IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

THE SCO GROUP, INC., a Delaware corporation,

Plaintiff,

vs. Case No. 2:04-CV-139TS

NOVELL, INC., a Delaware corporation,

Defendant.

AND RELATED COUNTERCLAIMS.

BEFORE THE HONORABLE TED STEWART

March 25, 2010

Jury Instruction Conference

REPORTED BY: Patti Walker, CSR, RPR, CP

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A P P E A R A N C E S

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SALT LAKE CITY, UTAH; THURSDAY, MARCH 25, 2010; 3:00 P.M.

PROCEEDINGS

THE COURT: Nice to finally see the brains behind this outfit -- or outfits make an appearance.

I would note that we have with Mr. Normand and Mr. Jason Cyrulnik; is that correct?

MR. NORMAND: It is, Your Honor.

THE COURT: With Mr. Jacobs, we have Patricia Svilik, Daniel Muino and Rex Sears. Did I come close to pronouncing your names, right?

MR. MUINO: Muino, Your Honor. Very close.

THE COURT: In this case, it's Ms. Malley's writing. I'm hoping, however, that Mr. Normand and Mr. Jacobs will be the primary spokespersons for the instruction conference just to keep it under control, all right. You can stop and consult with the other attorneys any time you want, but I do need to rely on just one from each side.

Counsel, let me ask you, have you found anything in regards to the Rule 50 motion issue on special damages, either of you?

Mr. Normand.

MR. NORMAND: Your Honor, I would say that although we don't have any case law, we did go back and look at the Novell interrogatory response on the issue of damages. We didn't see any identification of any amounts

paid for copyright registration. In our view, that would be an additional basis for precluding them from pointing to that in support of special damages.

MR. JACOBS: Your Honor, I believe it's pled in our counterclaim, we had expended money on copyright registration.

THE COURT: Mr. Jacobs, again, the proposed instruction in this case -- and we have spent the better part of the last hour plus looking for any kind of case law to help us -- would indicate the types of damages contemplated by a scienter title case are narrow and focus almost exclusively on the types of things that are described in the jury instruction. And absent anybody finding anything to the contrary, the Court feels that it is going to have to grant the Rule 50 motion because of the absence of the types of damages that are required.

I would note on the question of constitutional malice, our analysis of the evidence would be that the Court could not grant it on that basis because we believe there is evidence that indicated that Mr. McBride was aware of the fact that his company may not own the copyrights, he persisted in making public statements, and a jury -- a reasonable jury could conclude that there was constitutional malice.

But in the absence of any finding of damages, the

Court is going to grant the motion and we'll just have to do the work overnight that we must in order to exclude the counterclaim, any reference to the counterclaim during the course of -- and what will result is tomorrow morning I will give you another packet. I'll have to ask if you could use your fellow attorneys here to go through that to make certain we've done it properly.

Counsel, let me begin next with the issue of the Court's decision to exclude Instruction No. 37, the privilege instruction. Do either of you wish to protest that?

MR. JACOBS: Yes, Your Honor.

THE COURT: Go ahead, Mr. Jacobs.

MR. JACOBS: It's actually -- I think it's the order -- the order even here is the first question whether the Court should instruct the jury that the privilege applies. Obviously, to the extent the Court did that, the instruction would go away. We read the cases as directing the Court to decide if the privilege is applied and then, arguably, it is a jury issue to decide whether the abuses have trumped the privilege. I think the case law is pretty clear that that is the right answer.

The interesting question that we've been wrestling with -- frankly, wrestling with from the beginning of the case, Your Honor, is given the elements of slander of title,

if the privilege applies, what malice or inappropriate intent causes the privilege to go away. Now we have constitutional malice on top of that. So there are some interesting cross currents here in terms of verbal formulations that are used.

If the Court has decided that it is not going to direct the jury that the privileges should apply -- the privileges apply, leaving to the jury the issue of abuse, then certainly the jury should be instructed to decide if the privileges should apply. I wasn't sure what you were thinking on that.

THE COURT: Let me explain to you as best I can.

And, counsel, you don't need to stand up for this. In fact, Mr. Jacobs, if you would loosen your tie like Mr. Normand has, maybe we'll set the right atmosphere.

MR. JACOBS: I'm going to scoot down so I can see you, Your Honor.

THE COURT: It would appear to the Court that if constitutional malice is found, the jury would have to conclude that there had been -- let me use the exact language -- a defamatory statement knowing it to be false and had acted in reckless disregard as to its falsity. And that same finding is the same finding for the privilege. So if those are found to be, then the privilege cannot apply. If they are not found, then it becomes irrelevant. That is

the Court's thinking.

MR. JACOBS: So I think we actually have to parse the privileges on this one, Your Honor. The analysis is slightly different. On the recipient's interest privilege, the verbal formulation for abuse of the privilege is different from the constitutional malice standard. On rival claimant's privilege, the words are similar. I think there is probably some burden shifting that goes on in terms of what the jury would have to rely on in terms of the plaintiff piercing the privilege.

But moreover, I think what is important is that rival claimants -- although it's called a privilege, it's actually the essence of what is going on in this case. So one reason we're so committed to having an instruction on rival claimants, notwithstanding the constitutional malice standard, is that what we have here are rival claimants to the UNIX copyrights. So the privilege sounds very directly on the facts of this case. Therefore, while the words that are used to describe the way the privilege is abused -- I'm checking now to make sure I've got this right -- are quite similar between constitutional malice and rival claimants. The fact that the jury would be instructed to decide if the privilege applies and then decide whether the abuse -- whether that privilege has been abused, we think is a very important think to do in a slander of title case like this.

THE COURT: I think I understand.

MR. NORMAND: Your Honor, our response to that, to the extent I understood Mr. Jacobs' point, would be he acknowledges that the jury would not be resolving any independent issue or question, which would be the simpler thing to have them do, and instead concedes that he thinks the language of describing the privelege would be helpful to Novell potentially. I think, by definition, that is an inappropriate instruction. It doesn't give the jury anything independent to assess and it's designed, as I heard Mr. Jacobs' description, to provide some collateral benefit to Novell.

THE COURT: Last word on this.

MR. JACOBS: So I think it's important to note this actually goes all the way back to the beginning of the disagreements over privileges. In our view, slander of title requires the making of an unprivileged statement. And I think that's the way the case law basically lays it out. So in order to show there's been slander, the plaintiff would have to carry its burden of showing all the elements plus unprivileged. It would therefore have to show that the rival claimant's privilege did not apply, and that determination would be made by the Court as a matter of law. And then the plaintiff would have to show that it's abused. That is a significant hurdle, especially if the Court

decides it as a matter of law.

If Your Honor decides not to decide it as a matter of law, it is, nonetheless, the plaintiff's burden to show that the rival claimants privilege does not apply. And the way the jury would go through that exercise does not render -- even though there is a constitutional malice standard in place, the way the jury would go through that exercise does not mean that it is meaningless. It is deciding whether the elements of slander of title have been met, subject to a later downstream determination of whether constitutional malice has been satisfied. We don't think that's a trivial thing for the plaintiff to overcome.

MR. NORMAND: Your Honor, should I speak or not speak?

THE COURT: Go ahead.

MR. NORMAND: We thought we showed, and showed convincingly, that it was the defendant's burden to prove where the privilege applies across jurisdictions, and that the Utah Supreme Court has used language -- in particular, burden shifting language that reflects that fact.

THE COURT: Okay, counsel, I understand your positions. I am going to have to just decide this one, and you will either see it or not tomorrow morning. Okay.

MR. NORMAND: Like Christmas.

THE COURT: All right. Mr. Jacobs, you look --

MR. JACOBS: I'm just -- the mechanics of this, because rival claimants is a point that one might want to include in closing, if there is any way we could just be alerted, even if we don't get the final instructions, what your decision is on rival claimants.

THE COURT: We'll try to communicate that to you as soon as I have had a chance to go back and consult.

MR. JACOBS: Sure.

THE COURT: Which is the first instruction you have an issue with, Mr. Jacobs, in the amended packet that you received today?

MR. JACOBS: Actually, Your Honor, I would like to read you on the record at this charging conference what we did this morning on preserving objections, if that's all right. We just checked the Tenth Circuit standard on this. It's obviously something we don't want to miss out of a failure of caution. So out of an abundance of caution, objections are preserved even if not made at the final charging conference if to do so would be completely futile and unavailing. And so I would propose that we all agree on the record that prior -- that renewing an objection previously made at this charging conference would be completely unavailing and futile.

MR. NORMAND: I'm happy to agree with that, Your Honor. It goes to a question I had as well because I've

seen this happen in a few different ways. But when Mr. Jacobs complains, I don't know if you want us to reiterate whatever support we have previously given. But I heard him to just say that maybe he won't be making old arguments, only new ones.

THE COURT: The Court's intention was that anything that was submitted to the Court in writing would be deemed part of the record, part of the opportunity you have to object to the charge to the jury. And I would say that as a blanket rule that would apply. If, however, there is something about the instruction packet that you received today that you believe is so important and you think the Court just doesn't understand, I will not preclude you from raising it again. To the extent you don't, it would be because of the finding it would be futile and without purpose to do so.

Will that cover you both?

MR. NORMAND: I think it does.

MR. JACOBS: Could you be more definitive than that?

MR. NORMAND: I didn't mean to be cryptic. We have, I would guess, many fewer issues with the proposed instructions than Novell. One or two of the issues I bring out might be mildly redundant of things we've said before.

THE COURT: I don't mind mild redundance. I just

don't want you to restate everything that you've been saying to each other and also to the Court over the last month or so.

MR. JACOBS: That's agreeable, Your Honor.

THE COURT: The question is which would be the first one you have?

MR. JACOBS: Instruction No. 30, Your Honor.

THE COURT: Do you have anything prior to that, Mr. Normand?

MR. NORMAND: I do, Your Honor, on Instruction 25-A.

THE COURT: Let's begin with 25-A then.

MR. NORMAND: We would object to the use of the last two sentences in the instruction. In particular, our concern is the phrasing of the last sentence which would be necessary only if the second to last sentence came in. So as an alternative to getting rid of the last two sentences, we would propose to amend the last sentence.

THE COURT: To read?

MR. NORMAND: However, the existence of these prior rulings may be considered by you in your determination of any special damages and punitive damages.

THE COURT: Could you read that again, please?

MR. NORMAND: Yes, Your Honor.

The existence of these prior rulings may be

considered by you in your determination of any special damages and punitive damages.

THE COURT: Mr. Jacobs, your response?

MR. JACOBS: I think if any is a little clearer in making it clearer to the jury that the Court is not in some way suggesting that special and punitive damages might be available. So the Court's language on if any is better. I'm not sure what Mr. Normand is driving at with the existence as opposed to these prior rulings. I am not sure I see the benefit over the way the Court drafted it.

MR. NORMAND: This goes to our issue -- our primary argument, which is getting rid of the last two sentences entirely because the second to last sentence, to some extent, stands in conflict with the last sentence, unless the last sentence is merely speaking to the existence of the rulings.

I know we're parsing this pretty thin, but when we read that last sentence, we were left a little confused as to what the jury is supposed to make of those prior rulings and what it is that the Court is telling them to do with them.

THE COURT: The Court will accept your language change except will continue to include if any.

MR. NORMAND: That wasn't the focus of our change. I still thought it was quicker.

THE COURT: The last sentence will then read, the existence of these prior rulings may be considered by you in your determination of special damages and punitive damages, if any.

Do you have anything between 25 and 30?

MR. JACOBS: Actually, Your Honor, we proposed language at 25-A to address the bankruptcy and bench trial.

THE COURT: Do you by chance have it in writing?

MR. MUINO: Your Honor, we don't have it in writing other than in an e-mail I sent to Mr. Normand, but I can read it aloud.

MR. NORMAND: Your Honor, we have proposed language as well.

THE COURT: Alternate language?

MR. NORMAND: It is mildly alternate.

THE COURT: Why don't we start with that, if that's all right, Mr. Muino.

MR. NORMAND: May I approach?

If Your Honor would like, I could explain our rationale for this language.

MR. JACOBS: Actually, Your Honor, this is fine with us.

THE COURT: All right.

MR. JACOBS: It doesn't address the prior trial, and our proposed language addressed both, the bench trial.

THE COURT: How could this, then, be amended to reflect the bench trial?

MR. NORMAND: Well, I thought we had a prior instruction already on that trial.

THE COURT: Not in writing. I mean, you are referring to the instruction I gave the jury?

MR. NORMAND: Yes.

THE COURT: Do you want to propose something on that?

MR. MUINO: If I may? Should I just read it?

THE COURT: Go ahead.

MR. MUINO: What we had proposed, Your Honor, was you have also heard reference to a trial involving SCO and Novell in 2008. That trial concerned other issues that are not before you.

MR. NORMAND: That's fine, Your Honor.

THE COURT: All right. We'll add that as a single, separate paragraph to follow on 25-A, all right, counsel?

MR. NORMAND: The bankruptcy and the trial?

THE COURT: The bankruptcy and the trial. They will be three sentences -- four sentences in that new paragraph to include your language as well as -- when I say yours, the written language I just got as well as the additional sentence that was just read to the Court.

It would be helpful, Mr. Muino, if you could write that out in very legible handwriting.

MR. MUINO: I will try my best.

THE COURT: All right. Now number 30.

MR. NORMAND: Sorry, Your Honor. We had one on 27-A.

THE COURT: I thought you said you didn't have very many. What's wrong with you, Mr. Normand?

MR. NORMAND: We're hitting ours early.

THE COURT: 27-A.

MR. NORMAND: The last two sentences of the first paragraph, as Novell had indicated, they did send us this proposed language some days ago and we failed to get back to them, but we're not entirely comfortable with those last two sentences of the first paragraph and we would propose alternative language. I can show Novell a copy of that and read it to Your Honor.

Why don't I give you that, Your Honor.

THE COURT: Do you need another copy, Mr. Normand? We can make another copy.

MR. NORMAND: I can hand this to Mr. Jacobs if he can't read my writing. I've got another typed version.

Our concern was the following, Your Honor. There is at least one statement -- actually two, I think, in evidence that were made by representatives of Novell after

the lawsuit was filed. And this phrasing is litigation related submissions and statements. And I think there is ambiguity in that phrasing as to whether we're only talking about statements made in pleadings and filings, which is what we would want the statement to address, as opposed to statements made outside the litigation while the litigation is pending. I think those statements were made on January 13th and the first week of March in 2004. They weren't made in filings or pleadings. They were made while litigation was pending. We wouldn't want to suggest to the jury that those are non-actionable statements.

THE COURT: Mr. Jacobs.

MR. JACOBS: I wouldn't object to changing the language of the Court's instructions to filings or pleadings, or some other -- court filings, but I think that the change the plaintiff is proposing here is a little more dramatic than necessary to cure the problem identified.

THE COURT: I believe that --

MR. NORMAND: Your Honor, I'm sorry. We could try a compromised version of this.

THE COURT: Go ahead, propose something.

MR. NORMAND: If you have the language in front of you, Your Honor, how about the allegedly slanderous statements do not include --

THE COURT: Are you working off of -- are you

working off of Mr. Jacobs' language?

MR. NORMAND: I am. I'm trying to work off of 27-A, your language, what Mr. Jacobs is endorsing. The allegedly slanderous statements do not include statements made in filings or pleadings by plaintiff and defendant in connection with this action -- this litigation, which began in January of 2004. Neither party may be held liable for making such pleadings or filings.

MR. JACOBS: I would just tweak that a little bit, Your Honor, to say, for parallelism, neither party may be held liable for making such statements in pleadings and filings.

MR. NORMAND: That's fine.

THE COURT: All right. Do you have that, Tom?

THE CLERK: Yes.

THE COURT: And you then would drop your request for the last sentence in your language?

MR. NORMAND: That's right.

THE COURT: Okay.

Now can we get to number 30?

MR. NORMAND: Yes.

THE COURT: Mr. Jacobs.

MR. JACOBS: Yes, Your Honor. In most cases, I believe, the form of the instruction now is to refer to the asset purchase agreement as amended. And that was earlier

introduced into this drafting process to make sure that all of the asset purchase agreement, its amendments, were considered together. And now in this instruction, I don't know whether it's an artifact or intentional, it refers only to Amendment No. 2. I wouldn't be adverse to the amendments, including Amendment No. 2, because obviously Amendment No. 2 is a focus. But it seems like if we're going to go to refer to Amendment No. 2, we should not create a consternation in the jury that all of a sudden on this topic Amendment No. 1 is irrelevant.

THE COURT: You would propose in the last paragraph that it read, herein the amendments, including Amendment No. 2, must be considered together?

MR. JACOBS: Yes.

THE COURT: Any objection to that, Mr. Normand?

MR. NORMAND: No, Your Honor.

THE COURT: We'll make that change.

MR. JACOBS: That would go into the next sentence as well.

THE COURT: All right. We'll make the same change in both those sentences then.

MR. NORMAND: So the next sentence would read the language of the amendments, including Amendment No. 2?

THE COURT: All right?

MR. NORMAND: Yes, Your Honor.

THE COURT: The next one you have, Mr. Jacobs.

MR. JACOBS: We jump to 33-A, Your Honor.

THE COURT: Do you have anything?

MR. NORMAND: I had one in 31-A that reflects the concern Mr. Singer raised about an hour and a half ago, that was the issue of what was being done with the Novell board minutes and the concern that Mr. Singer expressed. So we have some proposed language.

THE COURT: Do you have it in writing?

MR. NORMAND: We do.

THE COURT: If you could hand it up, please.

MR. NORMAND: What we've tried to do, Your Honor, is rather than craft it as one specifically directed to this issue of the board of directors minutes and the concern that Mr. Singer raised, we have tried to phrase it to capture what is a fairly well established doctrine of contract interpretation.

THE COURT: Where would you insert it in the instruction?

MR. NORMAND: We would propose to insert it as the second sentence of 31-A, in the middle of that first paragraph.

THE COURT: What do you think, Mr. Jacobs?

MR. JACOBS: Well, I recall a couple of interchanges on this topic. I recall objecting at one point

that Santa Cruz's private filings were irrelevant because it was uncommunicated intent and Mr. Normand responding that, no, that's just not true.

MR. NORMAND: Well, to be clear, this is not an instruction that would in any way trump course of performance. At least as I understood that conversation, the things that Mr. Jacobs and I were talking about I would say fall into course of performance.

MR. JACOBS: I think, more importantly, I was quite surprised by Mr. Singer's complaint. The basic SCO theory of the case on the original asset purchase agreement has been -- we heard it again in rebuttal today -- that somehow the legal negotiators of the asset purchase agreement were acting outside the scope of their authority and weren't operating under the direction of the CEO and that somehow they were -- maybe we'll hear this in closing tomorrow -- off the reservation. I was simply emphasizing with Mr. Braham that he and the general counsel are accountable for the board of directors and the board of directors made the decision in that insofar as Novell's intent was concerned, that was the final authority.

So I don't think we did anything except really respond and rebut to a somewhat bizarre theory, as a legal matter, that SCO was advancing. And to say that what either party has done itself in its manner of adopting or approving

the contract would take away all of our ability to say that, for example, the board of directors approved this. So how can you say that it wasn't Novell's intent to exclude the copyrights? I think it's a kind of a pinpoint instruction that is quite inappropriate on the record here.

THE COURT: Do you believe it inaccurately describes the law?

MR. JACOBS: Yes.

THE COURT: All right. Counsel, the Court will have to look at it and will let you know just as soon as it can whether it's going to include it or not.

MR. NORMAND: I would just say as a final thought, Your Honor, I think what I understand Mr. Singer's concern to have been is really directed to the issue of the minutes. We had talked about perhaps proposing something specific to the approval of the minutes, and we tried to frame it in a more general, perhaps less offensive way. I think it's an accurate description of the law.

But, you know, to the extent that our concerns could be addressed with a quick instruction on the relevance and irrelevance with respect to what contracts are at issue and what evidence is relevant, on the board of directors minutes in particular, that might do it.

MR. JACOBS: But this is quite bizarre, Your Honor. We have heard all manner of evidence from executives

of Novell about what their intent was and how, although they never said it to anybody, they had in their heads that the copyrights would transfer. Then we have the board of directors minutes that say the copyrights don't transfer. It is one of the most probative documents in the case with reference to SCO's theory of the case. So any instruction that would suggest to the jury that that is not an appropriate document to look at would be quite prejudicial.

As just another point, I think the Court has done a pretty good job of not dictating to the jury what it should do, but rather saying you should consider, you should do this as opposed to must.

MR. NORMAND: I would agree with Mr. Jacobs that it is relevant, and I meant to capture that in what I said. I think it would be equivalent to the instruction the Court gave early on that there had been an amendment to the original language of the APA on the grounds that there may have been a suggestion otherwise in the first couple days of trial that the integration clause of the APA somehow controlled. The equivalent instruction here would be it may have been suggested, perhaps inadvertently, that when the board of directors approved these minutes that somehow constituted a contract. I think that's what Mr. Singer's concern is. But I would agree with Mr. Jacobs that it's relevant evidence. It's just not the contract.

THE COURT: At a minimum, the Court is going to alter the must to a may, but the Court will look at it.

MR. NORMAND: Thank you, Your Honor.

THE COURT: Any concern with Instruction No. 32?

Thirty-three, then -- 33-A, excuse me.

MR. JACOBS: Yes, Your Honor. There are a couple of things going on in this -- let me just say, foreshadowing that, the whole issue of copyright law and how the jury is instructed on this is an area that is fraught with peril for all of us because the jury has heard a lot of testimony about the way copyright law works. We believe we've accurately reflected the -- through the testimony and the understanding of the witnesses, we believe we've been faithful to the way copyright law works. But it is an issue of law, and in dealing with the Davis issue, for example, the Court made it clear it would be instructing the jury on legal issues. So this is an area of particular, if you will, sensitivity.

On the proposed instruction, the first significant concern that we have is with the Restatement it is the owner of a copyright who may exercise these exclusive rights to copy. That's not quite right. The owner of a copyright has the exclusive right to do and to authorize his right as a matter of law. And that's in the sentence above the numerated exclusive rights one, two and three in this

instruction.

So we would propose to just strike that sentence, that the simplest ground is it's duplicative of the sentence the owner of a copyright has the exclusive right to do and to authorize any of the following.

THE COURT: Mr. Normand.

MR. NORMAND: We're fine with that.

THE COURT: Mr. Jacobs, the Court -- did you hear Mr. Normand say he's fine with that? So the Court will make that change.

MR. JACOBS: Thank you.

In this particular instruction, this is a place to ask the question whether SCO is going to proceed on a particular theory. If they are not going to proceed on the theory, then we don't need the instruction. We haven't heard a lot about it recently, that is the question of the legal significance of the physical location of copyright registrations.

As a matter of law, I think we even heard it from one of the SCO witnesses -- sorry, as a matter of his understanding, we even heard it from the SCO witnesses, physical location is irrelevant to ownership. If SCO is not going to argue in closing and they left those registration certificates with Santa Cruz in New Jersey after the asset purchase agreement, then we don't need an instruction.

If they are going to try to suggest that that is in some way relevant to the question of ownership, then I think we need an instruction that the physical location of copyright registration certificates is not relevant to the question you have before you.

MR. NORMAND: I would say the following on that. We plan to argue that our possession of the registration certificates is relevant extrinsic evidence. We had proposed initially and decided to withdraw our own instruction on the relevance of ownership of the actual registrations. We took that out. We thought we had an understanding with Novell that taking that out would put that issue to bed. Maybe I misunderstood, but they have now proposed an affirmative opposite instruction that says it's irrelevant. We think the law says it is relevant, but we're not going to press for such an instruction.

So I don't know where we stand if we continue to say we won't put in our proposed instruction, I don't know if Novell would be satisfied to withdraw their own if they know that we're arguing that it's relevant extrinsic evidence, the fact that we have them, but we would not ask for a formal instruction on their significance.

THE COURT: Mr. Jacobs.

MR. JACOBS: I'm a little confused. If something is legally irrelevant, then what one does with that

something should be legally irrelevant.

THE COURT: Well, if I'm understanding Mr. Normand, he's not saying that it takes on specific isolated legal significance, but that it is significant to the overall question of what was the intent, how did the parties perform, and that becomes purely an evidentiary issue. It's not an issue of a specific legal principle.

Is that correct, Mr. Normand?

MR. NORMAND: I think that's a fair summary, Your Honor.

THE COURT: So if they are not going to argue that it takes on special legal significance but rather is just simply evidence, I'm not sure that the jury needs to hear anything more on it.

MR. JACOBS: I think the jury could well be confused. We don't know what the actual words will be, but a jury that doesn't know that it is legally insignificant where the copyright registrations exist in the physical sense could well give undue weight to that kind of evidence. It could be like holding a pink slip to a car, for example, as reflecting ownership of title.

THE COURT: Do you agree that it has no legal significance?

MR. NORMAND: Not at all.

THE COURT: You do not agree?

MR. NORMAND: No, and that was the instruction we had proposed and subsequently withdrawn. Our understanding of the Copyright Act is if you possess the copyright registration certificates, it is prima facia evidence that you own the copyrights that you are claiming to enforce.

MR. JACOBS: Your Honor, we have authority directly on point that speaks to this topic.

THE COURT: Do you have language, Mr. Jacobs? That's more important for the Court right now.

MR. JACOBS: Yes, I do. This actually is a quote from the case, possession of certificates of copyright registration is immaterial to ownership of the copyrights.

THE COURT: That comes from what case?

MR. JACOBS: It comes from Kings Row Enterprises, Inc. v. Metro Media, Inc. It's a Southern District of New York case, 397 F.Supp.879 at 881. If I could read the relevant passage, I think it's persuasive. For its contrary view, defendant relies upon the seemingly undisputed, parentheses, but, at any rate, immaterial in the court's view, close parentheses, fact that the copyright certificates were physically present in the warehouse where the sale took place and were listed in the inventory signed by the sheriff showing the things sold. Then it goes on to say copyright ownership is a matter of state law and so therefore that would be relevant.

The Court goes on to say, the dispositive point is that the possessor of a copyright certificate is not ipso facto the copyright owner. The valuable federal right is not transferred by mere physical delivery, or other acquisition, of the certificate. The owner may, of course, assign the copyright. But this is to be done by an instrument in writing signed by the proprietor of the copyright. That's the 204(a) language of the old Copyright Act.

MR. NORMAND: Your Honor, as Mr. Jacobs' recitation reflected, it is not ipso facto evidence that if you hold them, that you're the copyright owner. However, the Tenth Circuit in the La Resolana case, 416 F.3d 1195, explained that, quote, the paper certificate does play an important role in judicial proceedings, unquote, which is that, quote, the certificate is prima facie evidence of the validity of the copyright, a considerable benefit to a plaintiff in an infringement action, unquote, so that the certificate, quote, has evidentiary value, unquote. We cited in our previous memoranda on this issue, Your Honor, a series of cases for the proposition that ownership of the registrations is prima facie not ipso facto evidence of ownership.

That's why we had proposed the instruction originally. We decided that this is not a copyright case as

such and so maybe it was asking to much of the Court, but we certainly dispute Novell's version of the law.

MR. JACOBS: Your Honor, they are leading the Court into error again. They are confusing physical possession with the fact of registration. And they are confusing registration within five years of publication, which does have prima facie evidentiary value for the contents of the certificate, with registration at any time, which is not prima facie evidence of anything.

So the registration certificates here by both sides are not -- as a matter of law are not prima facie evidence of anything regardless of physical location. And, once again, ownership of the registration is not in any way related to ownership of the physical copy. Again, the language of this decision, at any rate, immaterial in the court's view that the copyright certificates were physically present in the warehouse.

MR. NORMAND: Your Honor, just one last thought. We are having a fight over what the copyright law means. I don't think it can be disputed that the jury would be entitled to conclude that if one party or the other has made a decision about what to do with the copyright registration certificates, which exist for a reason, that that is relevant to their intent, and the question of intent is relevant in this trial. I think a jury would be more than

entitled to draw inferences from that fact.

MR. JACOBS: I suppose the jury could draw inferences if there was affirmative evidence of an affirmative decision, yes, Santa Cruz, I'm going to physically deliver the certificates to you. The undisputed evidence is they stayed in the same physical location after the facility in question --

THE COURT: I don't want us to be arguing evidence here. Do you have language that you want to propose to Instruction No. 33-A?

MR. JACOBS: Yes. Possession of certificates of copyright registration is immaterial to ownership of the copyrights.

THE COURT: Would you give that to Mr. Copeland, please, and the Court will consider it in deciding whether or not to include it or not.

Your next concern, Mr. Normand.

MR. NORMAND: We had a concern with two words in 33-A which relates to a broader issue reflected in the second paragraph of 34-A -- I'm sorry, 33-A was what I first met to refer to, Your Honor. Both 33-A and 34-A refer to this prospect of an exclusive licensee. It is referred to in the middle paragraph of 33-A after the word an assignee, it says or an exclusive licensee. Then, in 34-A, the entire second paragraph concerns exclusive licensees.

We would propose to eliminate the references -- any references in the instructions to exclusive licenses or exclusive licensees because there is no evidence that Novell is arguing that we have such an exclusive license. To the contrary, the evidence has shown they are arguing we have an implied license, so it would be unnecessary to instruct the jury on the issue of an exclusive license.

THE COURT: Your response.

MR. JACOBS: So this is a good point that bears some explication. I think the word implied has taken on a life greater than it was intended. Our contention is that there is a written agreement between Novell and Santa Cruz. Our contention is that in that written agreement the specific rights Santa Cruz needed to carry out its business are granted in writing. Our contention is that that is so -- even though the word license does not appear in the asset purchase agreement, our contention is that, as a legal matter, the omission of the word license is immaterial because the rights granted are the rights granted. And that is where the word implied has come up. People may have used the word implied license, but the right way to think about this legally is that there is a license in writing where the word license is implied.

We haven't had to land on the question yet in this case of whether it's an exclusive license. I think the

asset purchase agreement could be read as an exclusive license to evolve UnixWare and the emerged product because Santa Cruz got all of the --

THE COURT: So you dispute his contention that reference to exclusive license and licensee should be removed?

MR. JACOBS: I do.

MR. NORMAND: Your Honor, I hesitate because this is one that involves, to some extent, a discussion of the evidence because it goes to an issue that we've never heard in these many years, this prospect that we have an exclusive license, which if we did have we could have brought suit to enforce the copyrights, which our understanding has already been Novell did not think we had the right to do. So this is a new position that Mr. Jacobs is at least allowing for.

Novell's general counsel, who is an attorney and knows of what he speaks presumably, has repeatedly called it an implied license, both at trial and in his deposition testimony. On the issue of exclusivity, I heard Mr. Braham, at least in the last couple of days, to say Novell, in his view, retained the copyrights so that they could preserve rights vis-a-vis other third parties. I don't think Mr. Braham's testimony is consistent with any argument now that we have an exclusive license. I think Novell's general counsel used the term implied license knowingly.

So I think it's confusing for the jury, given that there has been to date no argument and no evidence, in our view, that we got an exclusive license.

THE COURT: Final word, Mr. Jacobs.

MR. JACOBS: We're confusing issues again. If there is an exclusive license, it is an exclusive license to evolve the UnixWare products that were delivered to Santa Cruz. It is not an exclusive license to UNIX for, say, other purposes. It couldn't be. UNIX has been widely licensed. So we still think that this language is fine. I don't know that it is going to get a lot of emphasis in closing, but as a technical legal matter it is correct and appropriate to leave it in.

MR. NORMAND: Let me speak to --

THE COURT: No, Mr. Normand. The Court is going to leave the language in. I think the Court would agree that if in closing the defendant wants to argue that what Novell had -- excuse me, what SCO received was an exclusive license to that which it then added to the licensed UNIX, that SCO would be allowed to do. So I am not going to make that change.

Mr. Jacobs, did you have additional concerns with 33-A?

MR. JACOBS: No, Your Honor.

THE COURT: Number 34-A?

MR. JACOBS: Yes, Your Honor.

THE COURT: Go ahead.

MR. JACOBS: Maybe the quickest way to do this is to propose the language?

THE COURT: Yes. Tell us where you are looking.

MR. JACOBS: Yes. So the first two paragraphs we have no proposed changes to. When we get to -- actually, I'm sorry, Your Honor, I'm catching something I didn't catch before, and Mr. Normand may agree with me on this. In the previous paragraph, we get to the question of an exclusive license again. I don't think we need that there and it's not really right. It's not correct because a copyright owner -- if a copyright owner sells to another person any of the exclusive rights included in the copyright, that person may not be called an exclusive licensee at all. That person may be called an owner of the right.

THE COURT: So you want the third sentence removed?

MR. JACOBS: The third and the fourth sentence should be removed, and I think we've covered exclusive license adequately in the previous instruction.

THE COURT: Any objection, Mr. Normand?

MR. NORMAND: With a caveat. I would agree to the removal of the third and fourth sentences of that second paragraph.

Is that what you are saying, Michael?

MR. JACOBS: Yes.

MR. NORMAND: I think, especially given the Court's decision on the prior issue, we need to add a sentence, and I would propose to add the following sentence from Section 101 of the Copyright Act, a transfer of copyright ownership is an assignment, mortgage, exclusive license, or any other conveyance of a copyright or of any of the exclusive rights comprised in a copyright. In other words, my understanding of the copyright laws, when you give someone an exclusive license, you have transferred copyright ownership to them. That's, to be honest, Your Honor, one of the reasons I have thought these many years that Novell would not want to say we have an exclusive license.

THE COURT: It would seem to me, Mr. Jacobs, if the Court is going to allow the exclusive license language in 33, it does have to include that definition if it's, in fact, from the copyright law.

MR. JACOBS: I agree, Your Honor, and we'll just double-check the Act. We'll contact chambers if for some reason it's been inaccurately recounted.

THE COURT: Mr. Normand, I'm going to have you give a copy of that language to Mr. Copeland, please.

Do you have anything else in 34-A, either of you?

MR. JACOBS: I do, Your Honor.

THE COURT: Go ahead.

MR. JACOBS: In the next paragraph we wanted to clarify what a nonexclusive license is as follows: Nonexclusive licenses, on the other hand, do not transfer copyright ownership and can be granted in writing, orally, or implied from conduct, so adding in writing in that sentence.

Then we would propose to add the following sentence, a nonexclusive license also arises when the copyright owner authorizes the licensee to copy, distribute, or prepare derivative works, and then we would --

THE COURT: All right. A nonexclusive license also arises when --

MR. JACOBS: The copyright owner authorizes the licensee to copy, distribute, or prepare derivative works.

THE COURT: Do you have that language written separately by any chance?

MR. JACOBS: We can do that right way, sir.

THE COURT: Mr. Normand.

MR. NORMAND: Well, to the extent I caught it, I would disagree with that as a proposition of the copyright law. This is something we argued to the Tenth Circuit. The language at the bottom of the page is, to our view, the only scenarios in which an applied license comes up. So I didn't get all the language that Mr. Jacobs proposed, but I think

what I heard him to say is that a contract, like the APA, can be an implied license, and we would disagree with that proposition.

MR. JACOBS: I think I was precise, Your Honor. We're not talking about an implied license, implied as a matter of law, which is the kind of license Mr. Normand is referring to. Just to jump ahead, we will be proposing that the last paragraph of Instruction No. 34-A in the draft be deleted because that is not our contention. We are not contending that an implied license arose by operation of law, which is the case contemplated by the law that Mr. Normand is referring to and the law that's reflected in the last paragraph of the instruction.

THE COURT: So you are suggesting striking all of the last paragraph of 34-A?

MR. JACOBS: That's correct.

MR. NORMAND: I'm sorry to do this to the Court, but, Michael, could you read in the sentence you proposed as the new second sentence of that paragraph?

MR. JACOBS: Sure. A nonexclusive license also arises when the copyright owner authorizes the licensee to copy, distribute, or prepare derivative works.

THE COURT: So with that sentence --

MR. NORMAND: That sentence can't be literally true because that could be an exclusive licensee as well.

MR. JACOBS: Well, it starts out with a nonexclusive license also arises when the copyright owner authorizes the licensee to copy, distribute, or prepare derivative works.

THE COURT: I hear that language, but it suggests that it is by definition a nonexclusive license, and that would be inaccurate.

MR. JACOBS: Maybe this will help, a nonexclusive license may also arise when the copyright owner authorizes the licensee to copy, distribute, or prepare derivative works.

MR. NORMAND: Do you have any authority for the proposition that a nonexclusive license like that can be in writing?

MR. JACOBS: Do I have any authority for the proposition. I don't have a case with me, but it seems that if I can say to you, Mr. Normand, you can copy my draft jury instructions, then that creates a nonexclusive license orally. But if I write you an e-mail and say, Mr. Normand, you can copy my draft jury instructions, I have created a nonexclusive license in writing by authorizing you to copy, distribute, or prepare derivative works.

MR. NORMAND: I'm definitely having limits of my knowledge of the copyright law tested, but I would say if we're going to add the phrase in writing to the prior

sentence, then we don't need the next sentence. The next sentence strikes me as much more crafted to suggest that the APA, the jury can find, is a nonexclusive license rather than a flat statement of law, which the previous sentence now will be if it has the phrase in writing.

THE COURT: All right. Mr. Jacobs, supply Mr. Copeland, before we leave, your proposed sentence to add to that paragraph. And if I understand it, if that sentence is added, then you are requesting the removal of the last paragraph?

MR. JACOBS: That's correct, Your Honor.

THE COURT: If that sentence is not added, do you still want the removal of the last paragraph?

MR. JACOBS: I think so, Your Honor. It's just not our situation and we're not going to argue it.

THE COURT: Okay. Anything else on 34-A?

35-A.

MR. NORMAND: Your Honor, our issue on 35-A is one that we have already, I think, put before the Court, which is that the third paragraph, in particular, which in the Model Utah Jury Instructions is bracketed language, really seems out of place with respect to the claim at issue here. It's about investigating and reporting.

THE COURT: You did, however, elicit a lot of testimony about, okay, what did you do to find or not find

an executed copy of Amendment No. 2, et cetera, et cetera. That came from a number of witnesses. The Court thinks it's probably in properly and will leave it in.

MR. NORMAND: Thank you, Your Honor.

MR. JACOBS: Just a small typo I think on this one, Your Honor. On the second paragraph, second line, there is a period after false.

THE COURT: I'm sorry. Where again?

MR. JACOBS: I'm sorry, Your Honor. It's a previous draft.

THE COURT: Okay. Nothing else, then, on 34-A.

Mr. Normand, let me ask you this before we go beyond, if the Court -- what do you think about the last paragraph of 34-A, in or out?

MR. NORMAND: 34-A?

THE COURT: I'm sorry. I should have asked you this before.

MR. NORMAND: I think, on balance, we would keep it in, Your Honor.

THE COURT: All right. I understand your positions then.

Thirty-six.

MR. JACOBS: We do have some concerns with this instruction. And with the Court's indulgence, I would ask Mr. Sears, he's become quite the expert on damages and

slander of title, to address this one.

THE COURT: Go ahead, Mr. Sears.

MR. SEARS: Thank you, Your Honor.

With respect to the substantial factor aspect of this instruction, we think it may be --

THE COURT: Will you draw my attention to a specific paragraph, line so I know where you're looking at?

MR. SEARS: Yes, Your Honor. So this is the paragraph that spills over from the bottom of the first page to the top of the second page. And the issue here is that there is both in the Restatement section that much of the remainder of this instruction is from and in form instructions from, for example, California where substantial factor is used, typically in a circumstance like this where there is evidence that harm would have been suffered even without the complaint of conduct, that a "but for" component should be included in the instruction.

For example, California's form instruction number 430 has, as bracketed language, at the end of its substantial factor instruction, conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct. So we would propose adding that language in to fortify the point.

It was well illustrated in a California Supreme Court opinion, Soule v. GM, which is 882 P.2d 298. In that

case there was an automobile accident. The auto had a defect, and GM requested that this language that I just read to the Court be included, the theory being in an accident involving a car and a semi, the defect in the car is not -- excuse me, coming at it the other way, the injury would have been sustained regardless of whether the car was defective when you get hit by a semi. The Court found reversible error in the failure to include the language that I just read a moment ago.

So our suggestion would be adding to the end of this paragraph the language from California's instruction 430.

THE COURT: Could you read it again, please?

MR. SEARS: Sure. Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.

THE COURT: Mr. Normand.

MR. NORMAND: Well, we would oppose this one, Your Honor. We think that the Court's draft language has it exactly right under Utah law and under the Restatement. I'm not familiar with the case that has been spoken to, but we cited chapter and verse that the substantial factor test is the standard for causation generally. Utah courts have repeatedly adopted the Restatement. The language of the Restatement is directly contrary to the argument that's been

made.

The language in the commentary of Section 632, for example, says that it is not necessary that the conduct should be determined exclusively or even predominantly by the publication of the statement. It is enough that the disparagement is a factor which determines his decision even though he is influenced by other factors without which he would not decide to act as he does.

So our view is the substantial factor test is the controlling one in Utah. It's controlling across jurisdictions. It's controlling as reflected in the Restatement. And we dispute the notion that you have to diffuse other factors. There is a comment in the Restatement that explains that one way to satisfy the substantial factor is to eliminate other causes. But that's merely one way in which you can satisfy that test, it's not the only way.

THE COURT: Mr. Sears, I'll give you the last word.

MR. SEARS: Thank you.

If we're going to look to the Restatement, much of the rest of this instruction is taken from the Restatement, Section 633, and comments (c) and (d) to that section of the Restatement support Novell's position.

THE COURT: All right. We'll look at that again.

Thank you, counsel.

MR. NORMAND: Those comments, Your Honor, are the examples of how the substantial factor test can be satisfied.

THE COURT: Anything else to 36-A?

Anything else at all, Mr. Jacobs?

MR. JACOBS: No, Your Honor.

THE COURT: Mr. Normand, do you have anything else?

MR. NORMAND: We did have a small comment on 40-A. The last sentence now says you should, of course, consider section 4.16. Your Honor may recall that we had fought for the difference between the verb may and the verb should on the issue of how the jury should consider extrinsic evidence. We would ask for a similar use of language as was used with respect to extrinsic evidence to say -- taking out the of course, as if it were self-evident, and say you may consider section 4.16, et cetera.

MR. JACOBS: No objection, Your Honor.

THE COURT: We'll make that change.

Anything else?

MR. JACOBS: Your Honor, we would just like to express appreciation for the process. We know we inundated the Court with a lot of paper on this. Everybody worked really hard. The way the Court has responded quickly and

gotten us drafts in the last few days has made it a lot easier on our team, so thank you.

THE COURT: Thank you, Mr. Jacobs. Mr. Copeland is the one who deserves that praise.

We'll try to get you another draft this evening so you've got it overnight. All right.

MR. NORMAND: Your Honor, there is one linguistic issue. I don't know if Mr. Jacobs would agree or not, but on this issue of conforming the instructions now that we have just the SCO claim, it may be simpler for the jury to have the parties referred to as plaintiff and defendant. I don't feel strongly about that, but I think, as it stands, we had agreed to call them claimant or something. Maybe it's easier to just say plaintiff and defendant.

MR. JACOBS: I think once, if Your Honor rules -- I'm sorry. Start over. I think it would be simpler to say SCO and Novell, then they really won't get confused.

THE COURT: All right. We'll change it, then, to SCO and Novell. I'm sure Mr. Copeland is not real happy with that.

The verdict form, anything other than obviously we will have to change it in light of the Court's ruling on the Rule 50 motion?

MR. NORMAND: Your Honor, we're fine with the verdict form as is.

MR. JACOBS: Your Honor, we expressed our concerns, as the form and the case has evolved, in our papers. If you would like to hear more on that orally --

THE COURT: Are you referring specifically to the fact that we have made a separate finding as to the ownership?

MR. JACOBS: That, but even more critically that it's a gaming factor to decide the slander of title claim. So the way the form reads now I believe, I don't think that's changed. You only decide slander of title otherwise, if you will. So if you answer yes, go on to question two. If you answer no, skip to question five. But logically the slander of title claim itself doesn't have that kind of flow. If the easiest way to dispose of the slander of title claim for the jury turns out to be malice, constitutional malice, the fact that they would have first decided this issue and decided in this gaming sort of way, we think would create some -- either some momentum going the wrong direction or a possible hangup.

So I'm not quite sure how you might handle this tomorrow evening, but if they reported out, you know, we're stuck on question number one, and the verdict form says you can't go on to question number two until you finish with question number one --

THE COURT: But isn't that a fact? Do you want

the jury to go on to number two without deciding number one?

MR. JACOBS: I think so, Your Honor. I think if we are found not to have slandered their title on any of the grounds, that we'll consider ourselves victorious.

THE COURT: I think, Mr. Jacobs, in the Court's mind, there is no way the jury can perform its responsibility tomorrow without making that initial determination. And to afford them any opportunity to do otherwise, I think would be an error. Okay.

MR. JACOBS: Understood, Your Honor.

The only other thing that has occurred to me is this issue of as of the date of the asset purchase agreement, the Court has been quite diligent, and we appreciate it, in including that in the instructions. I'm still a little bit worried that there's going to be confusion because UnixWare 1.0 and 2.0 are the pre-asset purchase agreement versions, 2.1 and thereafter are the post-asset purchase agreement versions. They may get hung up on UnixWare tomorrow night because obviously, as we've tried to make clear, Santa Cruz owns the copyrights in the post-APA versions.

I don't have a suggestion to cure -- it's possible the jury could come out tomorrow night and say what if we decide one way on UNIX and one way on UnixWare, what do we do next.

THE COURT: That seems highly unlikely, Mr. Jacobs.

MR. NORMAND: Your Honor, I think this falls into the category of there are issues in each of these questions that are built into and addressed in the instructions, and I think this falls into that category.

THE COURT: Do you have any more record you want to make?

MR. JACOBS: No, Your Honor.

THE COURT: All right. Counsel, the Court will take your requests and your opposition to the requests of the other side into consideration and will put together another packet and get it to you as soon as we can. It may be you'll just get a packet that includes the major decisions that have been made that will help you prepare for your closings, and then we'll give you the rest of it tomorrow.

MR. NORMAND: Thank you, Your Honor.

THE COURT: We'll be in recess.

MR. JACOBS: I'm sorry, Your Honor. One quick question. Are we okay on page length for the Rule 50 motions, that is --

THE COURT: Mr. Sears, what is your question.

MR. SEARS: Ideally, we would ask the Court for 35 pages for the brief in support. Keeping in mind that the

summary judgment motion was 25 pages plus statement of facts, we've tried to keep approximately close to that.

THE COURT: This is on your Rule 50 motion?

MR. SEARS: Yes.

THE COURT: I think I probably ought to, at a minimum, require no more than what would be in the summary judgment motion.

MR. SEARS: So 25 plus a statement of facts?

THE COURT: Yes.

MR. NORMAND: This is the Rule 50 motion that was made yesterday?

THE COURT: They indicated yesterday that they were going to, at the end of the trial as well, make a Rule 50 motion.

So I presume that's what you were referring to, Mr. Sears?

MR. SEARS: Yes, Your Honor.

THE COURT: The only question I would ask you is whether -- well, that's fine. That's fine. All right.

MR. JACOBS: Thank you, Your Honor.

(Whereupon, the proceeding was concluded.)

C E R T I F I C A T E

I hereby certify that the foregoing matter is transcribed from the stenographic notes taken by me and is a true and accurate transcription of the same.

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