

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DOCKETING STATEMENT

Case Name: The SCO Group, Inc. v. Novell, Inc.

Appeal No. (if available): 08-4217

Court/Agency Appeal From: United States District Court for the District of Utah

Court/Agency Docket No.: 2:04-CV-00139-DAK District Judge: Hon. Dale A. Kimball

Party or Parties filing Notice of Appeal/Petition: The SCO Group, Inc.

I. TIMELINESS OF APPEAL OR PETITION FOR REVIEW

A. APPEAL FROM DISTRICT COURT

1. Date notice of appeal filed: November 25, 2008

a. Was a motion filed for an extension of time to file the notice of appeal? If so, give the filing date of the motion, the date of any order disposing of the motion, and the deadline for filing notice of appeal: No.

b. Is the United States or an officer or an agency of the United States a party to this appeal? No.

2. Authority fixing time limit for filing notice of appeal:

Fed. R. App. 4 (a)(1)(A) X Fed. R. App. 4(a)(6) _____

Fed. R. App. 4 (a)(1)(B) _____ Fed. R. App. 4(b)(1) _____

Fed. R. App. 4 (a)(2) _____ Fed. R. App. 4(b)(3) _____

Fed. R. App. 4 (a)(3) _____ Fed. R. App. 4(b)(4) _____

Fed. R. App. 4 (a)(4) _____ Fed. R. App. 4(c) _____

Fed. R. App. 4 (a)(5) _____

Other: _____

3. Date final judgment or order to be reviewed was filed and **entered** on the district court docket: November 20, 2008.

4. Does the judgment or order to be reviewed dispose of **all** claims by and against **all** parties? *See* Fed. R. Civ. P. 54(b). Yes.

(If the order being appealed is not final, please answer the following questions in this section.)

- a. If not, did district court direct entry of judgment in accordance with Fed. R. Civ. P. 54(b)? When was this done?

- b. If the judgment or order is not a final disposition, is it appealable under 28 U.S.C. § 1292(a)? _____
- c. If none of the above applies, what is the **specific** statutory basis for determining that the judgment or order is appealable? _____

5. Tolling Motions. *See* Fed. R. App. P. 4(a)(4)(A); 4(b)(3)(A).

- a. Give the filing date of any motion under Fed. R. Civ. P. 50(b), 52(b), 59, 60, including any motion for reconsideration, and in a criminal appeal any motion for judgment of acquittal, for arrest of judgment or for new trial, filed in the district court: August 31, 2007 – Plaintiff The SCO Group, Inc. filed a Motion for Reconsideration although we observe that the motion is not a “Tolling Motion.”
- b. Has an order been entered by the district court disposing of that motion, and, if so, when?
Yes. Order dated September 14, 2007 (District Court docket number 469).

6. Bankruptcy Appeals. (To be completed only in appeals from a judgment, order or decree of a district court in a bankruptcy case or from an order of the Bankruptcy Appellate Panel.)

Are there assets of the debtor subject to administration by a district or bankruptcy court? _____

Please state the approximate amount of such assets, if known.

B. REVIEW OF AGENCY ORDER (To be completed only in connection with petitions for review or applications for enforcement filed directly with the Court of Appeals.)

1. Date petition for review was filed: _____
2. Date of the order to be reviewed: _____
3. Specify the statute or other authority granting the court of appeals jurisdiction to review the order: _____

4. Specify the time limit for filing the petition (cite specific statutory section or other authority): _____

C. APPEAL OF TAX COURT DECISION

1. Date notice of appeal was filed: _____
(If notice was filed by mail, attach proof of postmark.)
2. Time limit for filing notice of appeal: _____
3. Date of entry of decision appealed: _____
4. Was a timely motion to vacate or revise a decision made under the Tax Court's Rules of Practice, and if so, when? *See* Fed. R. App. P. 13(a) _____

II. LIST ALL RELATED OR PRIOR RELATED APPEALS IN THIS COURT WITH APPROPRIATE CITATION(S). If none, please so state.

SCO Group v. Novell, Inc., 08-4154 Notice of Appeal filed August 1, 2008 by Movant-Appellant Jonathan Lee Riches. Appeal dismissed on October 6, 2008 pursuant to Tenth Cir. R. 42.1 for failure to prosecute.

III. GIVE A BRIEF DESCRIPTION OF NATURE OF ACTION AND RESULT BELOW.

Plaintiff, The SCO Group, Inc. (“SCO”), brought suit against the Defendant, Novell, Inc. (“Novell”), principally to redress (i) Novell’s public claims that it owns the copyrights to the source code to the UNIX computer operating system, which copyrights SCO contends were transferred to SCO’s predecessor-in-interest in 1995 and thereafter to SCO; (ii) Novell’s claimed right to waive SCO’s rights under any contracts it owns concerning any legacy UNIX System V (or “SVRX”) computer operating system; and (iii) Novell’s decision to waive SCO’s rights under the Software and Sublicensing Agreements to which International Business Machines, Inc. (“IBM”) is party, and which SCO is seeking to enforce against IBM in parallel litigation in the District Court. Novell brought counterclaims principally claiming ownership of 95% of the money that SCO has received under several agreements that SCO has executed since 2003, including agreements with Microsoft, Inc. and Sun Microsystems, Inc., and requesting a declaratory judgment that SCO lacked the authority to enter into those agreements.

In an Order dated August 10, 2007, and Findings of Fact and Conclusions of Law dated July 16, 2008, following a four-day non-jury trial, both embodied in its Final Judgment dated November 20, 2008, the District Court (i) ruled, as a matter of law, that copyrights to the source code in the UNIX operating system were not transferred to SCO’s predecessor-in-interest in 1995; (ii) ruled, as a matter of law, that Novell has the right to waive SCO’s rights under any contracts it owns concerning SVRX; (iii) ruled, as a matter of law, that Novell has the right to waive SCO’s claims to enforce the IBM Software and Sublicensing Agreements; (iv) found that Novell is not entitled to any of the money that SCO has received under the foregoing agreements executed since 2003, except for a portion of the money received under the Sun Agreement; and (v) found that SCO had the authority to execute the SCOsource Agreements and Microsoft Agreement, but was not authorized to enter into the Sun Agreement based on the amendment of provisions concerning confidentiality requirements in a prior agreement with Sun.

ISSUES RAISED ON APPEAL.

1. Whether the District Court erred in concluding, as a matter of law, that the Asset Purchase Agreement (“APA”) between Novell and The Santa Cruz Operation, Inc., SCO’s predecessor-in-interest, did not transfer the UNIX copyrights to Santa Cruz.
2. Whether the District Court erred in concluding, as a matter of law, that if the APA did not transfer the UNIX copyrights, then SCO is not entitled to the transfer of those copyrights now.
3. Whether the District Court erred in concluding, as a matter of law, that Novell has the right to “waive” SCO’s rights under any contract concerning SVRX, including SCO’s source-code rights.
4. Whether the District Court erred in concluding that if Novell had the right under the APA to “waive” SCO’s rights under any contract concerning SVRX, Novell did not have to comply with the implied covenant of good faith and fair dealing in exercising such right.
5. Whether the District Court erred in finding that SCO owes Novell \$2,547,817 plus prejudgment interest in revenues SCO received under the Sun Agreement.
6. Whether the District Court erred in finding that SCO was not authorized to enter into the Sun Agreement based on its amendment of provisions concerning confidentiality in a prior agreement with Sun.
7. Whether the District Court erred in concluding that, as SCO’s principal, Novell has the right both to repudiate the contracts that SCO executed as Novell’s agent and to collect payments made thereunder.

IV. ADDITIONAL INFORMATION IN CRIMINAL APPEALS.

- A. Does this appeal involve review under 18. U.S.C. § 3742(a) or (b) of the sentence imposed? _____
- B. If the answer to question in A is yes, does the defendant also challenge the judgment of conviction? _____
- C. Describe the sentence imposed. _____

- D. Was the sentence imposed after a plea of guilty? _____
- E. If the answer to question D is yes, did the plea agreement include a waiver of appeal and/or collateral challenges? _____
- F. Is defendant on probation or at liberty pending appeal? _____
- G. If the defendant is incarcerated, what is the anticipated release date if the judgment of conviction is fully executed? _____

NOTE: In the event expedited review is requested, the defendant shall consider whether a transcript of any portion of the trial court proceedings is necessary for the appeal. Necessary transcripts must be ordered at the time of appeal by completing and delivering the transcript order form to the clerk of the district court when a notice of appeal is filed. Defendant/appellant must refrain from ordering any unnecessary transcript as this will delay the appeal. If the court orders this appeal expedited, it will set a schedule for preparation of necessary transcripts, for designation and preparation of the record on appeal, and for filing briefs. If issues other than sentencing are raised by this appeal, the court will decide whether bifurcation is desirable.

V. **INDICATE WHETHER ORAL ARGUMENT IS DESIRED IN THIS APPEAL.** Yes. The factual background of the claims in this litigation is lengthy and complex and the appeal presents several legal issues that turn on detailed analysis of the applicable precedent. SCO seeks oral argument (i) to summarize and highlight for the Panel the particular facts and authority on which SCO would ask the Panel to focus; and (ii) to answer any questions from the Panel at that time, which SCO reasonably expects the Panel will have and pursue.

VI. **ATTORNEY FILING DOCKETING STATEMENT:**

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PLEASE IDENTIFY ON WHOSE BEHALF THE DOCKETING STATEMENT IS FILED:

- A. Appellant
- Petitioner
- Cross-Appellant

B. PLEASE IDENTIFY WHETHER THE FILING COUNSEL IS

- Retained Attorney
- Court-Appointed
- Employed by a government entity
(please specify _____)
- Employed by the Office of the Federal Public Defender.

/s/ Edward Normand
Signature

December 15, 2008
Date

Attorney at Law

NOTE: A copy of the court or agency docket sheet, the final judgment or order appealed from, any pertinent findings and conclusions, opinions, or orders, any motion filed under Fed. R. Civ. P. 50(b), 52(b), 59, or 60, including any motion for reconsideration, for judgment of acquittal, for arrest of judgment, or for new trial, and the dispositive order(s), any motion for extension of time to file notice of appeal and the dispositive order, and the notice of appeal or petition for review **must be attached to the Docketing Statement**, except as otherwise provided in Section I of the instructions.

The Docketing Statement must be e-filed with the Clerk care of esubmission@ca10.uscourts.gov. In addition, within two business days counsel must forward one hard copy of the statement, with attachments, to the court. .

This Docketing Statement must be accompanied by proof of service.

The following Certificate of Service may be used.

CERTIFICATE OF SERVICE

I, Edward Normand, hereby certify that on this 15th day of December, 2008, a true and correct copy of the foregoing **Docketing Statement**, was electronically filed with the court and forwarded via electronic mail to the following recipients:

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Counsel for Appellee Novell, Inc.

/s/ Edward Normand _____
Edward Normand

Dated: December 15, 2008

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CERTIFICATE OF DIGITAL SUBMISSION

The undersigned certifies with respect to this filing that no privacy redactions were necessary. This **DOCKETING STATEMENT** 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: December 15, 2008

/s/ Edward Normand

Edward Normand