No. 10-4122

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THE SCO GROUP, INC.,

Plaintiff-Appellant,

v.

NOVELL, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the District of Utah
Hon. Ted Stewart, Presiding
No. 2:04-CV-00139-TS

REPLY BRIEF FOR APPELLANT, THE SCO GROUP, INC.
ORAL ARGUMENT REQUESTED

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STATEMENT OF FACTS

SCO paid approximately $50 million in stock (A2187:106-07;A2206:183-84;A2351:735-36), plus additional revenue streams one of which was estimated at $50 million for the year 1995 alone (A2224:248;A2235:292;A2350:730-32), for "all of Seller's right, title and interest" in "all rights and ownership of UNIX, UnixWare and Auxiliary Products" (A3160), subject only to certain exclusions. The exclusion of all copyrights was subsequently amended in Amendment No. 2 so that copyrights "required for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies" were not excluded from the sale, and thus remained within the encompassing reach of all "right, title and interest," including all "ownership" rights in UNIX and UnixWare that was sold to SCO. This appeal focuses on whether these contractual agreements, and the evidence surrounding them, properly allow a finding that none of the UNIX and UnixWare copyrights were required by SCO to exercise its rights in the UNIX and UnixWare technologies it acquired.

The proposition that the district court's denial of SCO's Rule 50(b) motion rests upon – and the lynchpin of Novell's case – is that SCO acquired the assets, including the UNIX and UnixWare source code, except for the UNIX and UnixWare copyrights, to which SCO received only a license to use the UNIX and

UnixWare copyrights. Even viewed through the prism of drawing inferences in

Novell's favor, the salient facts cannot support that proposition.

The APA does not contain an express license to SCO to use the UNIX and

UnixWare source code and technologies. In addition, the record contains no

testimony from the numerous witnesses on both sides of the transaction about the

negotiation of any license to SCO. The testimony of Novell's lawyer, Tor Braham,

concerning the original exclusion of copyrights does not show that any such

license was negotiated, even though, by Novell's lights, the license would have

been essential to the transaction if the copyrights were being withheld.

Amendment No. 2 does not speak of confirming an "implied license" or creating

an "express license." While it is true that the original APA had an exclusion of

copyrights in the schedule of assets being transferred, that language was replaced

by Amendment No. 2 – a totally unnecessary move if only a license was being

provided to SCO.

The extrinsic evidence on the intent of the transaction is mixed only on the

Novell side of the transaction, not on the Santa Cruz side. The five Santa Cruz

witnesses, all of whom have no affiliation with or interest in SCO, testified

consistently that a transfer of copyrights was intended. (A2280(Mohan);

A2287(Michels);A2290-91(Michels);A2275-76(Wilt);A2395-96(Sabbath);A2364-

65(Madsen).) What is extraordinary in this case is that SCO also presented

testimony from five <u>Novell</u> executives who agreed that transfer of the copyrights

was intended. (A2183-84(Frankenberg);A2204(Frankenberg);

A22192(Thompson);A2251(Chatlos);A2253(Chatlos);A2336(Mattingly).) While

Novell notes that certain of these witnesses had a financial interest in SCO, their

testimony was consistent with the testimony of Novell's CEO and in-house

attorney who had no such financial interest, and with all of the Santa Cruz

witnesses. Novell's CEO at the time, Robert Frankenberg, stated that it was his

intent at "the beginning of the transaction," "throughout the transaction," and

"when the transaction closed" to "sell the copyrights in UNIX and UnixWare" to

SCO. (A2204;A2828.) Novell's former in-house counsel working on the

transaction, Burton Levine, went so far as to suggest that it would have been

unethical and counter to the intent of the deal to withhold the copyrights. (A2295.)

Novell relies heavily on the testimony of its in-house lawyer Alison Amadia,

who drafted Amendment No. 2. Amadia admitted on cross-examination that if

copyrights were required for SCO to exercise its rights with respect to its

acquisition of UNIX and UnixWare, they were transferred through the Amended

APA. (A2728-29:A2177-78.) Consistent with this testimony, when the dispute

first arose, Novell admitted to the world in a press release in 1996 that Amendment

No. 2 confirmed a transfer of UNIX copyrights. (A3352;A2268:414-

15(Messman);A2578:1607(Stone).) Novell CEO Jack Messman admitted at least

twice under oath that this press release was accurate and that Amendment No. 2

changed which assets Novell retained under the APA. (A2268:414-

15;A2265:404.) Novell General Counsel Joseph LaSala also admitted that as part

of the transaction, SCO obtained the right to assert claims to protect its business

(which for a software, including source code, business, requires the copyrights, as

this Court pointed out in its prior decision). (A2675:1976-77.)

Further, the APA provided for a license-back to Novell to use the technology

being sold – which made no sense if Novell retained the copyrights to that

technology. The TLA license was "a license back" to Novell, granting it "the

rights to internal use of UNIX and UnixWare, even though the products were part

of the assets sold." (A:2701:2068(Tolonen);A2677:1984(LaSala);A2672:1964-

65(LaSala).) Novell says that the license-back was for future derivative products,

but the license-back included not only derivatives created by SCO after the sale but

also the technology SCO was acquiring from Novell at the time of the sale,

including the source code to all the existing versions of UNIX.[1] (A3114§1.6;

A3160;A3381§II.A.(1).)

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[1] In 2002 and 2003, contrary to what Novell asserts now, the new owners of
SCO asked for a document clarifying that SCO had acquired the copyrights in the
1995 APA. SCO did not request a transfer of copyrights at that time, and it made
its request for clarification before either party had located Amendment No. 2. (See
A2575(Stone);A2587(Stone);A002745(Jones).)

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The undisputed evidence of the parties' actions after the sale also reflects an understanding as to who owned the copyrights. After the sale, Novell left its UNIX copyright registrations with SCO (A2319); and Novell remarked the source code and packaging of the UNIX product being shipped at that time (i.e., containing no Santa Cruz improvements) with the Santa Cruz copyright notice. (A2609:1725-28;A2608:1723-36;A3281-88.) A few months later, when Novell tried to modify IBM's UNIX license to grant IBM expanded rights, Novell never suggested that it owned the copyrights or could do what it wanted with the license by exercising "waiver" rights under the APA to direct SCO's actions. (See, e.g., A2369:801-02.)

ARGUMENT

I.   THE DISTRICT COURT ERRED IN DENYING SCO'S MOTION FOR JUDGMENT UNDER RULE 50(B).

> **A.   The Amended APA Transferred Copyrights That SCO "Required."**

SCO's 50(b) argument is straightforward: At a minimum, the APA, after Amendment No. 2, transferred those copyrights that were "required" for SCO to exercise its rights in the UNIX and UnixWare technologies it acquired. This follows from the plain language of the APA, as amended, from the reasoning of this Court's prior decision, and from the testimony of the witnesses who were personally involved in Amendment No. 2. Novell's response does not undermine any of these three pillars of SCO's argument.

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1. *The Language of the APA, as Amended, Provided for Transfer of "Required" Copyrights.* The asset transfer provisions of the APA require looking at both the schedule of assets to be sold, and the schedule of those excluded from the sale. The language transferring "<u>all rights and ownership</u> of UNIX and UnixWare" in the Assets Schedule transferred "a broad set of assets limited only by Schedule 1.1(b)." <u>SCO Group, Inc. v. Novell, Inc.</u>, 578 F.3d 1201, 1212-13 (10th Cir. 2009). Novell suggests that because certain trademarks were specifically identified in one place in the Asset Schedule, copyrights must not have been included since they were not also specified. This suggestion ignores that the broad language of "all rights and ownership" (which clearly covers copyrights when referring to computer code), and the case law SCO cited and this Court recognized, <u>id.</u> at 1212-13, for this proposition is neither refuted nor distinguished. If there had been no schedule of excluded assets, it would be inconceivable that "all rights and ownership" of all UNIX and UnixWare source code did not include copyrights.

Novell's position that the copyrights were excluded must therefore rest on the language in the schedule of excluded assets. Originally there was an exclusion of "all copyrights," but this exclusion was undeniably replaced by Amendment No. 2 with the following key language: "All copyrights and trademarks, except for the copyrights and trademarks owned by Novell as of the date of the [APA] required

for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies." (A3219§A.) Thus, if the copyrights are "required," the exclusionary language does <u>not</u> apply and they remain within the broad category of "all rights and ownership of UNIX and UnixWare" that was transferred to SCO.

In short, Novell offers no plain language interpretation that would give any meaning to Amendment No. 2 if copyrights that were "required" by SCO were not transferred. Instead, Novell insists that the critical change made to the language of the assets schedule sought only to confirm the existence of an implied license so that SCO could make use of, but not own, the copyrighted technology. Of course, Amendment No. 2 – and the APA as a whole – <u>never</u> makes reference to such a license, and the Amendment revises schedules of assets being transferred, not assets being licensed.

2. *Novell's "Implied License" Interpretation is Precluded by this Court's Prior Opinion.* Novell argues (at 30) that this Court did not hold "that Amendment No. 2 referred only to ownership, not usage rights." In fact this Court stated: "[A]ny change to the set of Excluded Assets in Schedule 1.1(b) necessarily implicated those copyrights <u>actually transferred</u> under Schedule 1.1(a)," and that "[w]hatever the Amendment means, <u>it refers to the ownership of copyrights, not to licenses</u>." <u>SCO</u>, 578 F.3d at 1213-16 (emphasis added).

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When Novell suggests (at 25) "that Amendment No. 2 was never intended to transfer ownership of the UNIX copyrights," it addresses a straw-man: Neither SCO nor this Court stated that Amendment No. 2 *alone* transferred any copyrights. It is the interaction between the broad schedule of included assets and the revised schedule of excluded assets that makes inescapable the conclusion that "required" copyrights were being transferred. That is the nature of an amendment.

Novell also insists (at 30-31) that "it was entirely consistent with this Court's mandate for the jury and district court to conclude that Amendment No. 2 did something other than transfer the UNIX and UnixWare copyrights." But here Novell confuses the question of whether the UNIX and UnixWare copyrights were in fact "required," with the question of whether those copyrights that were "required" did transfer. This Court's prior opinion explained that the amended APA sufficed as a transfer instrument because it made "<u>clear</u> that the parties contemplated <u>that copyrights transfer</u>," despite "the linguistic <u>ambiguity</u> concerning <u>which particular copyrights</u> were transferred." Id. at 1213 (emphasis added). The Court thus expressly distinguished between the two questions – whether the amended APA transferred the "required copyrights," where the contract was "clear," and whether the specific copyrights at issue were "required," where the contract had "ambiguity."

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In explaining the operation of the asset schedules, moreover, the Court explained that the language transferring "all rights and ownership of UNIX and UnixWare" in the Assets Schedule transferred "a broad set of assets limited only by Schedule 1.1(b)." Id. at 1212-13 (emphasis in original). Precisely because the original Excluded Assets had excluded "all copyrights," the Court noted that "any change to the set of Excluded Assets in Schedule 1.1(b) necessarily implicated those copyrights actually transferred under Schedule 1.1(a)." Id. at 1213 (emphasis added). With respect to the change made by Amendment No. 2 exempting the "required" copyrights from the exclusion, the Court concluded that the Amendment "excised certain copyrights from the exclusion." Id. at 1214, 1216. The Court thus specifically held that the Assets Schedule, combined with the "required" language of Amendment No. 2, transferred the "required" copyrights. Id. at 1213-16.

The Court's remand highlights the distinction between the issue the Court resolved and the question it left for trial: "We need not determine at the summary judgment stage which copyrights were 'required.'" Id. at 1218 (emphasis added). The Court explained that SCO had "presented sufficient evidence to create a triable issue as to whether at least some UNIX copyrights were required for it to exercise its rights under the agreement." Id. The question to be resolved at trial, therefore,

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was not whether the amended APA transferred the "required" copyrights, but

rather whether the copyrights at issue were or were not "required."

Finally, Novell argues (at 34-35) that SCO's position "is contrary to this

Court's mandate in SCO's first appeal, and directly contradicts arguments that

SCO advanced (and this Court accepted) in that appeal." On the contrary, SCO

previously argued that the plain language of the APA could not support a summary

judgment for Novell predicated on the notion that Amendment No. 2 simply

confirmed some form of implied license. Now SCO argues that, for the same

reason, the denial of SCO's Rule 50(b) motion is error. Thus, not only is that

entirely consistent with SCO's prior position, but this Court's acceptance of that

proposition was essential to its prior ruling and therefore should be accorded the

weight of law of the case. See Sparks v. Rittenhouse, 314 Fed. Appx. 104, 108

(10th Cir. 2008) (law of the case doctrine applies "to all issues previously decided,

whether explicitly or by implication," when their "resolution was a necessary step

in resolving the previous appeal"); Rohrbaugh v. Celotex Corp., 53 F.3d 1181,

1184 (10th Cir. 1995) (law of the case doctrine applies to "holdings essential to the

determination of the first appeal").

3. Extrinsic evidence cannot salvage Novell's position. Because Novell's

position cannot be squared with either the plain language of the APA as amended,

or with this Court's prior reading of the agreement, it cannot be rescued – on this

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point – by extrinsic evidence. Even if Amendment No. 2's drafter, Alison Amadia,

had consistently and emphatically insisted that Amendment No. 2 only served to

confirm an implied license, that is simply an unsustainable position. However, as

detailed in SCO's opening brief (at 14, 27-28), Amadia actually <u>conceded</u> the

correctness of SCO's position and finally admitted on cross-examination that "if

there are copyrights that are required for SCO to exercise its rights, like the UNIX

and UnixWare trademarks, they were transferred." (A2729:2178;A2721:2148;

A2724:2160.)

Novell argues (at 28) that "even if portions of Amadia's testimony were

construed to support SCO's claims that copyright ownership transferred, the fact-

finders were free to rely on and credit her ample testimony that supported Novell's

position." However, Amadia's testimony that Amendment No. 2 merely affirmed

an implied license cannot be squared with the amended APA and this Court's prior

order. Even if the jury and judge chose to credit this incongruous testimony, while

discrediting her clear, logical admissions, this testimony cannot support the verdict.

At bottom, Amadia's candid admissions on cross-examination give voice to the

only reasonable interpretation of Amendment No. 2.

Given the above admissions, the plain language of the provision, and this

Court's prior ruling, Amadia's testimony concerning her negotiations with Steve

Sabbath, SCO's general counsel, is hardly (as Novell says at 26) "sufficient for a

reasonable jury to find for Novell." Her testimony first confirms that Sabbath

believed the original exclusion of copyrights was erroneous – a clerical error – and

was looking for it to be fixed. (A2730:2184-85.) If Sabbath acquiesced to

Amadia's language, it was because he believed that it would suffice to cure the

problem, as Sabbath himself testified. (A2397:910-11(Sabbath); see also A2726-

29:2169-79(Amadia).) He may have accepted the higher test of copyrights being

"required" as opposed to those "which pertain" to the UNIX business (which he

had proposed in his draft), but there is no competent testimony that Sabbath

believed the APA post-Amendment No. 2 did not serve to transfer copyrights.

Sabbath's assistant, Kim Madsen, testified similarly. (A2369-70:802-03.)[2]

Novell asserts (at 22-23) that it retained the copyrights to protect the SVRX

royalty stream. But the cited testimony merely speaks to the motivations (of some

Novell employees) for seeking to retain the copyrights; it does not speak to the

meaning of the language transferring the "required" copyrights. Even if this

testimony were relevant to the interpretation, the testimony cannot be squared with

the fact that the parties later amended the APA precisely – as the Tenth Circuit

found – to affect the balance between transferred and excluded copyrights. The

only reasonable reading of the transfer language thus establishes that the APA was

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[2]   Novell also relies on Tolonen's testimony to defend the verdict. But his
testimony also cannot support a reasonable verdict because he was not even
involved in the negotiation or drafting of the language of Amendment No. 2.

amended <u>notwithstanding</u> any motives to protect the royalty stream, which was

independently protected by other provisions in the APA (A3111§1.2(b)).

In sum, evidence that the amended APA did not transfer ownership of

"required" copyrights and instead merely affirmed an implied license cannot be

reconciled with the only reasonable interpretation of the APA and this Court's

prior opinion. While the Court left open the question of whether the UNIX and

UnixWare copyrights were "required," the Court did <u>not</u> remand the case for a

determination as to whether "required" copyrights were transferred. If copyrights

were "required," SCO acquired them.

B.   The UNIX and UnixWare Copyrights Are "Required" by SCO.

There is undisputed evidence that the UNIX and UnixWare copyrights were

and are required for SCO to protect its intellectual property, engage in source code

licensing, and litigate claims.[3]

**1.   The UNIX and UnixWare Copyrights Are Required for
SCO to Protect the Source Code Underlying Its Business.**

Novell's former UnixWare development manager, Andrew Nagle, testified

that older UNIX code is at the heart of UnixWare. (A2610;A2623-

24;A363;A2766.) Novell argues (at 40, n.7) that this testimony is "a red herring"

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[3]   As noted in SCO's opening brief (at 33, n.6), there was no testimony at trial
distinguishing among the various UNIX and UnixWare copyrights. SCO's
testimony established that the group of UNIX and UnixWare copyrights was
required (<u>see, e.g.</u>, A2397:911), and there was no contrary testimony.

because Nagle acknowledged that SCO may have contributed millions of lines of code to the UNIX code base it acquired under the APA. But that testimony does not remotely detract from his undisputed testimony that UnixWare was nearly identical to its predecessor SVRX releases and that UnixWare, in 1996 and today, could not even run without the code from pre-APA releases of UNIX. (A2610;A2623-24;A363.) That SCO has added millions of lines of code on top of the code it acquired from Novell does not reduce the critical value or importance of that intellectual property to UnixWare.

Novell awkwardly asserts (at 36) that SCO presented no testimony to support the interpretation that Amendment No. 2 was designed "to allow SCO to bring litigation." But Novell misses the point: SCO was not required to present testimony that that Amendment No. 2 was designed to facilitate litigation. All SCO needed to show was that without the copyrights, SCO could not protect against infringement of the underlying intellectual property on which UnixWare rests and could not protect that business going forward – facts that were undisputed at trial. (A2333-34:666-68(Broderick);A2398:913-15(Sabbath); A2421:997(McBride);A2599:1686-87(Maciaszek);A2364:780(Madsen); A2369:802-03(Madsen);A2386:865-66(Madsen);A2388:875;A2390-91:884-85(Madsen);A2825:2542(Frankenberg).)

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Nor did Darl McBride or Ryan Tibbitts "admit" that SCO does not require the copyrights. As SCO explained in its opening brief (at 36-38), McBride and Tibbitts explained that a portion of SCO's business – the business of selling binary products – does not require ownership of the copyrights (A2479:1225-26), but the licensing side and pursuit of legal claims do require ownership of the copyrights (A2642:1850-51).

Novell maintains (at 38-39) that SCO could run the UnixWare binary business without the copyrights, just as Santa Cruz had "successfully distributed the OpenServer flavor of UNIX . . . without owning the copyrights in the underlying UNIX code." The UNIX and UnixWare copyrights are nevertheless required if SCO is to protect the code underlying the business. (A2333-34:666-68(Broderick);A2398:913-15(Sabbath);A2421:997(McBride);A2599:1686-87(Maciaszek); A2364:780(Madsen);A2369:802-03(Madsen);A2386:865-66(Madsen);A2388:875; A2390-91:884-85(Madsen);A2825:2542(Frankenberg).) If third parties can use the code underlying UnixWare with impunity, the market for the sale and distribution of UnixWare will disappear. The instant dispute regarding the ownership of the UNIX and UnixWare copyrights arose precisely for that reason. Because it is undisputed that an implied license would not give SCO the right to enforce the copyrights, ownership of the copyrights was required.

2.   The Copyrights Are Required for SCO to Exercise Source-Code Licensing Rights.

Novell does not dispute that the copyrights to pre-APA UNIX code are required for SCO to license UnixWare source code if UnixWare contains pre-APA UNIX code. Instead, Novell responds (at 41) that SCO, "as a matter of law, could license any new software it created," and that "SCO did not have any independent authority to license old code" – neither of which addresses source code licensing of the UnixWare code. (A2825:2543-44;A2222:241-42;A2333-34:666-68;A2290:503-04;A2275:442-43;A2397-98:912-15.) Novell seeks to perpetuate the fiction that UNIX and UnixWare are distinct and separate, where in fact all the evidence at trial established that UnixWare was simply the brand name for the most recent update of the same UNIX SVRX operating system. (A2610;A2623-24;A2766; A363.) Accordingly, as was also shown without dispute at trial, in 1996 UnixWare was nearly identical to the prior versions of UNIX, and even today UnixWare would not even function if the old UNIX code from which it was developed were removed. (Id.) Even Novell's head of the UNIX division, Michael DeFazio, admitted that "the intellectual property in UNIX was an important part of the going forward UnixWare business" and that it was Novell's intent "to transfer the intellectual property of the UNIX program to Santa Cruz through the asset purchase agreement." (A2766:2321.) Thus, even fourteen years later, let alone in 1996, the UnixWare source code simply could not be licensed

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without also licensing the vast and essential "SVRX" or "old UNIX" code in

UnixWare.[4]

3.   The Copyrights Are Required for SCO to Pursue the Legal Claims It Acquired Under the APA.

Characterizing the assignment to SCO of "all of seller's claims" as

"boilerplate," Novell asserts (at 42-43) that this provision did not transfer the

copyrights to SCO. But again Novell mischaracterizes SCO's argument and the

clear meaning of the amended APA. SCO has not argued that the foregoing

provision itself directly transferred the copyrights; SCO argues that UNIX and

UnixWare copyrights are "required" for SCO to bring those claims, and that the

amended APA transferred all copyrights SCO required to exercise any of its rights

in the UNIX and UnixWare business.

Novell also says (at 42) that SCO "provided no evidence of any such claims

that it was entitled to pursue." Novell once again misapprehends the record. Even

Novell's General Counsel Joseph LaSala admitted that SCO acquired the rights to

bring legal claims to protect its business. (A1977.) This echoed DeFazio's

testimony (above) and Novell's senior executive Duff Thompson's testimony "that

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[4]   In addition, after the first trial, in a portion of its judgment that was not
disturbed in the first appeal and therefore remains the law of the case, the district
court held that SCO was also authorized under the APA to license the source code
to all prior versions of UNIX as such when SCO licensed UnixWare. SCO Group,
Inc. v. Novell, Inc., No. 2:04CV139DAK, 2008 WL 2783523, at *18 (D. Utah July
16, 2008.) SCO needs the copyrights for that purpose as well.

the enumerated assets Novell actually sold to Santa Cruz included legal claims that

it would have against parties that were connected with the business." (A2224:249-

50). After the closing of the APA, SCO pursued legal claims against Microsoft

(A2371-72:807-11;A3364-66§§3.4,4.9;A3439), expressly and publicly asserting

ownership of the AT&T UNIX copyrights (which Novell did not challenge). More

recently, SCO's pursuit of copyright claims relating to alleged Linux infringement

is another obvious example. (A3526-26.) The very reason that SCO's ownership

of the copyrights became controversial was that SCO needed those copyrights to

seek to protect the business it had bought from Novell against Linux infringement.

II.   IN THE ALTERNATIVE, THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING SCO'S MOTION FOR A NEW TRIAL AND ITS ALTERNATIVE CLAIM FOR SPECIFIC PERFORMANCE.

While SCO's Rule 50(b) argument focuses specifically on the transfer of the

copyrights because they were required, SCO's alternative motion under Rule 59

for a new trial also should have been granted, because of the overwhelming

evidence that the intent of the transaction was to transfer the copyrights to SCO.

Five former Novell executives and five former Santa Cruz executives,

including both former CEOs, testified that the intent of the deal was to transfer the

copyrights to SCO. (A218384(Frankenberg);A2204(Frankenberg);

A22192(Thompson);A2251(Chatlos);A2253(Chatlos);A2336(Mattingly);

A2280(Mohan);A2287(Michels);A2290-9(Michels);A2275-76(Wilt);

A2395-96(Sabbath);A2364-65(Madsen).) While it is true that the quantity of

witnesses is not dispositive, the significance of SCO's trial testimony is that *five* of

these witnesses were Novell executives at the time of the APA; and not just any

executives – they included Novell's CEO, Robert Frankenberg; Novell's lead

negotiator, Ed Chatlos; and Novell's in-house attorney working on the transaction,

Burton Levine. Their testimony, moreover, squares with the amended APA.[5]

Novell claims (at 48), however, that "many" SCO witnesses had "a financial

stake in SCO prevailing." Novell is wrong. SCO presented five former Santa

Cruz executives, none of whom had any financial interest in SCO or this litigation

at the time of their testimony. Of the five witnesses SCO presented from the

Novell side of the transaction, Frankenberg and Levine had no interest in SCO or

this litigation, and their testimony corroborates the testimony of the other three

Novell witnesses (Thompson, Chatlos, and Mattingly) who had a financial interest

in SCO.

While Novell presented the testimony of three witnesses (Braham, Bradford,

Tolonen), their testimony cannot be reconciled with the fact that one year later the

parties removed through Amendment No. 2 the exclusionary language for all

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[5]   Novell claims that Amendment No. 2 would have needed to be approved by
Novell's board to be effective if it indeed confirmed the transfer of required UNIX
copyrights. This point is another red herring as there is no question that the
Amendment was a binding agreement with SCO.

copyrights. When coupled with the testimony of all of the witnesses on the SCO

side, and the other Novell executives, that transfer of the copyrights was intended,[6]

this becomes precisely the type of situation for which Rule 59 exists.

This Court has said that the parties' course of performance is perhaps the

best evidence of contractual intent, SCO, 578 F.3d at 1217, and here SCO

presented extensive, detailed, and uncontroverted evidence of the course of

performance post-APA. Specifically, Novell took affirmative steps to leave the

pre-APA UNIX copyright registrations with Santa Cruz after the transaction

closed, and re-marked the source code and packaging of the UNIX product being

shipped at that time (i.e., code that contained no Santa Cruz improvements) with

the SCO copyright notice. Novell asserts that SCO was entitled to place its

copyright on new UnixWare versions with modified code, but that misses the

point: Novell engineers put SCO's copyright notice on the UnixWare products

that Novell had developed at a time when there was no new contribution of code

by SCO. (A2609:1725-28;A2608:1723-36;A3281-88.)

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[6]   Remarkably, Novell asserts that Steve Sabbath and Kim Madsen "had
nothing to say regarding the negotiations and interpretation of the Amendment No.
2." But both clearly testified that the intent of Amendment No. 2 was to clarify
that copyrights were transferred in the transaction. (A2397(Sabbath);A2395-
96(Sabbath);A2369-70:802-03(Madsen);A2364-65(Madsen).) Likewise, Novell's
statement that Tolonen was the only executive who was involved with both the
original APA and Amendment No. 2 is inaccurate. (Id.)

What Novell did not do post-APA also is informative. Novell did not claim

ownership of the copyrights to resolve the dispute with Santa Cruz over Novell's

expansion of IBM's UNIX rights in 1996. (A2369:801-02.) Novell also sent out

countless letters to UNIX licensees and partners explaining that the APA had

transferred "Novell's existing ownership interest in UNIX System-based

offerings." (A3539-80;A2313:586;A3528-33.) While Novell now says that the

letters sent to customers were intended to simply inform customers they would be

dealing with SCO going forward, there is no justification for Novell to express that

its "existing ownership interest" in all current and prior versions and releases of

UNIX System V had been transferred if Novell in fact was keeping that business

and the critical copyrights reflecting ownership of the UNIX code. Ambiguity is

perhaps understandable; an affirmative misstatement on this critical point is not.

For the same reasons, the district court's refusal to grant specific

performance and direct Novell to transfer the copyrights now is also error.

**III. THE DISTRICT COURT ERRED IN CONCLUDING THAT
NOVELL RETAINED BROAD WAIVER RIGHTS TO DIRECT
SCO TO ABANDON LEGAL CLAIMS AGAINST IBM.**

**A. Novell's Waiver Rights Did Not Extend to the
IBM Software Development Agreement.**

Novell sought a declaration that its APA rights allowed it to countermand

any action SCO took with respect to any UNIX software licensing agreement, and

thus Novell had the right to force SCO to abandon its claim that IBM had breached

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the terms of its Software Agreement by making UNIX technology contributions to Linux, a competing operating system. Novell does not dispute the detailed textual analysis (at 43-43) showing that the district court erred as a matter of law in its reading of the term "SVRX Licenses" under the APA. The IBM Software Agreement was transferred under a <u>different</u> Item in the Assets Schedule, not subject to the Novell "waiver" rights. Nor does Novell dispute the fact that this Court already held that Paragraph B.5 of Amendment No. 2 "would be pointless and ineffectual" if "Novell already had the right under [Section 4.16 of] the APA itself to force SCO to increase any SVRX licensee's rights to SVRX code." <u>SCO</u>, 578 F.3d at 1222. Nor does Novell even acknowledge the testimony of nine witnesses who testified that Section 4.16 was intended to protect Novell's interest in the SVRX royalty stream. (A2188(Frankenberg);A2254-56(Chatlos);A2223-24(Thompson);A2276(Wilt);A2282(Mohan);A2288-90(Michels);A2331-32(Broderick);A2396(Sabbath);A2382;A2392-93(Madsen). Even Novell's Michael DeFazio made clear that Section 4.16 was intended "to protect" Novell's legacy royalty stream. (A2764-65:2310,2313.)

**B.   Novell's Interpretation Must Be Rejected Because
It Would Give Novell the Ability to Destroy
<u>SCO's Benefits Under the APA.</u>**

Novell argues (at 51) that "a broad waiver right does not undermine Santa Cruz's benefit of the bargain; rather it is consistent with Santa Cruz being Novell's

agent," and with SCO having acquired nothing more than "the assets and rights it needed to exploit and develop UnixWare going forward." This argument fails.

Even if (contrary to fact) Santa Cruz purchased only the UnixWare licensing business, Novell should not be able to undermine that very UnixWare business by allowing third parties to give away core UNIX technology that makes UnixWare valuable. That is precisely what SCO contended IBM had done through its technology contributions to Linux. Because "the first releases of UnixWare contain all or virtually all of the technology included in the immediately prior System V releases, SVR4.2 and SVR4.2MP," SCO Group, 2008 WL 2783523, at *3, both "SVRX" products, Novell's purported waiver of SCO's efforts to protect that technology directly undermine SCO's UnixWare assets.

Novell also argues (at 53-54) that SCO's position renders Novell's Section 4.16 rights "illusory," "as it would allow SCO unilaterally to terminate an umbrella software agreement, rendering the product supplement agreement ineffective." But there is no conflict between SCO's ownership of all rights in the Software Agreements and Novell's protection of its "financial interest" in SVRX Royalties. SCO has always agreed that Section 4.16 authorizes Novell to protect this interest in royalties. In addition, IBM had already bought out the SVRX royalty obligations, and as Novell's former general counsel Joe LaSala conceded at trial,

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allowing SCO to litigate its claims against IBM on the merits could not jeopardize

those payments. (A2668-69.)

> ### C.   Novell Breached the Covenant of Good Faith and <u>Fair Dealing in the Amended APA</u>.

Even if Novell has broad waiver rights, their exercise should be held subject

to the covenant of good faith and fair dealing. Under California law, even broad

contract rights and rights purportedly in the discretion of one party are subject to

an implied obligation to act fairly and in good faith. <u>Major v. W. Home Ins. Co.</u>,

169 Cal. App. 4th 1197, 1209 (2009).

Novell does not dispute that "the fundamental purpose of the implied

covenant is that neither party will do anything that will injure the right of the other

to receive the benefits of the agreement." Even if Novell's actions were based on a

reasonable reading of the APA, that is irrelevant because the covenant only applies

in the first place if Novell's interpretation is right. If Novell's contract

interpretation of the scope of Section 4.16 is wrong, this Court need not even reach

the issue of what limits apply to Novell's exercise of its Section 4.16 rights.

Novell points out that it was in its economic interest to stop SCO from

proceeding with its legal claims against IBM. But a party has never been found to

have acted in good faith and fairly simply because it has an economic motive for

its actions. The entire point of the implied covenant is that a contracting party is

required to act in good faith and fairly to effectuate the purposes of the contract, rather than simply in its own economic interest. (Id.)

IV.   THE DISTRICT COURT ABUSED ITS DISCRETION IN MAKING CRITICAL EVIDENTIARY RULINGS THAT PREJUDICED SCO.

A.   The District Court Wrongly Informed the Jury of Prior Judicial Decisions Rendered Against SCO.

.   Novell does not dispute that it failed multiple times in its efforts to publish the reversed summary judgment decisions to the jury, that the district court rebuffed those requests stressing that "Plaintiff would be prejudiced if the jury was informed that this Court once entered judgment against it on those very claims that the jury will be asked to decide," or that, even when relenting to Novell's requests, the court noted that the publication was generally "unnecessary" and "highly prejudicial." (A2541:1465;A1094.2.)

Instead, Novell suggests that SCO "opened the door" to this "evidence" by stating during opening argument that Novell's website still had a statement claiming ownership of the copyrights, and Novell reasonably relied upon those decisions at that time in asserting those claims. But Novell asserted that it owned the copyrights in 2003, years before the court decisions, and continued to assert ownership after this Court reversed the summary judgment decision in 2009. The judicial decisions thus are not relevant to the issue of Novell's intent in publishing

its ownership claims. The district court was right to reject Novell's initial requests

to publish the decisions.

Novell's defense (at 58-59) of the district court's decision to reverse course

near the end of trial makes no sense. Dr. Botosan's damages model did not present

"a skewed version of the facts" by excluding the prior judicial decisions as "a

potential cause of third-party licensing decisions." The whole point and design of

the model was to calculate revenues SCO would have received had Novell <u>not</u>

claimed ownership of the copyrights in the first place. In applying this long-

established and widely-accepted "but for" methodology, Dr. Botosan correctly

ignored events – such as these judicial opinions – that would not have occurred

absent the slander. If the slander had not occurred, there would have been no

litigation and no judicial decisions at all.

Novell speculates (at 59) that the district court's instruction that the district

court's decisions had been reversed on appeal "decreased any potential prejudicial

effect." Even assuming that the jury apprehended that the district court's decisions

were reversed, the jury had been told that the judge (they were not instructed that a

different judge had made the ruling in favor of Novell) agreed with a decision in

favor of Novell and had ruled against SCO on the same issues that were now in

front of the jury. No fair trial can occur where the presiding court reveals its

position on the issues the jury will decide. There can be no confidence that a jury

will receive evidence impartially and deliberate freely where the presiding authority reveals which party the court believes to be right. The district court's imprimatur on Novell's position created prejudice that no curative instructions could undo.

But there is more. The district court allowed Novell to publish to the jury not only the ultimate conclusion that "the APA did not transfer any copyrights," which would have served the ostensible purpose of the publication, but also allowed Novell's counsel to read from the prior decisions that "there is no dispute that all copyrights were excluded under Schedule 1.1(b)" (referring to the replaced language of the original APA), that Amendment No. 2 "does not constitute a transfer of copyrights on its own," that the Amendment is "not retroactive to the date of the APA," and that the Amendment "provides no date for the transfer" and "does not state that a transfer of the copyrights is to occur as of the date of the amendment." (A2549-50.) Each of these statements was wrong, they were reversed by this court, and yet were presented to the jury as a decision made by the district court. The publication of the district court's prior judicial decisions thus conveyed to the jury not only the bottom-line conclusion that the same court had previously reached in favor of Novell, but also provided several erroneous pathways for the jury to reach the same conclusion.

Through most of the trial, the district court correctly had rejected Novell's numerous efforts to contaminate the jury with the prior, reversed decisions; its reversal of course on Novell's gambit to do so in the guise of being relevant to damages, and thus making it one of the most dramatic moments of the trial for the jury, was an abuse of discretion necessitating a new trial.

B.   The District Court Improperly Permitted Novell to Rely on Language in the APA That Was Replaced.

SCO does not argue, as Novell says (at 59), that Novell confused the jury by concealing Amendment No. 2. Novell confused the jury by pretending that the old language was still part of the APA and that Amendment No. 2 was something separate and distinct. The district court unfortunately did not prevent this charade by wrongly refusing to grant SCO's motion in limine, by overruling objections SCO had made, and by not allowing SCO to make clear with the witnesses testifying about the old language that it had, in fact, been replaced – whether or not they were directly involved in the negotiation of the amendment.

Although Novell claims (at 60) that it "did nothing that might lead the jury to believe that the original APA remained operative," Novell cannot deny the numerous record citations in SCO's opening brief (at 57-58) that prove otherwise. At every step, the district court allowed Novell to address "the exclusion of copyrights" as though that were the language of the agreement and Amendment No. 2 were a separate instrument. Novell thus treated the original APA and

Amendment No. 2 as separate contracts, each of which, standing alone, failed to transfer the copyrights – a fiction that this Court pointedly rejected. SCO, 578 F.3d at 1211. In fact, as explained above (at Part IV.A.), the district court put its imprimatur on this fiction by permitting Novell to read from the court's prior decisions.

The district court then magnified its error by not allowing SCO to ask its lead witnesses about Amendment No. 2. (A2186;A2192;A2215-16;A2238.) Novell argues (at 60-61) that "SCO wanted it both ways" by asking these witnesses about "the intent of the original, pre-amendment APA," and then blocking Novell from cross examining them with the language of the pre-amendment APA.

First, there is a difference between questioning about the intent of the original transaction, while making clear that the language was replaced (which was what SCO's denied motion in limine sought to require), and presenting replaced and removed contractual language as a basis upon which the jury could conclude that the copyrights had not been transferred. Worse yet, Novell cross examined SCO's witnesses who testified that the intent of the transaction was to transfer copyrights by presenting the alleged inconsistency between their intent and the "exclusion of copyrights" language, suggesting that their testimony could not be reconciled with the APA transaction. (See, e.g., A2192-93:129-31.) SCO was then precluded on re-direct from eliciting that the supposedly inconsistent language

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of the APA had been excised and replaced through Amendment No. 2. This, too, is reversible error as it went directly to the central issue at trial.

C.   The District Court Erred By Admitting Hearsay That SCO Was "The Most Hated Company in Tech."

Novell does not dispute that the <u>Business Week</u> article was double hearsay if admitted for its truth, or that the article is obviously prejudicial. Instead, Novell argues (at 61-61) that the article was not admitted for the truth and was in any event harmless because it related to issues the jury did not reach.

The point of the expert's testimony, and the obvious purpose for showing the <u>Business Week</u> "most hated company" title to the jury, was not to establish that <u>Business Week</u> had published such an article, but to support the proposition that SCO was indeed the "most hated company" in technology and thus, could not have been damaged by Novell's slander of title. If that proposition were not true, the article would not support Novell's argument that licensees did not buy SCOsource licenses for reasons other than Novell's slander. Novell thus used the article precisely to show the truth of the matter – that SCO was "the most hated company in tech." <u>See, e.g.</u>, <u>Bateman v. United Parcel Service, Inc.</u>, 31 Fed. Appx. 593, 597-98 (10th Cir. 2002). The fact that Novell used the article for issues the jury did not reach in their verdict is irrelevant because the proposition that SCO was "the most hated company in tech" would undermine SCO's credibility before the jury on all issues.

CONCLUSION

With respect to copyright ownership, the denial of SCO's Rule 50(b) motion should be reversed and the case remanded for trial of the issues presented by SCO's slander of title claim that the jury did not reach. In the alternative, SCO's motion for new trial (based on sufficiency of the evidence or evidentiary issues), or request for specific performance, should have been granted. The district court's judgments concerning Novell's Section 4.16 waiver rights should be reversed.

DATED this 15th day of November, 2010.

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<u>CERTIFICATE OF SERVICE</u>

I, Edward Normand, hereby certify that on this 15th day of November, 2010,

a true and correct copy of the foregoing **REPLY BRIEF FOR APPELLANT,**

THE SCO GROUP, INC. was filed with the court and served via electronic mail

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CERTIFICATE OF COMPLIANCE WITH
<u>FEDERAL RULE OF APPELLATE PROCEDURE 32(a)</u>

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1.   This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,998 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2.   This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in 14-point Times New Roman.

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CERTIFICATE OF DIGITAL SUBMISSION

The undersigned certifies with respect to this filing that no privacy

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Dated: November 15, 2010

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