

Appeal No. 08-4217

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

THE SCO GROUP, INC.,

Plaintiff-Appellant,

vs.

NOVELL, INC.,

Defendant-Appellee.

**On Appeal from the United States District Court
for the District of Utah
The Honorable Dale A. Kimball, Judge Presiding
(Case No. 2:04-CV-00139-DAK)**

**MOTION OF *AMICUS* WAYNE R. GRAY FOR ENTRY OF ORDER
EITHER RELEASING AUDIO RECORDING OF ORAL ARGUMENT
OR RELEASING A CERTIFIED TRANSCRIPT OF ORAL ARGUMENT**

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The Amicus, WAYNE R. GRAY (“the Amicus Mr. Gray” or “Mr. Gray”), by and through his undersigned counsel, hereby moves this Court for entry of an order releasing either (i) audio recording (or a certified transcript derived from the audio recording) of the oral argument conducted before this Court on Wednesday, May 6, 2009, in The SCO Group, Inc. v. Novell, Inc., Appeal No. 08-4217, and in support of his motion the *Amicus* Mr. Gray states:

1. The *Amicus* Mr. Gray currently is appealing a summary judgment entered against him in the case styled and numbered WAYNE R. GRAY v. NOVELL, INC., THE SCO GROUP, INC., AND X/OPEN COMPANY LIMITED, Case No. 8:06-cv-01950-VMC-TGW, United States District Court for the Middle District of Florida, Tampa Division (“the Florida Federal District Court Action”). The appeal is styled and numbered WAYNE R. GRAY, v. NOVELL, INC., THE SCO GROUP, INC., AND X/OPEN COMPANY, LIMITED, Appeal No. 09-11374-C, United States Court of Appeals for the Eleventh Circuit.
2. In his Eleventh Circuit appeal, the *Amicus* (there, the Appellant) Mr. Gray expects that Court to confront many of the same arguments advanced by Novell, Inc., the Appellee in the above-styled and numbered appeal pending before this Court.

3. As undersigned counsel for the Amicus Mr. Gray has pointed out repeatedly in previous motions and memoranda (*e.g.*, “Motion For Leave To File Brief Amicus Curiae For Wayne R. Gray In Support Of Defendant-Appellee Novell, Inc.” and “Reply Memorandum Of Amicus Wayne R. Gray To (i) ‘Appellee Novell, Inc.’s Opposition To Wayne R. Gray’s Motion For Leave To File Amicus Brief’ And (ii) ‘Appellant’s Response To Wayne R. Gray’s Motion For Leave To File Amicus Brief In Support Of Defendant/Appellee Novell, Inc.’”), counsel for the Appellee Novell have taken quite different, and oftentimes quite contrary, positions on issues common to both cases, in Utah and in Florida.
4. Although undersigned counsel for the Amicus Mr. Gray has reviewed all briefs and memoranda filed by the Appellee Novell in the above-referenced appeal to this Court, a review of the several “blogs” reporting on the oral argument in this case suggests that Novell went beyond its original positions (as stated in its brief and memoranda to this Court) and perhaps made statements to this Court quite contrary in substance to the positions that it (and its co-defendant X/Open Company Limited) asserted in the now-appealed Florida Federal District Court Action.

5. Undersigned counsel for the Amicus Mr. Gray recognizes that this Court has adopted a policy of ordinarily not making available the audio recordings of oral arguments to the public. The present request is in accord with the general purpose of that policy; here, though, access to the audio recording of the oral argument conducted before this Court on Wednesday, May 6, 2009 (or a certified transcript), is essential to the fair and balanced administration of justice by the two appellate courts: Tenth and Eleventh Circuits. Here, we have (i) the same parties (SCO and Novell), (ii) the same “Asset Purchase Agreement,” (iii) the same amendments to that 1995 “APA,” (iv) the same “Bill Of Sale,” (v) the same business, (vi) the same U.S. “UNIX” Trademarks, and (vii) the same post-1995 transactions.
6. This Court is the only federal appellate court in the United States that does not make available to the parties or to the public, either the audio recordings of its oral arguments or certified transcripts of those arguments. Indeed, the Eleventh Circuit expressly permits oral argument counsel to “arrange and pay for a qualified court reporter to be present to record and transcribe the oral argument for counsel’s personal use.”

7. Without access to the substance of the audio recording of the May 6, 2009, oral argument of this appeal (either by audio recording or by a certified transcript derived from that recording), undersigned counsel for the Amicus Mr. Gray will not be able to analyze, in context, the statements and representations made to this Court by counsel for the Appellee Novell in that oral argument.

Accordingly, the Amicus, WAYNE R. GRAY, respectfully requests that this Court either:

- A. Release copies of the audio recording of the May 6, 2009, oral argument in this Tenth Circuit appeal to counsel for the parties in the Eleventh Circuit appeal -- Mr. Gray, X/Open, Novell, and SCO -- subject to such reasonable restrictions and limitations on use, distribution, or publication as this Court may impose; or
- B. Release copies of the audio recording of the May 6, 2009, oral argument in this Tenth Circuit appeal to the Eleventh Circuit, with directions that the Eleventh Circuit make copies available to the parties in the Eleventh Circuit appeal -- Mr. Gray, X/Open, Novell, and SCO -- subject to such reasonable restrictions and limitations on

use, distribution, or publication as that Court may impose.

Dated this 18th day of May, 2009.

Respectfully submitted,

s/ Thomas T. Steele

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CERTIFICATE OF SERVICE

I, Thomas T. Steele, certify that on this 18th day of May, 2009, the foregoing MOTION OF *AMICUS* WAYNE R. GRAY FOR ENTRY OF ORDER EITHER RELEASING AUDIO RECORDING OF ORAL ARGUMENT OR RELEASING A CERTIFIED TRANSCRIPT OF ORAL ARGUMENT was filed electronically with the Clerk of the United States Court of Appeals for the Tenth Circuit and by Federal Express, and a true and correct copy of the foregoing MOTION OF *AMICUS* WAYNE R. GRAY FOR ENTRY OF ORDER EITHER RELEASING AUDIO RECORDING OF ORAL ARGUMENT OR RELEASING A CERTIFIED TRANSCRIPT OF ORAL ARGUMENT was served via electronic mail on May 18, 2009, to the following recipients:

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