Brent O. Hatch (5715)
bhatch@hjdlaw.com
Mark F. James (5295)
mjames@hjdlaw.com
HATCH, JAMES & DODGE, PC
10 West Broadway, Suite 400
Salt Lake City, Utah 84101
Telephone: (801) 363-6363
Facsimile: (801) 363-6666

Stuart Singer (admitted pro hac vice)
ssinger@bsfllp.com
Sashi Bach Boruchow (admitted pro hac vice)
sboruchow@bsfllp.com
BOIES SCHILLER & FLEXNER LLP
401 East Las Olas Blvd.
Suite 1200
Fort Lauderdale, Florida 33301
Telephone: (954) 356-0011
Facsimile: (954) 356-0022

David Boies (admitted pro hac vice)
dboies@bsfllp.com
Robert Silver (admitted pro hac vice)
rsilver@bsfllp.com
Edward Normand (admitted pro hac vice)
enormand@bsfllp.com
BOIES SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504
Telephone: (914) 749-8200
Facsimile: (914) 749-8300

Attorneys for Plaintiff, The SCO Group, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

THE SCO GROUP, INC., by and through the Chapter 11 Trustee in Bankruptcy, Edward N. Cahn, Plaintiff/Counterclaim-Defendant, vs. NOVELL, INC., a Delaware corporation, Defendant/Counterclaim-Plaintiff.	**SCO'S OPPOSITION TO "NOVELL'S MOTION IN LIMINE NO. 6 TO PRECLUDE RELIANCE ON STATEMENTS IN DECEMBER 2003 AND MARCH 2004 THAT DO NOT CONSTITUTE FACTUAL ASSERTIONS OF COPYRIGHT OWNERSHIP"** Civil No. 2:04 CV-00139 Judge Ted Stewart

Novell argues that as matter of law certain statements it made public in December 2003 and March 2004 cannot be a basis for SCO's claim for slander of title, because they do not constitute "factual assertions of copyright ownership."[1]

The Supreme Court long ago rejected the argument that a party can insulate itself from liability for a defamatory or slanderous statement simply by using the words "I think" or "in my opinion" in making the statement. The Court held that "expressions of 'opinion' may often imply an assertion of objective fact." Milkovich v. Lorain Journal Co., 497 U.S. 1, 11-19 (1990); accord Russell v. Thomson Newspapers, Inc., 842 P.2d 896, 902 (Utah 1992). The question is whether a "reasonable factfinder" could conclude that the statement at issue contains such a factual assertion. Milkovich, 497 U.S. at 21; see, e.g., Warren v. City of Junction City, 207 F. Supp. 2d 1216, 1220-21 (D. Kan. 2002); Computerized Thermal Imaging, Inc. v. Bloomberg, L.P., No. 1:00-CV98K, 2001 WL 670927, at *2 (D. Utah. Mar. 26, 2001).[2] In addition, as Novell acknowledges, its statements cannot be assessed in a vacuum. All of Novell's statements after May 28, 2003, must be considered against the backdrop that on that date, Novell indisputably did assert its ownership over the copyrights.

---

[1] This motion is the second part, with motion no. 5, of Novell's two-part motion. The motions address the same subject matter and apply the same law, they just address different statements. Insofar as Novell's motions seek a ruling that certain of the slanderous statements are not actionable, that is a motion for partial summary judgment that was required to have been brought – like Novell's other summary judgment motions – by April 20, 2007, the deadline for dispositive motions.

[2] Novell argues for the proposition that whether a statement is "reasonably capable of a wrongful meaning" is a question of law for the Court, but the cited cases address the discrete and particular question of whether "a statement is capable of sustaining a defamatory meaning," which is a term of art that means a statement "impeaches an individual's honesty, integrity, virtue or reputation and thereby exposes the individual to public hatred, contempt, or ridicule." West v. Thomson Newspapers, 872 P.2d 999, 1008 (Utah 1994). Those questions are not at issue here.

December 22, 2003. Novell issues a press release that itself makes certain statements and that attaches and cross-references prior correspondence that Novell had sent to SCO. The press release thus publishes the following statements concerning the issue of copyright ownership:

- "Novell believes it owns the copyrights in UNIX, and has applied for and received copyright registrations pertaining to UNIX consistent with that position."
- "Novell detailed the basis for its ownership position in correspondence with SCO. Copies of our correspondence, and SCO's reply, are available here."
- "Novell continues to assert ownership of the UNIX copyrights."
- With respect to SCO's letter claiming ownership, Novell had written that SCO's "letter contains absurd and unfounded accusations against Novell and others." (See also SCO's Opposition to Novell's Motion in Limine No. 5.)
- With respect to SCO's statements that it "owns 'all rights to the UNIX and UnixWare technology,'" and SCO's statement on its website that "SCO owns 'the patents, copyrights and core technology associated with the UNIX System,'" Novell had written: "SCO's statements are simply wrong." (See also SCO's Opposition to Novell's Motion in Limine No. 5.)
- Novell had further written: "We dispute SCO's claim to ownership of these copyrights," and "SCO's claim to ownership of any copyrights in UNIX technologies must be rejected, and ownership of such rights instead remains with Novell." (See also SCO's Opposition to Novell's Motion in Limine No. 5.)

This is the relevant question: Could a reasonable factfinder conclude from the foregoing statements, taking them either separately or in the aggregate, that Novell was making the factual assertion that it owns the UNIX and UnixWare copyrights? The obvious answer is yes. Indeed, it is hard to conceive of a more repeated and definitive set of slanders to SCO's ownership of the copyrights than those above. Novell's wafer-thin arguments to the contrary not only ignore the obvious import of the foregoing statements and conduct – how does a party apply for copyright registrations on copyrights that it is not factually claiming to own? – but runs directly counter to Novell's simultaneous invocation of qualified privileges such as the "rival claim" privilege. The

very premise of Novell's reliance on such legal arguments is that it was "claiming" to own the UNIX and UnixWare copyrights. (See Novell Motion in Limine No. 7.)

March 16, 2004. Novell Vice Chairman Chris Stone gives the keynote address at the March 2004 Open Source Business Conference and, in front of hundreds of people, says of Novell: "We still own UNIX." The statement is widely published. Mr. Stone claims that with respect to this statement, and others, he was being "sarcastic." (Ex. 1 at 62-66.) This is the relevant question: Could a reasonable factfinder conclude from the foregoing statement that Novell was making the factual assertion that it owns the UNIX and UnixWare copyrights? The obvious answer, again, is yes.

Indeed, Mr. Stone's own testimony was that he was claiming to own the copyrights when he made the statement. (Id. at 66.) Novell's claim that Mr. Stone merely was "repeating Novell's subjective view that it owned the copyrights for the reasons in its letters" makes a hash of both the facts and the law, where Mr. Stone neither couched his statement in the form of an opinion – which would not suffice to preclude a claim for slander anyway – nor cross-referenced any pending litigation or arguments therein. Nor does Novell's "subjective" argument make any sense when considered against Mr. Stone's testimony. If he was being "sarcastic," what was he being "sarcastic" about? He plainly meant to assert that Novell owns the copyrights – he says so. (Id. at 66.) So if he was being "sarcastic" only about the extent to which Novell has an ownership interest in UNIX, then by definition the literal meaning of his words were that Novell was claiming a broad ownership interest in UNIX. It follows that a reasonable factfinder could – would have to – conclude from the words he used that he was claiming Novell owns, at least, the copyrights. In fact Mr. Stone could not have made a flatter factual assertion: "We still own UNIX." The jury can decide if, and if so the extent to which, Mr. Stone was being "sarcastic."

CONCLUSION

SCO respectfully submits, for the reasons set forth above, that the Court should deny Novell's "Motion in Limine No. 6."

DATED this 19th day of February, 2010.

By: /s/ Brent O. Hatch
HATCH, JAMES & DODGE, P.C.
Brent O. Hatch
Mark F. James

BOIES, SCHILLER & FLEXNER LLP
David Boies
Robert Silver
Stuart H. Singer
Edward Normand
Sashi Bach Boruchow

Counsel for The SCO Group, Inc.

CERTIFICATE OF SERVICE

I, Brent O. Hatch, hereby certify that on this 19th day of February, 2010, a true and correct copy of the foregoing **SCO'S OPPOSITION TO "NOVELL'S MOTION IN LIMINE NO. 6"** was filed with the court and served via electronic mail to the following recipients:

Sterling A. Brennan
David R. Wright
Kirk R. Harris
Cara J. Baldwin
WORKMAN | NYDEGGER
1000 Eagle Gate Tower
60 East South Temple
Salt Lake City, UT 84111

Thomas R. Karrenberg
Heather M. Sneddon
ANDERSON & KARRENBERG
700 Bank One Tower
50 West Broadway
Salt Lake City, UT 84101

Michael A. Jacobs
Eric M. Aker
Grant L. Kim
MORRISON & FOERSTER
425 Market Street
San Francisco, CA 94105-2482

Counsel for Defendant and Counterclaim-Plaintiff Novell, Inc.

By: /s/ Brent O. Hatch
Brent O. Hatch
HATCH, JAMES & DODGE, P.C.
10 West Broadway, Suite 400
Salt Lake City, Utah 84101
Telephone: (801) 363-6363
Facsimile: (801) 363-6666