs, and ultimately loss of income/investment could have long term affects which none of us would want.

In the end, it is going to be appealed and will be heard by a jury. It's just a costly road that SCO must go down to get what they feel they are entitled through the APA.

Posted By Randy Rumormill, Los Angeles, Ca : September 10, 2007 4:18 pm

SCO had years and years to point to the places where code was copied. What did they have to show after all that time? Nothing. Even the dumbest ass programmer would be able to produce SOMETHING, ANYTHING after all that time. So where is it? Too bad they could not find anything in all their "mountains of code". So somebody's not been telling the truth.

Also, why worry about cash? IF they had a case, they have a very powerful friend in cash rich Microsoft for funds. Oh yeah, that's right. They DON'T have a case. Too bad. I'm crying my eyes out.

Posted By richard, vancouver, b.c. : September 10, 2007 4:14 pm

I sure hope people do not rely on Forbes for accurate analysis of any topic that they bet their own personal money on. Their record in loudly backing SCO (starting at when they were worth $30 a share, till now, as they approach delisting) has been quite dismal.

Posted By James, San Jose, CA : September 10, 2007 3:59 pm

Does Mr. Parloff understand the meaning of the word "nowithstanding"? A lawyer ought to. The contract 'ambiguity' he trumpets is no ambiguity at all.

The agreement calls for the transfer of all right and title to the UNIX software, and it excludes all copyrights: stated like that, it is contradictory. However, the agreement does not state it like that. It calls for the 'all right and title' transfer, but then says that "notwithstanding" that provision, no copyrights are transferred. This eliminates any ambiguity, and makes it clear that the "no copyrights" provision is controlling. Another way of saying it is "all right and title, but excluding all copyrights". Since the contract is unambiguous, the parade of SCO witnesses is irrelevant. (By the way, none of the SCO witnesses were actually in on the final negotiations, while Novell's final negotiator supports the plain reading of the text. SCO's failure to produce its final negotiator speaks volumes.)

SCO and its allies are furiously spewing out misinformation about the recent decisions in this case, and it appears that Mr. Parloff has fallen for it.

Posted By Jim O., Concord, MA : September 10, 2007 3:47 pm

Parloff,
It is apparent you have no background in contract law or civil litigation. Your theory of "let the jury decide" is precisely the reason why our judicial system is so costly and time consuming. We need more judges like Kimball who have the intellect and guts to rule on the express language of a written and negotiated contract, rather than to allow frivolous claims that "the contract does not mean what it says" or "I intended it to mean something else" to be dragged through a costly jury trial. Thankfully, there are a few judges who do have significantly higher intellect than yorself.

Posted By jhansen, Phoenix, AZ : September 10, 2007 3:43 pm

There was no document signed by the owner of the copyright (which may not even be Novell) transferring ownership. Here is reference :
http://smallbusiness.findlaw.com/copyright/copyright-own-license/transfer-copyright.html

Posted By Joe, Houston, Texas : September 10, 2007 3:27 pm

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Posted By Joe, Houston, Texas : September 10, 2007 3:27 pm

Roger, I found your article and read it based on the title, "Did SCO get Linux-mob justice?", yet there seems to be a major diconnect between the title and the content.

You claim in your article title that somehow linux, I assume the linux community, has brought some form of mob justice against The SCO Group. However, there is nothing in the article that has anything to do with linux or the linux community. This was a dispute between Novell and The SCO Group and has more to do with The SCO Group's handling of Novell UNIX customers than it does with anything linux. In fact, even if Kimball through out the obvious copyright exclusions in the APA and gave The SCO Group everything they wanted it still would have absolutely nothing to do with linux.

If you have been following the case The SCO Group brought against IBM concerning linux you would know that The SCO Group failed to present any of the millions of lines of code they claimed they had as evidence. In fact, evidence brought forward by IBM from internal e-mails at The SCO Group shows that it was already known all the way up to the CEO, McBride, that there was no infringement in linux.

linux had nothing to do with the justice here, I'm even willing to bet that Kimball doesn't even use or profit from linux. This is simply justice, albeit slow.

Posted By Bryan, Riverton UT : September 10, 2007 3:12 pm

Frankly, I think Parloff is right. The judge violated California contract law in not granting the plaintif the leeway with witnesses that California law grants plaintifs when it comes to erroring on their side. The bottom line, as I read it, SCO had 9 witnesses, Novell had 2. The jury should have decided their credibility. A judge can't do that

in summary judgements. As a result, unfortunately he's forced almost the guaranteed overturn of this on appeal to the 10th circuit court and will drag this drama out for more years. If Novell and the judge were so confident in the outcome of this, why not let a jury decide? It certainly would have been entertaining.

Posted By S. Summerhays, Scottsdale, AZ : September 10, 2007 2:48 pm

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Posted By S. Summerhays, Scottsdale, AZ : September 10, 2007 2:48 pm

Hmm, two pro-SCO comments rehearsing arguments that a courtroom lawyer for BSF might present to a jury of naive Utahans.

BSF won't get the chance. The judge has ruled for a bench trial, and against an immediate appeal. Is mighty BSF reduced to presenting its treasured confuse-a-cat walnut shell carnival monte to a blog.

"Rumormill" harps on the trust and integrity of Novell. He uses metaphors, similes, idioms and language that have already been employed by SCOX executives in published interviews. That is a very curious coincidence, given his pseudonym.

Trust and integrity was exhausted by SCOX long ago. Its "super secret rocket science" evidence has been revealed as a fraud that even BSF is embarrassed to submit to a court.

Posted By Pan Glozz, Mojave, Ca : September 10, 2007 2:14 pm

Dave G:"it is a contract to purchase software, not a derivative works license agreement"

Wrong. The original negotiation (the one all SCOXs parole evidence relates to) was for Novell to sell the *entire* UNIX **business**. Everything from the IP to the reseller channel. They couldn't afford the *entire business, instead they effectively bought a derivatives business and the reseller channel. Part of the payment to Novell* was running Novells business as their agent. Novell got to dump running UNIX as a business without being able to sell everything.

Another thing to remember when reading McBrides bluster is the ever increasing price SCOX apparently paid for UNIX. He always skips explaining they've included all the royalties collected for Novell, royalties SCOX never owned on IP Novell didn't sell. What SCOX actually paid is a pittance, certainly not what you'd expect the IP to be worth, even IP so degraded as UNIX (no-one really knows how much of it even has copyright protection).

Posted By Paul Shirley,Leicester,England : September 10, 2007 2:11 pm

> Did SCO get Linux-mob justice?
>
> Assuming that you are "right," and that there is some ambiguity in whether the copyrights were transferred (I don't think there was any such ambiguity, but lets assume that for a moment anyway), it seems to me that the title line of your article is a dead givaway.
>
> SCO arrived at the courthouse in 2003, with about a dozen or so incredibly big lies in hand. He had incontrovertable "proof" of mass literal copying of "millions" of lines of code, directly from SysV into Linux. He would show that incontrovertable "proof" to anyone, so long as they signed an absolute NDA, disallowing them to reach the conclusion that the "proof" wasn't there. And blah, blah, blah.
>
> Monumental efforts were made by SCO to try the case in the press. It was all "in the bag." Up pumped the stock, and up pumped Mr. McBride's various forms of "compensation."
>
> Four years later, millions of dollars in legal fees later, billions and billions of laborously produced lines of code having been produced by IBM under discovery (not that it should have been needed, since the source code was open anyhow), those "million lines" turned out to be vacuous. Totally vacuous. Four years of wasting the courts time. Four years of lie, after lie, after lie, after lie. You really ought to pay some amount of attention.
>
> If the judge erred — and I don't believe it for a minute — might it not be sensible to ascribe some of that to the judge being darn annoyed that SCO, rather clearly, was here on a stock pump, and otherwise was wasting everyone's time.
>
> Of course not. Obviously it's "Linux-mob justice."
>
> Excuse me, but your rather obvious predjudice is showing.
>
> Why don't you apply for a job at one of the other tabloids, rather than Fortune? It would seem to better suit your style.

Posted By Wally Bass, Sunnyvale, CA : September 10, 2007 1:40 pm

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The contract between Novell and SCO is horrible, but it is a contract to purchase software, not a derivative works license agreement. The confusion of the exemptions is common on copyright transfers to non-programmers. If you read the APA again, which you should, it exclude any gray areas copyrights. Most people think that Unix is one big software program. It is actually about 50,000 programs. There are always stray programs that could or could not be included in the sale. We call these "Gray area software". Gray area software is a BIG problem with copyright transfers. Large software systems will always have lots of gray area software, and the line between software can become confusing. The best way to draw the line is by excluding everything outside the purchased assets, which the APA does. But, you have to read the wording carefully. And, yes it can be interpeted several ways incorrectly. Excluding all other software is the best way for Novell to prevent SCO from later trying to claim other copyrights as part of the sale. Because if a claim is later placed, the damage become a cancer, and Novell could easily lose thousands of copyrights in a fight. Where do you draw the line? It is every software developers nightmare. The fifth exclusion clearly excludes everything outside of Unix copyrights. Read it again carefully.

If it was to exclude the copyrights to Unix, then it would have been a LICENSE AGREEMENT, and "LICENSE AGREEMENT" would have been on the top of page 1. A License Agreement of this type must also talk about the rights to derivative works. There would also been a discussion of other rights, and term periods. If you read the APA, it doesn't talk about any of this. It is like confusing a car purchase agreement with a car rental agreement. They are two very different contracts.

The judge appeared to be confused by the contract and pretty much ignored it, except when it served him. When he became confused he put the APA aside and relied on the testimony of Branford & Braham. Probably his interpetation was that Branford & Braham were being sneaky in retaining the copyrights, and there is nothing illegal about being sneaky.

Looking at the APA from a the software side, the APA makes sense to me that the copyrights of Unix were transferred, and excluded any and all copyrights to Unixware, interfacing software, gray area software, and any other software that Novell has created or owned rights to.

I can understand how the judge made this decision, but I also understand how he became confused. SCO's attorneys should have explained their case better. Confusion is the devil of many patent cases.

Posted By Dave G, Albany NY : September 10, 2007 1:30 pm

I think Roger brings up some questionable points. One point he makes, "What it gives in one provision, it takes back in the next" is one that has bothered me from day one. After having read the APA, I was confused and wondered how SCO could not question it at the time of its drafting or when they signed the dotted line.
1) Did they really believe that the exclusion was only related to NetWare?
2) Why wasn't this matter brought up?
3) Is this why SCO went back to Novell to get it in writing after realizing there maybe a future issue?

It sounds to me like Novell was pulling a fast one on a company that was entering into an APA in good faith and in the end was defrauded.

I think SCO will ultimately leverage everything for an appeal once the "trial" is complete. They most likely will not have to pay Novell anything until the appeal process is complete.
However, this is just one of those things that every person and business should be aware of today. Read the contract thoroughly!

It really makes no sense to buy a car that has no wheels, nor will you be allowed to buy, install, and cause to be moved by those wheels. That is the SCO situation. They got something they can really not use to its full potential for a price tag of $125 million.

I also want to point out that most of the comments and opinions in favor of Novell's position are made by Unix/Linux users and not those of a business nature. I would think anyone in business that felt they had purchased a product and all rights "without limitation" to that product, would defend that position regardless of public opinion. I for one do not use Linux and probably never will. However, whether it is Microsoft, Novell, SCO, or any other company whose very life depends on product development/sales must fight to the end. I for one believe SCO bought everything they said they did. I also believe that if SCO had never issued letters and warning about UNIX licensing to the many companies they did, their position might very well have been supported by others in the business world. This is not about licenses, Unix/Linux or even about money. This case is about good faith and integrity – something that Novell is seriously lacking.

Posted By R. Rumormormill, Los Angeles, Ca : September 10, 2007 1:29 pm

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Posted By R. Rumormormill, Los Angeles, Ca : September 10, 2007 1:29 pm

Roger, your abilities are deteriorating, you've lost your edge. Did you sleep during contract law classes at your Ivy league schools? No contract for copyrights, no copyrights. No copyrights, no trial by jury about copyrights. Just a little trial to see how much SCO actually owes Novell for not following the contract they DO have, which says 95% of Unix licensing must go to Novell. JD from Yale, eh? If Yale saw your ramblings about CEO good intentions and bad memory superceding contracts, perhaps they'd want it back. Better hide it.

Posted By Ralph Siegler, Wheeling, IL : September 10, 2007 1:04 pm

Roger,

You may well have been an excellent criminal lawyer, but you are clearly unfamiliar with the history of Unix licensing. Dozens of companies, including the original SCO, built substantial Unix businesses without owning copyrights on the vast majority of the code. That is true to this day. For example, a huge chunk of SVR4 code is not, and was not ever, copyrighted by AT&T, or Novell but rather was produced as a result of the SVRX/BSD code merger done by Sun Microsystems in the early 1990's. Novell could not have transfered the copyright to that code, because they did not own it. In any event, there is no ambiguity. The APA contract between SCO and Novell says that the copyrights were excluded. Kimball quite properly ruled that the contract meant what it said. In addition, unlike all of the witnesses that testified for SCO, Tor Braham produced contemporaneous paperwork that showed conclusively that it was the intent of the parties to exclude the copyrights. If Kimball were to rule as you would have preferred, there would be no point in ever having a written contract.

Posted By Robert Weiler, San Francisco, CA : September 10, 2007 12:35 pm

Parloff rehearses some of the hearsay testimony of the Utah crowd. His emphasis on this is a good indication that this article was coached as part of a broader press campaign playing out in other forums.

The Lee Johnson testimony, for instance, was not directly referenced in the Judge Decision. It was submitted in May, 2007 and was subject to a single Groklaw article, with no text transcription.

Parloff's emphasis on the recollections of the ex-BYU football fraternity implies to me that the SCO side has pressured Parloff to accept their interpretation uncritically.

I am most interested in learning if this press campaign is a Utah exclusive , or if Boies' law firm has a hand in conducting it.

Posted By Pan Glozz, Mojave, Ca : September 10, 2007 12:31 pm

Roger,

If you had looked into the UnitedLinux initiative that included IBM, Novell, and SCO, you would see that SCO's case was so baseless.

Basically, SCO decided to withdraw from that agreement and charge for licenses for Linux distros that may or may not have had SCO code in it. In other words, SCO tried to take its ball and everyone else's and go.

Judge Kimball has done open source a great service but busting SCO down into oblivion.

Posted By Robert, Cleveland, Ohio : September 10, 2007 12:16 pm

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Posted By Robert, Cleveland, Ohio : September 10, 2007 12:16 pm

The way I understand it…

— I don't believe the judge is saying this contract can be interpreted only a single way as you suggest. I believe the judge is saying there is not interpretation of this ambiguous contract that transfers copy rights (period). Thus nothing to decide.

Posted By Tony , Franklin MA : September 10, 2007 12:01 pm

I would also suggest you look at the background on the hack, Roger Parloff, that Fortune had write the latest dribble. His background is CRIMINAL law, which is a very different matter from CIVIL law. His publications include a book about the "death penalty". So he is not an authority on copyright law, contract law, and not even civil law. Just another paid hack, working for Fortune.

His comment clearly reflects a view from a criminal law perspective, not civil law. He is trying to view issues as if they were in criminal court, not contract law in civil court. Contracts say what they say, period. The copyrights specifically were not transferred, they were specifically exempted. End of story.

Posted By Dennis, Knoxville, TN : September 10, 2007 11:48 am

Let me rephrase:

Once in a while an editoral comes down that's so wrong at such a basic level you're just left scratching your head.

That editorial is from 'Fortune' magazine's blog.

(For those too lazy to see what was referenced by backing up to the parent remark:)

http://legalpad.blogs.fortune.com/2007/0...

Guess Danny-boy Lyons isn't good enough anymore to take on the burgeoning mobs of penguinistas. Fortune had to bring in a new hack. Let the logical lynchings begin.

Posted By FakeDanLyons : September 10, 2007 11:31 am

Does the author really believe that the ink on the contracts, plainly read by an experienced judge, should be ignored so that a jury can listen to witnesses bicker about decade-old memories?

Is his characterization of the involvement the "water cooler nine" accurate? Will he acknowledge that none of them recalled discussing copyrights? Does the author understand the concept of parole evidence?

Supposing there were ambiguity, is the author willing to address the detailed notes and intermediate contract drafts supplied by those witnesses he dismissed?

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Posted By Dave, Austin, TX : September 10, 2007 11:31 am

Looks like your blog is getting "Linux-mob justice".

Or maybe, just maybe, the mob picked up on the most salient point — a point that you, either deliberately or accidentally, completely missed.

Posted By Greg, Raleigh, NC : September 10, 2007 11:26 am

The original APA was clear enough–SCO didn't get the copyrights. SCO came back later and asked for the copyrights, as if it had all been a small oversight (!!) It didn't get them, but it did get an addition, that although insignificant in its intent, unfortunately left the door open for SCO to get creative.

The lawyer who drafted the APA kept the previous drafts–a writing, not a memory. and Novell's Board of Directors left a record in writing that they understood that copyrights had not transferred. SCO had nothing comparable to support its position.

The deal did change from the original track when SCO didn't have sufficient cash to buy the copyrights. And Novell was afraid SCO might not have financial longevity (which was wise in retrospect). So it's not surprising that the memories of some SCO folk differed from the final agreement.

Posted By Ken, San Antonio, Texas : September 10, 2007 11:16 am

Even if you ignore the irrelevance of parole evidence the only parole evidence that could be relevant is from **after** oldSCO came clean and admitted they couldn't afford to pay for everything. What they all intended before then doesn't matter, that deal didn't happen.

Correct, the APA is a contradictory mess. Not exactly surprising when it was modified at the 11th hour to deal with oldSCOs lack of cash. Confusing or not its a contract Kimball was able to rule on purely on matters of law.

SCOX have spent the vast majority of the litigation heading down blind alleys hoping to drag the system along with them, you shouldn't be so surprised that the judge didn't bite. He's trained to ignore smoke&mirrors.

Posted By Paul Shirley,Leicester,England : September 10, 2007 11:02 am

Wow.
Once in awhile an article comes out that's so wrong at such a basic level that you're just left scratching your head.

The law is pretty darned clear. Copyrights CANNOT be transfered ANY OTHER WAY THAN IN A LEGAL WRITING.

Intent has NOTHING to do with it. If there is no transfer writing, explaining exactly what is transferred and when, then there is NO copyrights tranfer.

That's the law and that's what the judge ruled. It simply does not matter what people intended. It's irrelevant to the case.

In light of this, the judge made the right decision. Period.

Posted By Pat, Montreal, Canada : September 10, 2007 10:56 am

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Posted By Pat, Montreal, Canada : September 10, 2007 10:56 am

You misrepresent the ruling when you say that Kimball was ruling on a summary judgement motion because of his evaluation of parol evidence. Kimball ruled on the basis of the parol evidence rule that excludes such evidence, on the basis that the contract, "was unambiguous and not reasonably susceptible to SCO's interpretation".

Hence he didn't rely on ANY of the witnesses for his ruling (although he took some time to point out that the witnesses agreed with his interpretation as well; for example, your favourite witness, Frankenberg, was found to have contradicted the minutes of the board meeting, the testimony of Novell's negotiators, himself, and admitted not being intimately involved with the deal.)

And you've clearly not READ the APA, (did you just use the SCO press release as cliff notes or something?) or you wouldn't quote it out of context in order to claim it was ambiguous.

The part you quote ("All rights and ownership of UNIX and UnixWare…") is from Schedule 1.1a, which is an ancilliary part of the contract. It is referred to in the main body of the contract with the words
"On the terms and subject to the conditions set forth in this Agreement, Seller will sell … to Buyer and Buyer will purchase … the assets and properties … identified on Section 1.1 (a) hereto. Notwithstanding the foregoing, the Assets to be so purchased shall not include those assets (the "Excluded Assets") set forth on Schedule 1.1 (b)"

That's abundandly clear. If it's in Schedule 1.1 (b) it's not transferred, otherwise if it's in Schedule 1.1(a) it's transferred.

No other interpretation is reasonable or consistent with the wording or the notion of even having a schedule of Excluded assets.

Have SCO's PR people being surreptitiously doing the rounds to you guys? You're singing the same tune as SCO's press release, although going into slightly more detail…

Posted By David Sinclair, London, England : September 10, 2007 10:51 am

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If SCO truly believed they were entitled to the copyrights, why did they sue Novell for Slander of Title and not for performance of contract? The answer is because they in fact had the APA and knew the copyrights were excluded. There's nothing ambiguous about it – Excluded Assets are Excluded Assets

Posted By Pete Henry, Acton, MA : September 10, 2007 10:48 am

I happen to agree with the judge's ruling.

But for the sake of argument, let's say newSCO owns UNIX. Why have they not, after four years of requests, been able to show a SINGLE line of code that was improperly placed in Linux from UNIX?

Google: "McBride+millions of lines of code+could go to trial with evidence today"

Posted By Steve Alderson, Austin, Texas : September 10, 2007 10:46 am

Dig out your notes from your first-year law course on contracts, and look up “parol evidence rule.” It doesn’t matter how many witnesses SCO had. The contract says, “excluding all copyrights and patents.” It doesn’t say, “excluding all copyrights and patents in NetWare,” or “excluding all copyrights and patents except the ones Buyer really, really wants.” It says, “excluding all copyrights and patents.” The APA as a whole isn’t particularly clear, but on this point at least, it is unambiguous. If SCO has a claim to the copyrights, it has an equally strong claim to the patents — stronger, in fact, since there is no language in the APA to the effect that Novell retains an equitable interest in the royalties on those. Yet SCO has never claimed in court to own any UNIX patents.

Also, what was transferred wasn’t merely licensing rights to UNIX, but a reseller channel which at the time had considerable value.

Posted By Oronyx, Newport Beach, CA : September 10, 2007 10:44 am

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What Parloff forgets to mention is that Darl McBride asked Novell for the copyrights, thus conceding that the SCO Group did not have them. Kimball’s ruling to strike SCO’s jury request represents due process and the law. Kimball ruled the SCO Group does not own the UNIX copyrights and that they violated the APA and stole Novell’s money. Mr. McBride will probably have to answer to the SEC for lying to stockholders.

This factually inaccurate article by Fortune is incompetent. “Writers” such as Parloff should check their facts before writing.

Posted By Joe, Charlotte NC : September 10, 2007 10:36 am

If Mr Darl McBride believed SCO already owned the copyrights to SVRX, why did he (and Yarro) repeatedly request those rights from Novell prior to initiating litigation? Why does the purchase agreement from Santa Cruz to Caldera indicate that there is no chain of title from Novell but they would try to get it? Why does the law require an explicit writing to transfer copyright if you can apparently acquire it without? The APA from Novell to Santa Cruz is clear. The section on included assets explicitly and clearly states that items in excluded assets take precedence. The first two items in excluded assets are All trademarks except UNIX and UnixwareAll copyrightsThe Santa Cruz lawyers would not have missed anything this clear if it was a scrivener’s error.

Posted By Tim Bolshaw, Bangkok, Thailand : September 10, 2007 10:26 am

1) The minutes from the Novell board meeting immediately signing the Santa Cruz agreement specifically mention their retention of copyright.
2) The “95% of license fees” item only makes sense if Novell had retained ownership, doesn’t it? Why would SCO be obliged to send money back if they owned it outright?
3) The IBM case hinges on SCO’s claim of IBM passing UNIX code into Linux, yet the only code SCO has produced to date are header files defining POSIX standard error codes, which can’t very well be claimed. And given Kimball’s ruling that the Novell contract means what it says, Novell can compel their agent, SCO, to drop the case, which leaves SCO open for the countercharges of interference with trade, etc.

While I’m sure Certain IT Companies are disappointed at the failure to derail the Linux bandwagon here, the majority of us are delighted to see an IP troll getting their just desserts.

Posted By Robert Halloran, Jacksonville FL : September 10, 2007 10:21 am

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Posted By Robert Halloran, Jacksonville FL : September 10, 2007 10:21 am

Except you’ve missed an important point — under the law, copyrights can only be transferred in writing. All of the testimony as to what the parties intended is completely beside the point if there is no section 402 transfer of copyright. The judge already ruled was back in 2004 that it was indisputed thaT the original APA did not confer copyrights. The judge also ruled at that time that the Amendment did not confer copyrights. Kimball was looking for someone to come up with a bill of sale notarizing th transfer *as there was when the original APA was signed*.

Posted By Roy Murphy, Garden City, New York : September 10, 2007 10:11 am

“all copyrights” means “all copyrights” ?? seems to be pretty selfexplanitory, does it not?? how could there have been anything BUT a summary judgement in this case??

Posted By steve worcester mass. : September 10, 2007 10:09 am

Correct me if I'm wrong, but isn't the most daming bit the amendment that was added after SCo couldn't come up with the $600 million asking price? The original intent was most certainly for Novell to ditch Unix, but since SCO couldn't afford it, they wrote the amendment that allowed for Novell to retain the important bits, and for SCO to resell and advance Unix. Saying the judge acted as jury is a bit misleading. He wrote a large volume of information in a ruling to cover all bases. So I can only come to two conclusions about your article:
1) Your in it for the flame attention, as you know the Groklaw folk will write and pick apart your every sentence
2) You have stock in SCO, and you need to raise the price a little to break even.

Which is it?

Posted By John Spangler, Frederick MD : September 10, 2007 9:53 am

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Posted By John Spangler, Frederick MD : September 10, 2007 9:53 am

Your argument is well-reasoned and cogent. However, this particular case is almost a sideline to the real issue, which is that SCO has asserted that Linux has UNIX code (for which it may or may not own the copyright) in its source base. As SCO has not produced examples of such code, this claim is at best unproven. Even if SCO could establish copyright ownership, it still has a long legal road to travel. This may be the straw that broke SCO's camel's back, but that camel was already carrying a heck of a load.

Posted By Peter Varhol, Nashua NH : September 10, 2007 9:44 am

Well, let's look at the basics:

1. Did Novell even own all the copyrights to the SVRX codebase? The answer is "not really" if you look at was has been revealed in the UCB case.

2. Was there ever a proper transfer of copyrights? No. Wade through all the evidence, and its not there. The original SCO knew this as was OK with this. If Caldera (the new SCO Group) didn't realize this when they purchased the Unix business, that was their problem.

3. The agency agreement. 100% of the money goes back to Novell for SVRX licences, and then 5% goes back to SCOG for administering it. That tells you who is supposed to own SVRX right there.

Sure, the APA is very poorly worded, and as a legal document is a joke. But that's what the original parties signed.

Judge Kimball's ruling was completely fair. If fault is to be found, it is with the original lawyers on both sides who crafted the APA.

Posted By James Graves, Chicago IL : September 10, 2007 8:49 am

Seems you don't like the ruling. SCO knew they had no evidence all along and have failed to produce anything believable after four years. I would say that you've missed that last four years, but there are a lot of people who are very upset that suing without evidence is not being allowed to continue. I suppose maybe SCO should have listened to their own engineers who said they had no evidence at all.

Posted By Chuck Talk, Austin, Texas : September 10, 2007 8:30 am

Just because the Novell CEO says he gave away the rights to UNIX doesn't mean he had the right to give it away. UNIX has been there since the 1960s and widely distributed as a freeware. The jury trial was sought by SCO so that by sheer luck an uninformed public could given them the lottery. But sadly for them justice does prevail even in our litigious society and its accompanying extortions(such as with RIMM).

Posted By Suresh, San Francisco, CA : September 10, 2007 8:07 am