

No. 08-4217

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

**THE SCO GROUP, INC.,
by and through Edward N. Cahn as Chapter 11 Trustee,
Plaintiff-Appellant,**

v.

**NOVELL, INC.,
Defendant-Appellee.**

On Appeal from the United States District Court for the District of Utah
Hon. Dale A. Kimball, Presiding
No. 2:04-CV-00139-DAK

**RESPONSE OF APPELLANT, THE SCO GROUP, INC.,
TO PETITION FOR REHEARING AND REHEARING
EN BANC OF APPELLEE, NOVELL, INC.**

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APPELLANT'S AMENDED CORPORATE DISCLOSURE STATEMENT

On August 25, 2009, the United States Bankruptcy Court for the District of Delaware appointed Edward N. Cahn, of the law firm of Blank Rome LLP, as Chapter 11 Trustee for Debtor The SCO Group, Inc. (“SCO”). Pursuant to Federal Rule of Bankruptcy Procedure 2012(a), upon his appointment, the Trustee was automatically substituted for the debtor-in-possession as the party-in-interest in this matter. SCO is not owned by a parent corporation. No publicly held corporation owns 10% or more of SCO’s stock.

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INTRODUCTION

Novell's arguments regarding the Panel's decision of August 24, 2009, do not remotely satisfy the standards for rehearing or rehearing en banc. Novell concedes that the Panel's decision does not conflict with any decision of this Court or the Supreme Court, and the decision does not involve a question of exceptional importance, where it does not change existing copyright law and does not conflict with any decision of any other Court of Appeals.

What the Panel decision does is modest: it holds that in the sale of the UNIX business from Novell to SCO's predecessor-in-interest, the amended Asset Purchase Agreement ("APA") did not as a matter of law exclude the transfer of UNIX copyrights; a trial was required on those issues; and the entry of summary judgment was improper. In the course of that decision, the Panel correctly held the amended APA satisfied the requirements of Section 204(a) of the Copyright Act because the amended APA is a written instrument transferring copyrights.

The amended APA identified the assets sold as "all rights and ownership of UNIX, UnixWare and Auxiliary Products," including but not limited to programs listed in detail in Schedule 1.1(a) of the Agreement. While the original APA excluded "all copyrights and trademarks" from the sale, Amendment No. 2 removed that exclusion so that the copyrights required for SCO "to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies" were

not excluded. This Amendment thus brought the APA into conformity with the intent of the parties – as reflected in testimony from both Novell and Santa Cruz executives – that the copyrights were intended to transfer. The Panel’s decision that a new Bill of Sale was not required to accompany this Amendment so as to comply with Section 204(a) is perfectly sensible, and does not conflict with any authority.

The courts applying Section 204(a) have repeatedly considered extrinsic evidence to determine the parties’ intent – which the leading authorities on copyright law agree is the paramount goal in interpreting the transfer document. Novell cannot cite a single case holding either that a court should disregard extrinsic evidence of the parties’ intent in determining whether a writing satisfies Section 204(a) or that an agreement specifically identifying copyrights (like the amended APA) cannot satisfy Section 204(a). Instead, Novell proposes a standard under which a reasonable dispute between parties regarding their intent to transfer particular copyrights could not be resolved like any other contract dispute. As the Panel concluded, neither the language nor the legislative history of Section 204(a) supports “such an onerous restraint on the alienability of copyrights.”

BACKGROUND

This litigation arose from the well-publicized statements Novell made in 2003 claiming ownership of the copyrights to the UNIX operating system that it

had sold to SCO's predecessor-in-interest under the APA more than seven years earlier. In March 2003, SCO brought a lawsuit in the district court alleging that IBM, a UNIX licensee, had breached SCO's contract and intellectual property rights by contributing UNIX-derived source code to Linux in a strategic effort to transform Linux from an upstart program into a UNIX competitor. By this time, Novell had itself made a strategic shift to Linux and would shortly, with a \$50 million investment by IBM, purchase global Linux distributor SuSE Linux. On May 28, 2003, Novell publicly claimed that it had the right under the APA to waive SCO's claims against IBM, and that Novell – and not SCO – owned the UNIX copyrights because the APA had failed to transfer them. Yet a few days later, immediately after SCO had located and sent Novell a copy of Amendment No. 2, Novell publicly admitted that “the amendment appears to support SCO's claims that ownership of certain copyrights for UNIX did transfer to SCO in 1996.” Novell later retracted its retraction and continued to assert ownership of the UNIX copyrights.

Before the district court and on appeal, SCO presented overwhelming evidence that the parties intended to transfer ownership of the UNIX copyrights under the APA. Such evidence included the unequivocal testimony of ten witnesses from both sides of the transaction who negotiated the deal, including Novell's own President, chief negotiator, and officers overseeing the transaction.

The evidence also included Novell's transfer of UNIX copyright registrations to SCO and Novell's contemporaneous admissions that its engineers had modified the copyright notices on existing UNIX code to reflect the change in ownership from Novell to SCO. Shortly after the transaction closed, Novell executives also sent many letters to Novell's key customers explaining that "Novell transferred to The Santa Cruz Operations, Inc., ('SCO') its existing ownership interest in UNIX System-based offerings and related products as listed in Attachment A."

(Emphasis added.) The products listed on Attachment A included "All Releases of UNIX System V and prior Releases of the UNIX system" – language that covers the listing of assets in Schedule 1.1(a) of the APA.

The Panel correctly ruled that the district court had erred (among other ways) in ruling as a matter of law that Novell had retained the copyrights and rights to waive SCO's claims against IBM and others. As to copyright ownership, the Panel rejected Novell's position that the APA and Amendment No. 2 must be read separately, and concluded that the amended APA plainly transferred copyright ownership under contract and copyright law. In its petition, Novell does not challenge any of the Panel's rulings, except its conclusion that the APA satisfies the writing requirements of the Copyright Act, and that a second bill of sale after Amendment No. 2 was not required to effectuate the transfer.

LEGAL STANDARD

The general rule is that an “en banc hearing or rehearing is not favored and ordinarily will not be ordered.” Fed. R. App. P. 35(a); see also Tenth Cir. R. App. P. 35.1(A) (“En banc review is an extraordinary procedure” that is “disfavored”). The exceptions are when such consideration is “necessary to secure or maintain uniformity of the court’s decisions,” or “the proceeding involves a question of exceptional importance.” Id. Novell argues for rehearing en banc under only the second exception, conceding that the Panel’s decision does not conflict with any decision of the Supreme Court or of this Court.¹

ARGUMENT

I. THE PANEL’S DECISION DOES NOT INVOLVE A QUESTION OF EXCEPTIONAL IMPORTANCE, WHERE IT DOES NOT CHANGE EXISTING COPYRIGHT LAW AND IS NOT IN CONFLICT WITH ANY DECISION OF ANY COURT OF APPEALS.

A. The Panel’s Decision Applies Existing Copyright Law to the Unique Structure of the Amended APA.

Section 204(a) of the Copyright Act requires that a “transfer of copyright ownership” include “an instrument of conveyance, or a note or memorandum of the transfer.” Considering that language, as the Panel observes, the cases applying

¹ Although Novell styles its motion as one for rehearing or rehearing en banc, Novell asserts no grounds for rehearing by the Panel, and indeed makes no argument for such rehearing. Novell does not identify any issue as to which the Panel “overlooked or misapprehended” the facts or any controlling law. Fed. R. App. P. 40(a).

Section 204(a) ask whether the writing at issue evidences the parties' intent to engage in a transfer of "copyright ownership" as opposed to other categories of ownership rights. SCO Group, Inc. v. Novell, Inc., No. 08-4217, 2009 WL 2581735, at *9-10 (10th Cir. Aug. 24, 2009).

The amended APA, as the Panel explains in detail, id. at *6-11, meets the foregoing standard. Without revisiting the full breadth of the Panel's reasoning, the Panel's decision makes the following critical points:

- The APA conveys "all rights and ownership" in the list of UNIX software programs identified on the attached Schedule 1.1(a). When a party acquires "all rights and ownership" in a set of works, courts have repeatedly found such language to satisfy Section 204(a), particularly where the asset is computer software.²
- While the original APA excluded "all copyrights" from transfer, Amendment No. 2 expressly clarified the parties' intent by narrowing the exclusion only to those copyrights not required for SCO to

² See ITOFCA, Inc. v. MegaTrans Logistics, Inc., 322 F.3d 928, 931 (7th Cir. 2003) (written intent to transfer "all assets" can indicate intent to transfer copyrights); Chugrue v. Cont'l Airlines, Inc., 977 F. Supp. 280, 284-85 (S.D.N.Y. 1997) (written agreement to transfer "all right, title and interest" in software indicated intent to transfer copyrights); Relational Design & Tech., Inc. v. Brock, No. 91-2452-EEO, 1993 WL 191323 at *6 (D. Kan. May 25, 1993) (transfer of "all rights" in software program included copyright).

exercise its rights with respect to the acquisition of UNIX and UnixWare technologies.

- Because the amended APA specifically excised the “all copyrights” language from the Excluded Assets in Schedule 1.1(b), the amended APA clearly is an instrument of the conveyance of copyrights identified among the Assets in Schedule 1.1(a) and not excluded by Schedule 1.1(b). As the Panel explained, to hold otherwise would mean that the amendment was a nullity. SCO, 2009 WL 2581735, at *14-15.
- Novell’s argument that a second bill of sale must accompany Amendment No. 2 is misplaced for two independent reasons: (1) it is not necessary for the Bill of Sale to have been executed at the same time as Amendment No. 2, and (2) Section 204(a) requires only a “note or memorandum of transfer,” and thus Amendment No. 2 (and the amended APA) satisfy that requirement by “evincing a clear intent to revise or clarify the formal schedule of copyrights transferred by Novell to Santa Cruz.”

The Panel’s decision and reasoning thus break no new ground in the interpretation and application of Section 204(a), but rather turn on the Panel’s

detailed assessment of the particular provisions of the APA and Amendment No. 2 consistent with the statute and relevant precedent.

B. The Panel's Decision Is Consistent with the Well-Established Precedent in This Court.

The Panel's decision and reasoning is entirely consistent with the rules of statutory interpretation that the Supreme Court and this Court have established and follow. Under these rules, the analysis of Section 204(a) must "start with the language of the statute." La Resolana Architects, PA v. Clay Realtors Angel Fire, 416 F.3d 1195, 1200 (10th Cir. 2005). As the Panel observes, Section 204(a) does not impose any heightened burden of clarity or particularity. SCO, 2009 WL 2581735, at *8-9.

No case has interpreted Section 204(a) to mean that the scope of assets properly transferred under a sufficient writing cannot be determined by recourse to extrinsic evidence – that an entire category of otherwise admissible evidence of the parties' intent should be deemed irrelevant and excluded if the writing contains an ambiguity on the scope of copyrights transferred. Nothing in the language of Section 204(a) – or even its legislative history – suggests that Congress intended to revise the rules of contract interpretation in such blunderbuss fashion. Novell thus proposes a new rule that no court has previously followed, that would conflict with the well-established precedent interpreting Section 204(a), and that would subvert longstanding rules of statutory interpretation.

C. The Panel's Decision Is Not in Conflict with Any Decision of Any Court of Appeals.

The Panel's decision not only is entirely consistent with this Court's precedent, but also is not in conflict with any decision of any Court of Appeals. Novell acknowledges that courts that have specifically addressed the issue – in contrast to the cases Novell cites – have considered extrinsic evidence of the parties' intent in applying Section 204(a).³ These cases have not found such consideration to undermine the purposes of the Copyright Act. SCO cited several such opinions, and Novell makes no effort to distinguish or even address those cases in its petition.

Novell fails to cite (and SCO has not found) any decision from any other federal court in conflict with the Panel's decision:

- No decision holds that a writing that specifically references copyrights, much less a writing that specifically identifies them, cannot satisfy Section 204(a).

³ See, e.g., Liu v. Price Waterhouse, 302 F.3d 749, 755 (7th Cir. 2002); Schiller v. Schmidt, Inc., 969 F.2d 410, 413 (7th Cir. 1992); Spectrum Creations, L.P. v. Carolyn Kinder Int'l, LLC, No. SA-05-CV-750-XR, 2008 WL 416264, at *85 (W.D. Tex. Feb. 13, 2008); Rico Records Distributions, Inc. v. Ithier, No. 04 Civ. 9782 (JSR), 2006 WL 846488, at *1 (S.D.N.Y. Mar. 30, 2006); Dick Corp. v. SNC-Lavalin Constructors, Inc., No. 04 C 1043, 2004 WL 2967556, at *5 n.5 (N.D. Ill. Nov. 24, 2004).

- No decision holds that a court cannot consider extrinsic evidence of the parties' intent in determining whether the writing at issue satisfies Section 204(a).
- No decision holds that extrinsic evidence is admissible to determine only whether a party has transferred all its copyrights, but is not admissible to determine whether the parties intended to transfer only a subset of such copyrights.

As the Panel decided: "Where ambiguity persists in the language of a parties' shared agreement concerning a copyright transfer, the transfer is not invalidated; instead, we look to parol evidence to construe the terms of the agreement." SCO, 2009 WL 2581735, at *9.

Instead, the cases Novell cites address particular circumstances involving a combination of elements not at issue here – namely, scenarios in which there is no signed writing at all, or in which the writing at issue says nothing about copyrights and the parties do not attempt to cite any extrinsic evidence of the parties' intent outside of the writing or writings at issue. As the Panel observed:

the majority of cases that Novell draws our attention to, in which alleged copyright transfers are found not to satisfy Section 204, involve transactions where it is not clear whether the parties intended that copyrights would transfer at all – not disputes over which specific copyrights were within the scope of an intended transfer.

Id. In fact, several of the cases Novell cites set forth standards that directly support the Panel's decision.⁴ Even the principal cases on which Novell relies do not, on close inspection, support Novell's position.⁵

⁴ In Radio Television Espanola S.A. v. New World Entm't, Ltd., 183 F.3d 922 (9th Cir. 1999), for example, the court expressly contemplates that where the "facts" surrounding the negotiation of the document at issue are "compelling," the writing at issue need not be clear on its face. Id. at 928. Similarly, in Morgan v. Hawthorne Homes, Inc., Civil Action No. 04-1809, 2009 U.S. Dist. LEXIS 31456 (W.D. Pa. Apr. 14, 2009), the court acknowledges with approval: "When interpreting facially ambiguous documents, some courts have looked to the surrounding circumstances to clarify the intent of the parties." Id. at *47-48.

⁵ In Lyrick Studios, Inc. v. Big Ideas Prods., Inc., 420 F.3d 388 (5th Cir. 2005), the court did not even consider whether there was sufficient reference to "copyrights" in the writings at issue to satisfy Section 204(a), because the plaintiff in that case contended that it had received copyright ownership only through the grant of an exclusive license. Id. at 391. The court thus did not determine whether a signed agreement transferring assets referred to copyrights with "reasonable certainty," but rather concluded only that the parties had never entered into an exclusive license, where they had never entered into any contract in the first place. Id. at 393-96.

Konigsberg Int'l, Inc. v. Rice, 16 F.3d 355 (9th Cir. 1994), is also easily distinguished. There, the court addressed whether a letter sent over three years after the parties entered into an oral agreement satisfied Section 204(a). The court held that it did not suffice because (a) "it was not substantially contemporaneous with the oral agreement"; (b) it was not "a product of the parties' negotiations"; (c) it was written "a year and a half after the alleged term [of the agreement] would have expired"; and (d) it was written "6 months into a contentious lawsuit." Id. at 357. In short, the letter "came far too late to provide any reference point for the parties' license disputes." Id.

In Pamfiloff v. Giant Records, Inc., 794 F. Supp. 933 (N.D. Cal. 1992), as in Konigsberg, the court addressed whether certain documents created after the parties entered into the alleged oral agreement satisfied Section 204(a), with respect to certain publishing rights claimed by the plaintiff. The first document at

None of Novell's cases addresses a detailed written agreement that transfers all ownership rights; identifies the copyrights at issue in the written document itself; contains numerous material terms setting forth the types of rights that copyrights comprise; and therefore reflects, on its face, the parties'

issue was a recording agreement that "makes no mention of any transfer of ownership rights," or even publishing rights; the second document "was never signed by any party and contains no date," and also made no reference to publishing rights. *Id.* at 935-36. Neither document made any reference to the "rights to reproduce, perform, distribute, market, promote, or otherwise exploit the compositions" that publishing rights comprise. *Id.* at 936.

Foraste v. Brown Univ., 290 F. Supp. 2d 234 (D.R.I. 2003), concerned whether certain Brown University's "Policies and Procedures Relating to Copyright" satisfied Section 204(a) with respect to certain photographs that plaintiff took while employed by Brown. The court said no, reasoning that the policies and procedures contained "no material terms specific to the contested photographs," and emphasized that the plaintiff "himself acknowledges that he did not even contemplate ownership of the photographs" until well after Brown adopted the policies and procedures, that "there is no evidence of a negotiation or 'meeting of the minds'" between the parties "regarding the contested photographs," and that there "is no indication" that the plaintiff "ever bargained for the copyrights he now seeks." *Id.* at 239-40. In addition, the court in Foraste specifically considered whether there was extrinsic evidence of the adoption of the policies and procedures, the parties' interpretation of them, and the parties' performance thereunder.

In Am. Plastic Equip., Inc. v. Toytrackerz, LLC, Civil Action No. 07-2253-DJW, 2009 U.S. Dist. LEXIS 27787 (D. Kan. Mar. 31, 2009), the court held that plaintiff failed to demonstrate chain of title between itself and Marx Toys, Inc., where there was "no written document memorializing that assignment in the record," but rather only a declaration from an officer of Marx Toys that he had assigned copyrights to plaintiffs in his official capacity. *Id.* at *18. In short, there was no written agreement before the court at all; it decided only that a unilateral declaration of the officer of a company cannot itself satisfy Section 204(a).

negotiations and bargaining over the subject of copyrights. Just as importantly, none of the decisions holds that the court cannot consider extrinsic evidence in assessing whether the writing at issue satisfies Section 204(a), and several of those decisions in fact do consider whether such evidence exists in their analyses. The precedent is not at all inconsistent with the Panel's core reasoning that where a detailed contract clearly contemplates the transfer of a discrete set of copyrights, a jury is entitled to consider the extrinsic evidence of the parties' intent to transfer some or all of the copyrights.

II. THE PANEL'S DECISION DOES NOT UNDERMINE THE POLICY OF THE COPYRIGHT ACT.

Novell argues that the decision conflicts with the policy of Section 204(a). Novell's argument fails for several reasons.

First, the plain language and legislative history of Section 204(a) no more require that the instrument meet some heightened standard of specificity in referring to "copyrights" than they require that the parties use the word "copyrights" in the first place – that is, there is no such requirement at all.

Second, as the Panel's decision points out, ambiguities in instruments of transfer obviously are common: Written memorializations of copyright ownership, like written memorializations of all manner of private agreements, inevitably are subject to more than one interpretation. SCO, 2009 WL 2581735, at *8-9. Yet Novell proposes a standard under which a reasonable dispute between parties

regarding their intent to transfer particular copyrights – or even, as the Panel points out, a dispute that one party in effect manufactures by pointing out any ambiguity in the writing at issue – could not be resolved like any other contract dispute, but instead would result in invalidating the transfer altogether. Id. at *9. Neither the language nor the legislative history of Section 204(a), as the Panel correctly reasoned, supports “such an onerous restraint on the alienability of copyrights.” Id.

Third, it is Novell’s position that would undermine the purposes of the Copyright Act. If a detailed Asset Purchase Agreement, memorializing the sale of a software business, is not a sufficient writing to convey copyrights, there would be greater uncertainty as to how far parties must go to comply with Section 204(a). Where the parties to an agreement indisputably intended to transfer copyrights as part of numerous other ownership rights, and where all of the copyrights at issue are identified in the agreement, the policy and goals of Section 204(a) are fully satisfied. Ordering a trial on these issues of intent hardly creates an issue of “exceptional importance.”

III. THE PANEL’S DECISION PROPERLY REJECTS NOVELL’S RELIANCE ON THE BILL OF SALE.

As the Panel determined, Novell’s argument that the parties needed to execute a second bill of sale in connection with Amendment No. 2 misapprehends both the facts of the transaction and the requirements of Section 204(a) for two reasons. First, by its own terms, Amendment No. 2 amends the schedules of assets

being transferred to Santa Cruz, and there is no requirement that another bill of sale needed to have been executed at the same time as the amendment.

Second, the Panel correctly found that even if there had been no bill of sale, Section 204(a) requires only a “note or memorandum of transfer” – a standard that Amendment No. 2 itself (and the amended APA) easily satisfies by “evinced a clear intent to revise or clarify the formal schedule of copyrights transferred by Novell to Santa Cruz.”⁶ Id. This unremarkable holding does not approach the standards for rehearing or rehearing en banc.

CONCLUSION

SCO respectfully submits, for the foregoing reasons, that the Court deny Novell’s motion for rehearing and rehearing en banc.

⁶ The Panel correctly rejected Novell and the District Court’s position that the reference in Amendment 2 to having been executed as of a given date meant that the Amendment did not have retroactive effect. Clearly, an amendment to the schedules of assets being sold is intended to relate to the transfer of those assets at the closing and under the Bill of Sale. The reference in Amendment 2 to transfer of copyrights owned by Novell “as of the date of the Agreement,” i.e, the APA, confirms that.

Respectfully submitted on this 1st day of October, 2009.

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CERTIFICATE OF SERVICE

I, Edward Normand, hereby certify that on this 1st day of October, 2009, a true and correct copy of the foregoing **RESPONSE OF APPELLANT, THE SCO GROUP, INC., TO PETITION FOR REHEARING AND REHEARING EN BANC OF APPELLEE, NOVELL, INC.** was filed with the court and served via electronic mail to the following recipients:

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CERTIFICATE OF DIGITAL SUBMISSION

The undersigned certifies with respect to this filing that no privacy redactions were necessary. This **RESPONSE OF APPELLANT, THE SCO GROUP, INC., IN OPPOSITION TO PETITION FOR REHEARING AND REHEARING EN BANC OF APPELLEE, NOVELL, INC.** submitted in digital form is an exact copy of the written document filed with the Clerk. The digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program (using Symantec Antivirus which is updated weekly) and, according to the program, is free of viruses.

Dated: October 1, 2009

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