

THE TALENT

Litigator of the Week: Michael Jacobs of Morrison & Foerster

by Jan Wolfe.

Winning over the judges assigned to your case is hard enough; winning the praise of a respected former judge on your opponent's side is another matter. That's what Michael Jacobs of Morrison & Foerster achieved in his victory for Novell in its legal battle with The SCO Group over the copyrights to the operating system Unix. After a Utah jury rejected SCO's argument that Novell transferred the copyrights in a 1995 deal between the companies, SCO's bankruptcy trustee, retired federal judge Edward Cahn, told the Salt Lake City Tribune last year that Morrison & Foerster are "the best lawyers west of the Mississippi."

On Tuesday, a panel of sitting judges offered the MoFo lawyers an even better compliment, when the U.S. Court of Appeals for the Tenth Circuit affirmed the jury's verdict.

The origins of the case date back to the 1990s. In 1993 Novell acquired from AT&T the rights to Unix, the closed-source operating system still widely used today. In 1995 Novell sold certain rights in Unix to a software company called the Santa Cruz Operation, which later sold those rights to The SCO Group. In 2003 SCO asserted claims that alarmed the open-source software community: It maintained that it had purchased in this 1995 sale the copyrights to source codes that appear in both Unix and in Linux, a free, open-source operating system. SCO is represented by Boies, Schiller & Flexner.

"While litigation is a marathon, not a sprint, I didn't think the case would last quite this long," Jacobs confessed.

In 2007 Salt Lake City federal district court judge Dale Kimball issued a summary judgment ruling that Novell retained the source code copyrights. But in 2009 the Tenth Circuit reversed and remanded, setting the stage for a high-stakes jury trial.



Before the trial, the Supreme Court issued its landmark decision on corporate speech rights, *Citizens United v. Federal Election Commission*. Citing that ruling, Jacobs' team convinced Salt Lake city federal district court judge Judge Ted Stewart (who was then presiding over the case) that SCO's "slander of title" theory impinged on Novell's First Amendment rights. That dealt a blow to SCO, requiring it prove, to a Constitutional "clear and convincing" standard, that Novell behaved with reckless indifference or actual malice.

As we previously reported, the jury needed just one day of deliberations to return a unanimous verdict for Novell, deciding the case on the first question of the verdict slip. As a result it didn't reach SCO's novel theory that Novell slandered it by falsely claiming title to the copyrights. (SCO had called an expert witness who testified that this slander had cost the company as much as \$215 million in lost profits.)

Jacobs gave credit to his team members Eric Acker, the co-chair of Morrison & Foerster's intellectual property practice, and Sterling Brennan, a former Morrison & Foerster attorney now at Workman Nydegger, an intellectual property firm based in Salt Lake City.

The verdict was a tough loss for then-insolvent SCO and its trial team at Boies, led by partner Stuart Singer. The firm had capped its legal fees at \$31 million in exchange for a portion of the hoped-for recovery. SCO appealed, leading to oral arguments before the Tenth Circuit in January. That argument pitted Jacobs and Singer against each other yet again. Finding the jury verdict supported by ample evidence, the appellate court affirmed.

"We're grateful," said Jacobs about the Tenth Circuit's ruling. "And we hope and anticipate that it brings this chapter of the computer industry's history to a close."