

# SCO v. NOVELL

- CROSS MOTIONS FOR SUMMARY JUDGMENT ON COPYRIGHT OWNERSHIP ISSUE

# Amendment 2, Section A

- A. With respect to Schedule I.1(b) of the Agreement, titled "Excluded Assets", Section V, Subsection A shall be revised to read:

All copyrights and trademarks, except for the copyrights and trademarks owned by Novell as of the date of the Agreement required for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies. However, in no event shall Novell be liable to SCO for any claim brought by any third party pertaining to said copyrights and trademarks.

# TLA Provisions Confirm that Copyrights Were Transferred

- Technology Licensing Agreement (“TLA”) provided for a license-back of technology from Santa Cruz to Novell, subject to certain restrictions and covenants.
  - Pursuant to TLA, Novell “shall have a non-exclusive, non-terminable, worldwide, fee-free license”  
(5/18/07 James Decl. Ex. 4 § II.A. (TLA).)
- Copyrights were core intellectual property Santa Cruz had acquired; if no copyrights, then license-back makes no sense.
  - Robert Frankenberg, Novell CEO:
    - If copyrights did not transfer, “there wouldn't be a necessity for a license back of the technology because we would have owned it.” (5/18/07 James Decl. Ex. 7 at 66  
(2/10/07 Frankenberg Dep.).)

# Extrinsic Evidence Confirms that Copyrights Were Intended To Be Sold

- Senior business executives who struck the deal, on both sides, AGREE, that copyrights were included.
- Novell contends its counsel fundamentally changed the deal in last ten days by language on excluded asset schedule.
- No suggestion that business executives on either side discussed or approved of such a change.
- Novell's lawyers' intent regarding contract language subsequently excised from the APA by Amendment 2 cannot create a fact issue.

# SCO Submits the Testimony of Witnesses Who Were Intimately Involved in the Transaction

## **Ty Mattingly:**

- As Novell acknowledges, “spent a lot of time on the deal.” (5/29/07 Suppl. Normand Decl. Ex. 20 at 10 (5/10/07 Jones Dep.).)
- Along with the rest of the Novell deal team, met with Santa Cruz representatives for a series of meetings lasting a month and a half to two months. (5/29/07 Suppl. Normand Decl. Ex. 32 at 20 (1/19/07 Mattingly Dep.).)
- Was “very heavily involved” in the negotiation of the APA, “interfacing between Bob Frankenberg and the SCO team...” (Id. at 22-23.)

## **Duff Thompson:**

- Formed the Novell deal team and was personally involved in face-to-face negotiations with Santa Cruz officials. (5/18/07 James Decl. Ex. 10 ¶ 5 (11/9/06 Thompson Decl.).)
- Operated under clear instructions: “sell everything, from Bob Frankenberg to me, and sell UnixWare. So sell UNIX, sell UnixWare.” (5/29/07 Suppl. Normand Decl. Ex. 30 at 24-25 (2/29/07 Thompson Dep.).)

## **Burt Levine:**

- Drafted “some of the provisions of the APA” and reviewed and revised drafts of the APA. (5/29/07 Suppl. Normand Decl. Ex. 23 at 56, 163-64 (3/23/07 Levine Dep.).)

## **Doug Michels**

- Was “very involved” in the “initiation” of the APA and the “strategy behind it” as well as “the high level structure of the agreement.” (5/29/07 Suppl. Normand Decl. Ex. 19 at 9 (3/28/07 Michels Dep.).)
- Was involved in “supervising pretty directly the people who were negotiating the details of the agreement.” (Id.)

## **Kim Madsen**

- “[P]articipated in meetings, negotiations, a review of the [APA], and possibly preparation of some of the schedules. (5/29/07 Suppl. Normand Decl. Ex. 14 at 33-34 (2/13/07 Madsen Dep.).)

# Senior Novell Executives Agree that UNIX Copyrights Were Being Sold

## Robert Frankenberg, Novell CEO:

- Decided in late 1994 or early 1995 to sell the entire UNIX and UnixWare business. (5/18/07 James Decl. Ex. 7 at 9-11 (2/10/07 Frankenberg Dep.).)

## Testimony:

Q. Was your initial intent in the transaction that **Novell would transfer copyrights** to UNIX and UnixWare technology to Santa Cruz?

A. **Yes.**

Q. Was that your intent at the time when the APA was signed?

A. Yes.

Q. Was it your intent when that transaction closed?

A. Yes.

Q. And did that **remain your intent**, as you view it, at all relevant times?

A. **Yes.**

Q. So that never changed?

A. No.

\* \* \* \*

Q. Is it your understanding that that sale of all rights and ownership of UNIX and UnixWare **would include copyrights** associated with UNIX and UnixWare?

A. **Yes.**

Q. Now, **did you ever give any directions to the team** that was negotiating the deal, including Mr. Thompson, Mr. Chatlos, that they should transfer all right and title and interest to UNIX and UnixWare but retain copyrights for UNIX and UnixWare from being sold?

A. **No.**

Q. Did you ever **tell anyone at Santa Cruz Operation** that copyrights for UNIX and UnixWare were not part of the technology being sold?

A. **No.**

Q. Did you ever authorize anyone at Novell to tell anyone at Santa Cruz that copyrights were not being sold as part of the transaction?

A. No.

(Id. at 9, 135. (emphasis added).)

# Senior Novell Executives Agree that UNIX Copyrights Were Being Sold

## Duff Thompson, Novell executive:

- Appointed by Novell CEO Robert Frankenberg to oversee the sale of the UNIX and UnixWare business. (5/18/07 James Decl. Ex. 10 ¶ 4 (11/9/06 Thompson Decl.))
- Formed the Novell deal team. Personally involved in face-to-face negotiations with Santa Cruz officials including Alok Mohan, Steve Sabbath, Jim Wilt, Geoff Seabrook and Kim Madsen. (Id. ¶ 5.)
- **His marching orders from Novell:** “sell everything, from Bob Frankenberg to me, and sell UnixWare. **So sell UNIX, sell UnixWare.**” (5/18/07 James Decl. Ex. 11 at 24-25 (2/9/07 Thompson Dep.) (emphasis added).)
- Testimony:

“[I]t was my **understanding and intent**, as the Novell executive responsible for the negotiation of the transaction, that the **UNIX copyrights were transferred** to Santa Cruz. . . .” (5/18/07 James Decl. Ex. 10 ¶ 8 (11/9/06 Thompson Decl.)(emphasis added).)

\* \* \* \*

Q. And a bundle of rights you believed included -- looking back on it, you believed the structure of the deal meant that the bundle of rights included the copyrights?

A. No. At the time I believe **it included the bundle of the copyrights**, at the time.

\* \* \* \*

It is impossible for me to parse in my mind the assignment that we received to sell the -- to sell the entire business, all of Unix and UnixWare to SCO, and to somehow also in that same breath say, except the copyrights.

I just -- I don't understand that kind of thinking, and certainly I just have to tell you that **that kind of trick play was not something that Bob Frankenberg would have directed, nor is it something he would have stood for. It's not something I would have done.**

If we had intended not to transfer the copyrights, we would have been very careful to say, you don't get the copyrights. And it wouldn't have been an oblique reference. **It would have been, you get all the business except the copyrights. Not, you get all the business.**

(5/18/07 James Decl. Ex. 11 at 132-33 (2/9/07 Thompson Dep.) (emphasis added).)

# Senior Novell Executives Agree that UNIX Copyrights Were Being Sold

## Ed Chatlos, lead Novell negotiator on APA:

- Novell's Senior Director for UNIX Strategic Partnerships and Business Development at the time of the APA. Novell's lead negotiator of the APA.

(5/18/07 James Decl. Ex. 12 ¶ 4, 6 (10/1/04 Chatlos Decl.) .)

- Primary negotiator during the "detailed discussions" with Geoff Seabrook and Jim Wilt that resulted in the APA, and "negotiated and structured" Amendment No. 1 to the APA.

(5/18/07 James Decl. Ex. 13 at 11-13 (3/22/07 Chatlos Dep.)

- Testimony:

**It was always my understanding and intent, on behalf of Novell, that the UNIX source code and its copyrights were part of the assets SCO purchased.** I do not recall anyone else ever suggesting that Novell would retain any copyright relating to UNIX, nor was I present for any discussion, general or specific, during the negotiations that contradicted my understanding of the transaction described herein. None of my superiors at Novell ever informed me that Novell was not transferring the UNIX copyrights to SCO. Likewise, **I never communicated to SCO in any way that the UNIX copyrights were not being sold to SCO.** Nor am I aware of any instance in which anyone from Novell ever informed SCO in any way that the UNIX copyrights were not being sold to SCO as part of the transaction.

Given my central role in the negotiations, I believe I would have known if the parties had agreed that Novell would retain UNIX copyrights. **My intent and understanding as the lead negotiator for Novell was that Novell was transferring the copyrights to SCO in the APA.** At the time the transaction was signed and closed, I did not observe anyone at Novell or SCO stating or acting as if Novell had retained any UNIX copyrights. If they had, it would have been contrary to the intent and structure of the deal as I understood it and communicated with SCO. In fact, **from the time the APA transaction closed in 1995 until this day, it has been my understanding and belief that Novell sold the UNIX copyrights to SCO as of the time of the closing in 1995.**

(5/18/07 James Decl. Ex. 12 ¶¶ 9-10 (10/1/04 Chatlos Decl.) (emphasis added).)

- APA was **"intended to sell the entire business, including the copyrights.** And there were no discussions to counter that."

(5/18/07 James Decl. Ex. 13 at 38 (3/22/07 Chatlos Dep.) (emphasis added).)



# Santa Cruz Executives, Without Exception, Understood They Were Being Sold the Entire Business, Including Copyrights

## Doug Michels, Founder and Senior Vice President:

- “very involved” in the “initiation” of the APA, “the strategy behind it,” and he “was very involved in the high level structure of the agreement,” and “was involved in supervising pretty directly the people who were negotiating the details of the agreement.”
- Testimony:
  - “In connection with the 1995 purchase from Novell, the parties agreed that (as is accurately explained by both Mr. Wilt and Ms. Madsen) Novell could retain the existing binary royalty stream even though **the entire UNIX business, source code and related assets, including copyrights, were transferred to Santa Cruz.**”
  - “Well, I meant that the only way that I know of, and anyone on my team knew of to buy a software business is to buy the copyrights, and there’s no way we would have ever done a deal to buy a software business where we didn’t get the copyrights and all the other intellectual property. That’s what you’re buying. And especially in the case of UNIX, with its convoluted intellectual property history, and whatnot, to not get that stuff would be to not do the deal. And so it was implicit in everything we did, everything we thought. **Every single person on my team understood that. The lawyers understood. The business development people understood it. The people at Novell understood it.**”

“I mean, it – it’s just so essential. It’s -- you know, it’s like breathing oxygen, you know, I mean, you just – **there’s no way that deal could have happened without getting the copyrights.**”
- “A. I know that **everybody involved in this negotiation knew the copyrights were being transferred.** I know that.

Q. How do you know that?  
A. Because I was there and I know it. That’s -- I -- I know what -- I know there were discussions. I know **there was shared vision.** I know **we all understood what it meant to buy a software company.** You know, I’ve known these people for many years. It -- it just wasn’t ambiguous. It wasn’t something that was ambiguous.”

# Braham and Bradford Declarations Do Not Create a Factual Conflict

- They do not controvert that business deal was for sale of entire business, including copyrights.
- The addition of a schedule selling “All rights and ownership of UNIX and UnixWare” makes no sense with an exclusion of copyrights.
- Schedule 1.1(a) transferred “All copies of UNIX and UnixWare, wherever, located” from Seller to Buyer, so how could Novell maintain copyrights in source code?
- They suggest in last 10 days before signing they amended the language so as to seek to exclude copyrights.
  - No testimony that this was discussed with and agreed to by Santa Cruz
  - Santa Cruz negotiators dispute
  - Bradford’s recollection itself is disputed:
    - Repeatedly told Lee Johnson, a long-time personal friend, that “he was not significantly involved in [the APA] transaction and did not know much about it.” (5/18/07 James Decl. Ex. 113 ¶ 6 (5/18/07 Johnson Decl.))
    - Said he was “too busy on much larger matters for Novell,” that “he had other people handle that transaction,” or that he was only “somewhat involved” in that transaction. (Id.)
    - When asked whether Novell kept the UNIX copyrights from Santa Cruz in the 1995 transaction, Mr. Bradford repeatedly stated that he did not know the answer to that question because, again, he “was not really that involved in that transaction and was busy on more important matters.” (Id. ¶ 7.)
    - Subsequently explained that he did not remember the details regarding the negotiation of the APA “but he had gone back and read the agreements a few times and concluded that this must have been what happened.” (Id. ¶ 9.)
    - After signing his declaration, confirmed “that his recent change of position was because he had reread the documents and concluded that his explanation as is set forth in his declaration must have been what happened.” (Id. ¶ 11.)
- No material factual conflict, however, because Amendment 2 changed the language on which Braham and Bradford rely.

# Board Minutes / Press Releases Do Not Create Factual Conflict

- Board minutes reflected either Netware assets remained, or at most, confusion created by Schedule of excluded assets BEFORE Amendment 2.
- Minutes: "Pursuant to the Asset Purchase Agreement, Novell will transfer to SCO its UNIX and UnixWare technology assets . . . ."
  - This can only mean that the copyrights to UNIX and UnixWare were transferred.
  - Frankenberg confirms:
    - Q. And I guess my question to you is when it [the board minutes] says "Novell will retain all of its patents, copyrights and trademarks except for the trademarks UNIX and UnixWare, as you sit here today and you read this, do you believe that it's erroneously reporting what was discussed at the board meeting?"
    - A. Looking back at it, I think what happened was that we -- that our biggest concern were copyrights and trademarks having to do with NetWare, and in no way did those get blurred or sent anywhere else. So I think that that was what was meant to be described but **it isn't described here properly.**
    - Q. So your best –
    - A. Nor is it described properly in the agreement.

(5/18/07 James Decl. at 7 at 83-84 (2/10/07 Frankenberg Dep.))

- Press release by parties reflected sale of IP Assets
  - Novell CEO Frankenberg verified at deposition that the joint press release mentioned in the APA stated "According to the terms of the agreement, SCO will acquire Novell's UnixWare business and UNIX intellectual property."
    - (5/18/07 James Decl. Ex. 7 at 23 (2/10/07 Frankenberg Dep.))
  - Other press releases do not contradict
- Novell's June 6, 2003 press release admits that Amendment 2 reflects SCO's ownership of copyrights
  - "Amendment #2 to the 1995 SCO-Novell Asset Purchase Agreement was sent to Novell last night by SCO. To Novell's knowledge, this amendment is not present in Novell's files. The amendment appears to support SCO's claim that ownership of certain copyrights for UNIX did transfer to SCO in 1996."

(5/18/07 James Decl. Ex. 38 at NOV 000043059 (6/6/03 Press Release)).

# Change in Copyright Notice Post-APA With Novell's Assistance

- In November 1995, Novell requested, approved, and made changes to the copyright notices in preexisting UNIX and UnixWare source code to reflect the change in ownership of the copyrights in UNIX and UnixWare from Novell to Santa Cruz.
  - (5/18/07 James Decl. Ex. 89 ¶¶ 5-8 (5/18/07 Gupta Decl.).)
- In a Statement of Work signed by both Novell and Santa Cruz in December 1995, Novell reported those changes in the code.
  - (Id. ¶ 9; 5/18/07 James Decl. Ex. 91 (Statement of Work).)
- Transition document entitled “SCO/Novell Documentation Transition Issues (10/16/95):”
  - “SCO will replace Novell as the Copyright owner” in the UnixWare 2.1 online books.
    - (5/29/07 Suppl. Normand Decl. Ex. 2 at SCO1605019 (SCO/Novell Documentation Transition Issues).)
  - Santa Cruz did, in fact, replace Novell as the copyright owner in the UnixWare online books as early as January 1996.
    - (5/29/07 Suppl. Normand Decl. Ex. 3 ¶¶ 2-5 (5/29/07 Gupta Decl.)

# Santa Cruz Microsoft Issues

## Support SCO's Position

- Santa Cruz letter to DOJ re Microsoft
  - In “December 1995, Novell sold the ownership of UNIX to SCO. As a result, SCO now enjoys the right, as the owner of the UNIX program, to exploit that program without the necessity of a license from any other party.”
    - (5/18/07 James Decl. Ex. 103 (9/19/96 Letter to U.S. Dept. of Justice).)

- Santa Cruz EC complaint

“SCO has now acquired ownership of the UNIX program itself so that it no longer requires a license from anyone to produce UNIX products.”

Santa Cruz referred to itself as “the copyright owner of UNIX.”

- Novell never objected.

– (5/18/07 James Decl. Ex. 32 (1/31/97 EC Complaint).)

# In 2003 SCO Sought Acknowledgment of Transfer, Not Transfer

- In 2003, SCO requested Novell to acknowledge prior transfer, not to transfer.
- Novell relies on testimony of Associate General Counsel Greg Jones – the point person for the company in its discussions with SCO in late 2002 and early 2003:
  - Jones admitted at deposition that SCO’s request had been for “documents” or “due diligence” that would clarify what SCO considered to be “a clerical error” in the Excluded Assets Schedule of the APA.

(5/29/07 Suppl. Normand Decl. Ex. 26 at 182-83 (1/26/07 Jones Dep.).)

- Darl McBride and Ralph Yarro attest that request was to clarify prior transfer.

(5/18/07 James Decl. Ex. 61 ¶ 16 (3/27/07 McBride Dep.); 5/29/07 Suppl. Normand Decl. Ex. 18 ¶ 3 (5/17/07 Yarro Dep.).)

# APA, with Amendment 2, and Bill of Sale Constitute Set of Documents Easily Sufficient to Convey Title Under Section 204

- With clarification of Amendment 2, there is no question that UNIX copyrights were transferred by Bill of Sale – it was curative amendment, signed later, but which expressly amends schedules that define what was transferred at closing.
- Any other interpretation renders Amendment 2 meaningless.
- Fact that it was “effective as of Oct 13, 1996” does not mean that it does not constitute an amendment changing inconsistent language to a schedule of assets sold earlier, which is what it clearly by its terms constitutes.
- Plain language of Amendment 2 references “copyrights and trademarks owned by Novell **as of the date of the Agreement** required for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies.”