

In The Matter Of:

THE SCO GROUP, INC., v.
INTERNATIONAL BUSINESS MACHINES CORPORATION

OTIS L. WILSON

June 10, 2004

LEGALINK MANHATTAN
420 Lexington Avenue - Suite 2108
New York, NY 10170
PH: 212-557-7400 / FAX: 212-692-9171

WILSON, OTIS L.



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A. It was a competitive selection. I was number one out of 10,000 people that were -- that went in for it.

Q. Further, in paragraph two, you say, "I was responsible for licensing operating systems under the UNIX brand beginning in 1980. Initially I was on the staff for negotiating license agreements with our customers."

"Beginning in 1983 until I retired in 1991 I was the head of the group responsible for licensing the UNIX System V operating system worldwide." Is that an accurate description of your employment at AT&T during the relevant period?

A. Yes, it is.

Q. Would you read, please, into the record paragraph four?

A. "In 1989 AT&T separated the organizations responsible for UNIX, and associated system software products and services, into a business unit called UNIX software operation. In 1991 the rights to the UNIX operating system and related products, technology and intellectual property were transferred to USL." I remained the head of the organization -- licensing organization throughout these changes.

Q. Does that accurately describe your employment at AT&T?

A. Yes.

MR. GANT: Objection. Compound, vague.

THE WITNESS: Yes, it does.

BY MR. MARRIOTT:

Q. In paragraph five you state that, "During the period from 1980 to 1991 AT&T and USL licensed UNIX source code, including UNIX System V source code, to hundreds of licensees. Nearly every UNIX license agreement executed by AT&T" -- well, withdrawn.

In paragraph five you state, "During the period from 1980 to 1991 AT&T and USL licensed UNIX source code, including UNIX System V source code, to hundreds of licensees. Nearly every UNIX license agreement executed by AT&T during this period was signed by me or on my behalf by people that reported to me." Is that an accurate statement, Mr. Wilson?

MR. GANT: Same objections.

THE WITNESS: Yes, it is.

Q. And how is it that you know that to be an accurate statement, Mr. Wilson?

MR. GANT: Same objection. Vague.

THE WITNESS: The organization responsible for this, the licensing of software, was one I was a part of, and I was there at the -- the inception. So I know all of the agreements concerning the software products actually came through my organization.

BY MR. MARRIOTT:

Q. Would you read, please, paragraph six into the record?

A. "The UNIX System V source code license agreements generally included a number of standard form agreements with each licensee. The standard software agreement granted the licensee the right to use and modify the source code for its own internal business purposes."

"In addition, many licensees were parties to sublicensing agreements, which granted the licensee the right to furnish sublicensed products based on UNIX System V to customers in object code format."

"A substitution agreement provided that the software agreement, and, if applicable, the sublicensing agreement, replaced earlier agreements relating to UNIX System V software."

Q. Are you sure that's true, Mr. Wilson?

MR. GANT: Objection. Compound, vague, leading, foundation.

THE WITNESS: Yes.

BY MR. MARRIOTT:

Q. In paragraph seven you state that you are familiar with licensing agreements between AT&T Technologies, Inc. and IBM, which you say were negotiated under your supervision while you were head of AT&T's licensing group. Is that an accurate statement?

MR. GANT: Same objections.

THE WITNESS: Yes, it is.

BY MR. MARRIOTT:

Q. Who's David Frasure, Mr. Wilson?

A. David Frasure was one of the negotiators in our organization that reported -- whom I supervised.

Q. Okay. And during what period of time did Mr. Frasure report to you?

A. Oh.

Q. Withdrawn.

Over what period of time roughly did Mr. Frasure report to you?

A. About six years. The period -- I'm trying to -- the period from about '84 to '91, I would

1 think.
2 MR. GANT: I couldn't hear the end of your
3 answer.

4 THE WITNESS: '84 to '91. I'm not exactly
5 sure exactly the period, but he was -- he was there
6 for a good six years, I guess.

7 BY MR. MARRIOTT:

8 Q. And how did Mr. Frasure come to work for
9 you at AT&T?

10 A. I actually recruited Dave Frasure for one
11 of the other organizations within Western Electric
12 at the time.

13 Q. Why did you do that, Mr. Wilson?

14 A. Personal knowledge of his work and the --
15 his expertise with the software and -- and through
16 the interview process.

17 Q. In paragraph eight you state that you were
18 familiar with licensing agreements between AT&T
19 Technologies and Sequent Computer Systems, which
20 you say were also supervised under your
21 supervision; is that correct?

22 MR. GANT: Objection. Vague, compound,
23 foundation.

24 THE WITNESS: Yes, it is.

25 BY MR. MARRIOTT:

1 Q. And did you, as stated in -- in paragraph
2 eight, sign those agreements on behalf of AT&T,
3 Mr. Wilson?

4 A. Yes, I did.

5 MR. GANT: Same -- same objections.
6 Excuse me.

7 THE WITNESS: Excuse me.

8 Yes, I did.

9 BY MR. MARRIOTT:

10 Q. And is it, in fact, your understanding
11 that Sequent has now been acquired by and merged
12 into IBM?

13 A. Yes.

14 Q. You need to speak audibly.

15 A. Yes.

16 No. I was waiting --

17 MR. GANT: I appreciate it. Thank you.
18 Contrary to Mr. Marriott's suggestion, I'm not
19 going to object to every question, only
20 objectionable questions.

21 BY MR. MARRIOTT:

22 Q. Take a look, if you would, Mr. Wilson, to
23 paragraph nine. Would you read that for me,
24 please, into the record?

25 A. "As a result of my role as head of the

1 group responsible for negotiating the IBM
2 agreements and the Sequent agreements and hundreds
3 of other UNIX System V licensing agreements, I have
4 a thorough understanding of these agreements and
5 what the parties intended" -- "intended them to
6 accomplish."

7 Q. Why did you say that in your declaration,
8 Mr. Wilson?

9 A. That's -- that's a statement of fact.
10 It's -- it's what I believe.

11 Q. Let me direct your attention, if I may, to
12 paragraph ten of your declaration. There you state
13 that from 1983 until 1991, while you were
14 responsible for licensing UNIX System V for AT&T
15 and USL, your group licensed UNIX System V source
16 code and related materials to a large number of
17 licensees around the world. Is that an accurate
18 statement of your activities during the period from
19 1983 to 1991?

20 MR. GANT: Objection. Leading, compound,
21 vague, foundation.

22 THE WITNESS: Yes, it is.

23 BY MR. MARRIOTT:

24 Q. Would you read paragraph 11 into the
25 record for me, please?

1 A. "The standard software agreement that we
2 used to license UNIX System V source code and
3 related materials sets forth the various rights
4 given to licensees and the restrictions imposed on
5 the licensees with respect to such materials, which
6 were called the," quote, "software product or
7 software products in the agreement."

8 Q. To the best of your understanding,
9 Mr. Wilson, is there anything inaccurate about that
10 statement?

11 MR. GANT: Same objections and leading.

12 THE WITNESS: I believe that to be an
13 accurate statement.

14 (DISCUSSION OFF THE RECORD)

15 BY MR. MARRIOTT:

16 Q. Mr. Wilson, may I direct your attention to
17 paragraph 12 of your declaration, dated April 26,
18 2004?

19 A. Okay.

20 Q. Paragraph 12 lists five provisions of what
21 you describe here as the standard early software
22 agreement of AT&T. Are you familiar with each
23 the provisions listed there?

24 MR. GANT: Objection. Mischaracterizes
25 the document, vague, foundation, compound.

THE WITNESS: Yes, I am.

BY MR. MARRIOTT:

Q. Would you describe -- would you read for me paragraph 12, Mr. Wilson?

A. "Among the standard provisions in our early software agreements, including the IBM software agreement and the Sequent software agreement, were the following:

"Section 2.01," colon, "AT&T grants the licensee a personal, nontransferable and nonexclusive right to use in the United States each software product identified in one or more of the supplements hereto, solely for the licensee's own internal business purposes." Starting from, "AT&T," to, "business purposes," are in quotes.

"Section 2.05," colon, quotation -- open quotation. "No right is granted by this agreement for the use of software products directly for others or for any use of software products by others," close quotation.

THE WITNESS: Do I need to read all of those?

MR. GANT: You have to ask Mr. Marriott what he wants.

MR. MARRIOTT: Do whatever you're

THE WITNESS: No.

BY MR. MARRIOTT:

Q. You made reference in previous testimony to there being a typo in -- in the third bullet point at page five. Could you describe what you meant by that, please?

A. Section -- as indicated in the page five of this document, section -- it references section 4.03. The reference should be to section 4.01. The text that follows that is correct, but the reference to the section should be 4.01.

Q. How did that come to your attention, Mr. Wilson?

A. In reading it. Reading -- actually reading -- excuse me. In reading the document.

Q. Would you look, please, at page six and that remaining portion of paragraph 12 of your declaration, which begins, "These provisions"?

A. Uh-huh.

Q. Would you just read that section to yourself and tell me when you're finished, please?

A. Okay.

Q. Is there anything inaccurate about what you've read in the remaining portions of paragraph 12?

comfortable with, Mr. Wilson.

THE WITNESS: "Section 4.03," colon, open paren. "Licensee agrees that it will not, without the prior written consent of AT&T, export directly or indirectly software products covered by this agreement to any country outside of the United States," close quote.

"Section 7.06," parentheses, little A, colon, open quotation. "Licensee agrees that it shall hold all parts of the software products subject to this agreement in confidence for AT&T," close quotation.

"Section 7.10," colon, open quote.

"Except as provided in section 7.06," paren, small B, "nothing in this agreement grants to licensee the right to sell, lease or otherwise transfer or dispose of a software product in whole or in part." Close quote.

Q. Let me just stop you there, if I may, Mr. Wilson, is -- is there anything, to your understanding, inaccurate about what you've read so far from paragraph 12?

MR. GANT: Objection -- objection. Vague, compound, foundation, calls for speculation and legal conclusions.

MR. GANT: Same objections.

THE WITNESS: There is not.

BY MR. MARRIOTT:

Q. There's nothing about that you'd change?

A. (WITNESS SHOOK HEAD FROM SIDE TO SIDE)

Q. Let me direct your attention in particular, Mr. Wilson --

MR. GANT: Was there an answer? I didn't hear it.

MR. MARRIOTT: He said, no.

THE WITNESS: No.

MR. GANT: Okay. Thanks.

BY MR. MARRIOTT:

Q. Would you -- direct your attention, please, to that portion of the latter part of paragraph 12 that begins, "At least as I understood." Could you read that portion, please, for me into the record?

A. "At least as I understood these sections and discussed them with our licensees, they do not, and were not intended to, restrict our licensees' rights to use, export, disclose or transfer their own products and source code, as long as they did not use, export, disclose or transfer AT&T's UNIX System V source code along with it. I never

1 understood AT&T's software agreements to place any
2 restriction on our customers' use of their own
3 original work."

4 Q. What is the basis, Mr. Wilson, of -- of
5 those statements?

6 MR. GANT: Objection. Vague, compound.

7 THE WITNESS: The -- the statement goes
8 to -- goes to the heart of the licensing program,
9 from the standpoint that we required our licensees
10 to protect the software products under the -- under
11 the stipulations in the software agreement, and we
12 did not intend to exercise any control or
13 restriction on those products that did not contain
14 portions of the software products.

15 BY MR. MARRIOTT:

16 Q. Did AT&T intend to exercise any control
17 over modifications or derivative works that --
18 withdrawn.

19 Did AT&T intend to exercise any control
20 over those portions of modifications or derivative
21 works of the software product that did not include
22 UNIX System V source code?

23 MR. GANT: Objection. Leading, compound,
24 vague, lack of foundation, calls for speculation
25 and for legal conclusions.

1 IBM software agreement and the Sequent software
2 agreement, included the following language: SU
3 right to use includes the right to modify such
4 software product and to prepare derivative work
5 based on such software product provided the
6 resulting materials are treated hereunder as part
7 of the original software product."

8 Do you see that, sir?

9 A. Yes, I do.

10 Q. Do you agree with the statements made
11 paragraph 13 of your declaration?

12 MR. GANT: Objection. Leading,
13 foundation, vague, calls for speculation and lega
14 conclusions.

15 THE WITNESS: Yes.

16 BY MR. MARRIOTT:

17 Q. Is there anything about that statement y
18 would change, Mr. Wilson?

19 MR. GANT: Objection. Vague.

20 THE WITNESS: I would not.

21 Q. Would you, please, read into the record
22 for me paragraph 14 of your declaration?

23 A. "As my staff and I communicated to our
24 licensees, this provision was only intended to
25 ensure that if a licensee were to create a

1 Q. Would you like the question read back?

2 A. No.

3 No. We didn't -- we did not intend to
4 extend our licensing agreement clauses to anything
5 other than the software product delivered with
6 those -- those agreements.

7 Q. Direct your attention, please, Mr. Wilson,
8 to paragraph 13.

9 MR. GANT: I'm sorry, David. Can I ask
10 that last answer to be read back?

11 MR. MARRIOTT: Sure.

12 MR. GANT: It was long, and I want to make
13 sure I got it. Thank you.

14 (DISCUSSION OFF THE RECORD)

15 (REQUESTED PORTION OF THE RECORD READ)

16 MR. GANT: Thank you. Thank you, David.

17 (DISCUSSION OFF THE RECORD)

18 BY MR. MARRIOTT:

19 Q. May I look at paragraph -- may I direct
20 your attention rather to paragraph 13, Mr. Wilson.
21 Paragraph 13 states, "AT&T's standard software
22 agreements also granted licensees the right to
23 modify UNIX System V source code and to prepare
24 derivative works based upon that code. Section
25 2.01 of our early software agreement, including the

1 modification or derivative work based on UNIX
2 System V, any material portion of the original UN
3 System V source code provided by AT&T or USL
4 was included in the modification or derivative wo
5 would remain subject to the confidentiality and
6 other restrictions of the software agreement.

7 "As we understood section 2.01, any sour
8 code developed by or for a licensee and include
9 a modification or a derivative work would not
10 constitute resulting materials to be treated as
11 part of the original software product, except for
12 any material proprietary UNIX System V source
13 provided by AT&T or USL and included therein."

14 Q. Is that an accurate statement, sir?

15 MR. GANT: Objection. Vague, compound
16 lack of foundation, calls for speculation and lega
17 conclusions.

18 THE WITNESS: Yes, it is.

19 BY MR. MARRIOTT:

20 Q. Would you, please, read for me into the
21 record paragraph 15?

22 A. "AT&T and USL did not intend to assert
23 ownership or control over modifications and
24 derivative works prepared by licensees, except t
25 the extent of the original UNIX System V source

code included in such modifications and derivative works.

"Although, the UNIX System V source contained in a modification or derivative work continued to be owned by AT&T or USL, the code developed by or for the licensee remained the property of the licensee, and could, therefore, be used, exported, disclosed or transferred freely by the licensee."

Q. You testified, Mr. Wilson, previously that that paragraph represents a true statement. Why did you provide that testimony?

A. Because I believe it to be a true statement.

Q. May I direct your attention, please, to paragraph 16. There you say, "I do not believe that our licensees would have been willing to enter into the software agreement if they understood section 2.01 to grant AT&T or USL the right to own or control source code developed by the licensee or provided to the licensee by a third party."

"I understood that many of our licensees invested substantial amounts of time, effort and creativity in developing products based on UNIX System V. The derivative works provision of the

1 derivative works prepared by or for the licensee,
2 except for any original UNIX System V source code
3 provided by AT&T or USL and included therein.

4 "We provided such clarification when
5 asked, because that is what we understood the
6 language in the standard software agreement to mean
7 in any event. In some cases we provided this
8 clarification orally, and in some cases we provided
9 it in writing."

10 Is there anything you would change about
11 the accuracy of that statement, Mr. Wilson?

12 MR. GANT: Objection. Foundation.

13 THE WITNESS: I would not.

14 BY MR. MARRIOTT:

15 Q. In paragraph 18 you state, "In fact,
16 although I am not a lawyer, it was my view at the
17 time that we could not claim any rights to non-UNIX
18 System V source code, as the plaintiff here appears
19 to be doing, without raising serious antitrust
20 issues.

21 "In light of the divestiture of AT&T
22 around that time, we, as a company, were very
23 concerned with the potential anticompetitive
24 effects of our actions.

25 "As a result, one of the reasons we made

software agreement was not meant to appropriate for IBM" -- "was not meant to appropriate for AT&T," rather, "or USL the technology developed by our licensees." Is that --

MR. GANT: Where is Dr. Freud when we need him?

MR. MARRIOTT: Dead.
BY MR. MARRIOTT:

Q. Is -- is that an accurate statement, Mr. Wilson?

MR. GANT: Same objections.
THE WITNESS: Yes.

Q. And why do you say what you say there in paragraph 16 of your declaration?

MR. GANT: Objection. Vague, compound.

THE WITNESS: Both 15 and 16 were -- are directed towards clarifying what was the intent of our software licensing program, and that -- that was what I was trying to -- to focus on with these two statements.

BY MR. MARRIOTT:

Q. In paragraph 17 of your declaration you say, "In fact, some licensees sought to clarify that under the agreements the licensee, not AT&T or USL, would own and control modifications and

1 clear to our licensees that our UNIX System V
2 software agreements did not impose any restrictions
3 on the use or disclosure of their own original
4 code, except insofar as it included UNIX System V
5 code, was to avoid any appearance of impropriety."

6 Why do you say that in paragraph 18,
7 Mr. Wilson?

8 MR. GANT: Objection. Vague, leading,
9 calls for speculation and legal conclusions.

10 THE WITNESS: I stated that, because
11 during this period of time -- 1983 being the date
12 that really kicked off -- the Bell system was going
13 through another separation or breakup. The first
14 was in 1956, when Sequent decreed our -- our
15 business with the AT&T Bell system was limited to
16 communication.

17 And in 1983 there was a major separation
18 of the operating telephone companies and AT&T into
19 different groups. And there was a high level of
20 concern that we did not infringe on any businesses
21 that we were not supposed to be into.

22 And so the whole software program was
23 started with software that was developed for other
24 purposes within AT&T, and we went through our
25 patent licensing organization as a -- stuff that

1 had been used for a primary purpose was now made
2 available to the -- to licensees under -- under
3 these agreements.

4 Q. Let me just -- and I don't want to cut off
5 your answer, but let me just caution you in
6 responding to the question not to provide any
7 information that might be privileged of AT&T. So
8 with that caveat, continue, if you -- if you have
9 more to say.

10 A. No. I'll -- I'll stop right there.

11 MR. GANT: Well, let me just ask for a
12 clarification. Has that been the case with all of
13 your prior questions and all of the witness' prior
14 answers, that none of the answers that he has
15 provided have been based in any way on any
16 communications with AT&T's counsel?

17 MR. MARRIOTT: Well, you'll have to ask
18 that question of the witness, but it's certainly
19 not my intent by way of any of my questions to seek
20 information that -- that is privileged.

21 MR. GANT: And has that been your intent
22 during the -- your questions that you've already
23 asked?

24 MR. MARRIOTT: I think I just said that.

25 MR. GANT: Okay. I just wanted to make it

1 accurately quoted in your declaration at page
2 eight, paragraph 19?

3 MR. GANT: Objection. Vague.

4 THE WITNESS: It's not -- it's not
5 verbatim, but it -- it -- it captures the essence
6 of both places.

7 BY MR. MARRIOTT:

8 Q. When you say, "It's not verbatim," I'm
9 actually referring only to the quoted portion in
10 paragraph 19, where it says, "Regarding section
11 2.01."

12 MR. GANT: I think he means because of the
13 brackets it's not verbatim.

14 THE WITNESS: Right.

15 MR. MARRIOTT: Okay. Fair enough. Thank
16 you for the clarification.

17 BY MR. MARRIOTT:

18 Q. Do you think in substance that what's
19 quoted at page eight of your declaration accurately
20 reflects paragraph two of the side letter at tab
21 four of your declaration?

22 MR. GANT: Objection. Vague.

23 THE WITNESS: Yes, I do.

24 BY MR. MARRIOTT:

25 Q. Under the quote at paragraph 19 of your

1 clear, if you did. So --

2 MR. MARRIOTT: Yeah.

3 Q. To -- just so -- for clarity, to your
4 understanding, Mr. Wilson, has the testimony you've
5 provided to this point in the deposition in any way
6 required you to disclose information that you
7 believe to be protected by an attorney/client
8 privilege?

9 MR. GANT: Objection. Vague, calls for a
10 legal conclusion.

11 THE WITNESS: It has not.

12 BY MR. MARRIOTT:

13 Q. In paragraph 19 you state, "We provided
14 IBM with just such a clarification in paragraph A.2
15 of the IBM side letter." The side letter
16 referenced there, Mr. Wilson, is attached to this
17 declaration as -- as tab four; is that correct?

18 A. That is correct.

19 Q. Direct your attention, if I may,
20 Mr. Wilson, to page two of the side letter, which
21 is at tab four of your declaration. Do you see --
22 do you see on page two, paragraph two --

23 A. Yes, I do.

24 Q. -- what's stated in the beginning,
25 "It's not that accurately -- is that

1 declaration you state, "I understood this
2 language," referring to the language of the side
3 letter, "to mean that IBM, not AT&T or USL, would
4 have the right to control modifications and
5 derivative works prepared by or for IBM."

6 "IBM, like all licensees under the
7 agreements, fully owns any modifications of and
8 derivative works based on UNIX System V prepared by
9 or for IBM, and can freely use, copy, distribute or
10 disclose such modifications and derivative works,
11 provided that IBM does not copy, distribute or
12 disclose any material portions of the original UNIX
13 System V source code provided by AT&T or USL,
14 except as otherwise permitted by the IBM
15 agreements."

16 Does paragraph 19 reflect your
17 understanding, Mr. Wilson?

18 MR. GANT: Objection. Vague, compound,
19 lack of foundation, calls for speculation and for
20 legal conclusions.

21 THE WITNESS: Yes, they do.

22 BY MR. MARRIOTT:

23 Q. In -- in paragraph 20 you say,
24 "Clarifications of the kind reflected in" -- "in
25 paragraph A.2 of the IBM side letter did not

represent a substantive change to the standard software agreement, since AT&T and USL never intended to assert ownership or control over modifications and derivative works prepared by licensees, except to the extent of any material portions of the original UNIX System V source code provided by AT&T or USL and included in such modifications and derivative works."

Do you see that?

A. Yes, I do.

Q. Is there anything about that that you would change, Mr. Wilson?

MR. GANT: Objection. Vague, leading.

THE WITNESS: I do not.

BY MR. MARRIOTT:

Q. You do not --

A. I do not see anything that I would change.

Q. Okay. Thank you.

In the following paragraph you make reference to numerous inquiries received from licensees. Could you explain, please, what you meant by that?

A. We got numerous inquiries -- we were constantly having questions about our licensing agreements and what they meant and how to interpret

this was just clarifications with regard to licensing. That was a section of the newsletter.

BY MR. MARRIOTT:

Q. Did you have any role in reviewing and approving the content of the \$ echo publications?

MR. GANT: Objection. Vague.

THE WITNESS: Yes, I did. I was responsible to ensure the accuracy of the information concerning licensing policies and agreements.

BY MR. MARRIOTT:

Q. In paragraph 23 of your declaration you make reference to seminars at which Mr. Frasure discussed the newsletter. Can you tell -- tell us, please, what you're referring to there?

MR. GANT: Objection. Vague, compound.

THE WITNESS: Just saying in addition to the newsletter, we actually presented the material in the newsletter to our licensees at seminars and conferences that we held for UNIX system licensees.

BY MR. MARRIOTT:

Q. Was the -- withdrawn.

Was the purpose of the \$ echo publication to change the -- the terms or meaning of the AT&T, UNIX licensing agreements?

them. You mean the whole paragraph or just that sentence?

Q. Just that -- you've answered the question.

A. Okay.

Q. Do you -- do you have familiarity with something known as the \$ echo publication?

A. Yes, I do.

Q. And you made reference to that in prior testimony; right?

A. Yes, I did.

Q. Would you just briefly describe what the \$ echo publication was?

A. \$ echo was a newsletter prepared for distribution to our licensees, and it covered product information, licensing information and anything of general interest to all of our licensees as a way to convey it to them.

Q. Did Mr. Frasure have any role with respect to the \$ echo publication?

MR. GANT: Objection. Vague, leading.

THE WITNESS: Mr. Frasure, as long as with other folks in the licensing organization, were contributing to the information concerning licensing that was contained within the \$ echo newsletter. He, among others. In other words,

MR. GANT: Objection. Leading, vague, compound, foundation, calls for speculation and legal conclusions.

THE WITNESS: Our purpose with the newsletter was just to provide information to our licensees, to keep them abreast of what was going on with the product.

MR. GANT: Objection. Move to strike as nonresponsive.

BY MR. MARRIOTT:

Q. What was the purpose of the newsletter, Mr. Wilson?

A. The purpose of the newsletter was to provide information on our licensing agreements and policies, our software products and any -- any other information that would be beneficial to our licensees in using those software products.

Q. And what -- what gave rise to the publication of the newsletter?

MR. GANT: Objection. Vague.

THE WITNESS: The -- the numerous inquiries that we received from our licensees concerning any specific issue. We felt it was a more efficient way to communicate the same message to all licensees in a way that they could receive

1 it without -- you know, try to reduce the number of
2 phone calls we had about repetitive issues that
3 would come up in those inquiries.
4 BY MR. MARRIOTT:
5 Q. Would you read to yourself, please,
6 paragraph 25 of your declaration?
7 A. (THE WITNESS COMPLIED)
8 Q. Do you stand by that statement?
9 MR. GANT: Objection. Leading, vague,
10 compound, foundation, calls for speculation and for
11 legal conclusions.
12 THE WITNESS: Yes, I do.
13 BY MR. MARRIOTT:
14 Q. What is a specimen copy, Mr. Wilson?
15 A. As referenced here, a specimen copy was
16 a -- what do you call it? I'm trying to think of
17 the right term. It was a -- it was a copy of the
18 agreement that could not be executed. It was just
19 a copy of the language.
20 Q. Did the \$ echo publications provide
21 clarification to your licensees concerning AT&T's
22 understanding of the AT&T licensing agreements?
23 MR. GANT: Objection. Leading, vague,
24 foundation, calls for legal conclusions.
25 THE WITNESS: I hope they did. We got

1 good response from the licensing community with the
2 \$ echo once we started putting it out. We had very
3 positive response.
4 BY MR. MARRIOTT:
5 Q. And who -- who did you intend to be the --
6 the beneficiaries of the clarifications made in the
7 \$ echo publications?
8 MR. GANT: Same objections.
9 THE WITNESS: Both the licensing
10 organization and our licensees, because it was a --
11 it was a way -- a way of communicating. And so it
12 was to our mutual benefit. Us, by not having to
13 keep answering the same questions, and, also, it
14 assured our licensees that the information being
15 provided was being provided to everyone.
16 BY MR. MARRIOTT:
17 Q. Are you familiar with the term side
18 letter?
19 A. Yes, yes.
20 MR. MARRIOTT: You're very good at helping
21 him.
22 MR. GANT: I appreciate it, as does the
23 court reporter, I'm sure.
24 THE WITNESS: Uh-huh.
25 BY MR. MARRIOTT:

1 Q. What is a side letter, Mr. Wilson?
2 A. A side letter is a term that we use to --
3 to classify a document that was written in response
4 to an inquiry about the base software agreement or
5 the sublicense agreement, what have you. So it was
6 a -- usually a clarification or a modification of
7 terms.
8 Q. In paragraph --
9 MR. GANT: I'm sorry. I wanted that read
10 back. I'm sorry. I didn't mean to -- the question
11 and the answer.
12 (REQUESTED PORTION OF THE RECORD READ)
13 BY MR. MARRIOTT:
14 Q. I think that got a little confused. Let
15 me ask you, by way of clarification, Mr. Wilson,
16 you say in paragraph 27 of your affidavit, "Whether
17 or not we entered into a side letter or other
18 agreements with our licensees to clarify the
19 treatment of modifications and derivative works or
20 altered the language of section 2.01, AT&T's and
21 USL's intent was always the same." What do you
22 mean by that, sir?
23 MR. GANT: Objection. Leading, vague,
24 compound.
25 THE WITNESS: What I meant by that is

1 section 2.01 in its original presentation, as well
2 as the -- the clarification that we provided later,
3 the intent behind the language in both cases was
4 the same. It was just another way of stating what
5 was meant by our intent in writing the language the
6 way we did.
7 BY MR. MARRIOTT:
8 Q. In the next sentence in paragraph 27 you
9 indicate that, "We never intended to assert
10 ownership or control over any portion of a
11 modification or derivative work that was not part
12 of the original UNIX System V source code provided
13 by AT&T or USL."
14 "The licensee was free to use, copy,
15 distribute or disclose its modifications and
16 derivative works, provided that it did not use,
17 copy, distribute or disclose any portions of the
18 original UNIX System V source code provided by AT&T
19 or USL, except as permitted by the license
20 agreements."
21 You say, Mr. Wilson, there that you never
22 intended to assert such ownership or control. Why
23 is that, sir?
24 MR. GANT: Same objections.
25 THE WITNESS: That -- that just was not

our intent. We did not -- we did not want ownership in any product that was created by or for our licensees. We only wanted to protect the underlying software product provided under the licensing agreement.

MR. GANT: Move to strike as nonresponsive.

BY MR. MARRIOTT:

Q. Did AT&T, Mr. Wilson, intend to assert ownership or control over any portion of a modification or derivative work that was not part of the original UNIX System V source code provided by AT&T or USL?

MR. GANT: Objection. Vague, compound, foundation, calls for speculation and legal conclusions.

THE WITNESS: No.

BY MR. MARRIOTT:

Q. Let me direct your attention, if I may --

MR. MARRIOTT: And I propose, if it's agreeable, that upon conclusion of this declaration we take a little break, if that's okay?

MR. GANT: That's fine.

BY MR. MARRIOTT:

Q. Okay. Let me just direct your attention

1 Do the contents of that paragraph reflect
2 your intent, Mr. Wilson?

3 MR. GANT: Objection. Leading, vague,
4 compound.

5 THE WITNESS: Yes, it does.

6 BY MR. MARRIOTT:

7 Q. And do you believe the contents of
8 paragraph 28 reflect the intent of those with whom
9 you worked while employed at AT&T?

10 MR. GANT: Same objection, and, also,
11 foundation. It calls for speculation and legal
12 conclusions.

13 THE WITNESS: Yes, I do.

14 BY MR. MARRIOTT:

15 Q. Would you take a look, please, at
16 paragraph 29. You say there that, "I understand
17 that plaintiff claims that IBM and Sequent have
18 breached the IBM agreements and the Sequent
19 agreements by improperly using, exporting,
20 disclosing or transferring AIX and Dynix/PTX source
21 code, irrespective of whether IBM or Sequent have
22 disclosed any specific protected source code copied
23 from the UNIX System V source code provided by AT&T
24 or USL."

25 What is the basis of your understanding

to paragraph 28, Mr. Wilson. There you say, "My understanding is that IBM's AIX and Sequent's Dynix," slash, "PTX operating system products include some UNIX System V source code.

"I do not know whether AIX and Dynix/PTX are sufficiently similar to UNIX System V that they would constitute modifications of or derivative works based on UNIX System V. However, even if AIX or Dynix/PTX were modifications of or derivative works based on UNIX System V, IBM and Sequent are free to use, export, disclose or transfer AIX and Dynix/PTX source code, provided that they do not use, export, disclose or transfer any UNIX System V source code provided by AT&T or USL, except as otherwise permitted by the agreements.

"Therefore, IBM and Sequent are free, under the IBM agreements and the Sequent agreements, to open source all of AIX and Dynix/PTX, other than those portions of the original UNIX System V source code included therein.

"Even portions of the original UNIX System V source code included in AIX and Dynix/PTX may be open sourced to the extent permitted by the IBM agreements and the Sequent agreements."

1 about what it is that the plaintiff in this
2 litigation claims, Mr. Wilson?

3 (DISCUSSION OFF THE RECORD)

4 THE WITNESS: I think it's stated there.

5 In other words -- and this is sort of what was
6 related to me. That there was a -- that the
7 plaintiff claimed that they could -- they were
8 improperly distributing copies of their -- their
9 system, because of its association with the UNIX
10 System V products.

11 BY MR. MARRIOTT:

12 Q. Let me clarify my question a little. What
13 I'm really just asking you is: Is whether -- have
14 you read the Complaint in this case, Mr. Wilson?

15 A. I have not.

16 Q. For your understanding of what the
17 plaintiff -- what the plaintiff claims here, you
18 rely upon whom?

19 A. When I discussed it with the -- when I was
20 discussing preparing for this declaration with the
21 attorneys.

22 Q. When you say, "the attorneys," you're
23 referring to what the IBM attorneys described to
24 you as being the contentions made by the plaintiff;
25 is that right?

1 A. That's correct.
2 Q. You say in paragraph 29, "In my view,
3 these claims are inconsistent with the provisions
4 of the IBM agreements and the Sequent agreements.
5 I do not believe that anyone at AT&T or USL
6 intended these agreements to be construed in this
7 way."

8 For how long, Mr. Wilson, did you work
9 with the AT&T, UNIX licensing agreements?

10 MR. GANT: I'm going to object to the
11 question as vague. You quoted from a paragraph,
12 and then you asked a seemingly unrelated question.
13 So if you're intending to link them somehow, I'm
14 going to object to that and object to the question
15 as vague and lacking foundation.

16 MR. MARRIOTT: Okay. Do you need the
17 question read back?

18 THE WITNESS: Yes.

19 MR. GANT: Stipulate the same objections;
20 right, David?

21 MR. MARRIOTT: I don't think we need to
22 stipulate. Just so it's clear, I think they're on
23 the record. So when she repeats the question, she
24 doesn't re-type it. So --

25 (PREVIOUS QUESTION THEN READ)

1 except for any protected UNIX System V source code
2 provided by AT&T or USL actually included in them,
3 because they are owned by the licensees?

4 MR. GANT: Same objections.

5 THE WITNESS: Yes. I believe that to be
6 true.

7 BY MR. MARRIOTT:

8 Q. In paragraph 30 of your declaration you
9 state, "In my view, any claim that the IBM software
10 agreement and the Sequent software agreement
11 prohibit the use, export, disclosure or transfer of
12 any code other than UNIX System V code is clearly
13 wrong. Not only did we at AT&T not intend the
14 agreements to be read that way, but we also went
15 out of our way to assure our licensees that that is
16 not what the agreements meant."

17 Is that an accurate statement?

18 MR. GANT: Same objections.

19 THE WITNESS: Yes. Yes, it is.

20 BY MR. MARRIOTT:

21 Q. And, finally, in paragraph 31, Mr. Wilson,
22 you state that all of the statements made in your
23 declaration in Exhibit 76 are made under penalty of
24 perjury; is that right?

25 A. That's correct.

1 (DISCUSSION OFF THE RECORD)

2 BY MR. MARRIOTT:

3 Q. Okay. During what period of time,
4 Mr. Wilson, did you -- did you work with the AT&T,
5 UNIX licensing agreements?

6 MR. GANT: Objection. Vague.

7 THE WITNESS: Through the period of 1980
8 through 1991.

9 BY MR. MARRIOTT:

10 Q. And based upon your having worked with
11 those agreements during that period do you believe
12 that anyone at AT&T or USL intended those
13 agreements to be construed in the way described in
14 paragraph 29 as being the claim of the plaintiff in
15 this litigation?

16 MR. GANT: Objection. Leading, vague,
17 compound, lack of foundation, calls for speculation
18 and for legal conclusions.

19 THE WITNESS: I do not.

20 BY MR. MARRIOTT:

21 Q. To the best of your understanding, is it
22 an accurate statement that modifications and
23 derivative works under these AT&T, UNIX licensing
24 agreements are not subject to the confidentiality
25 and other restrictions contained in the agreements,

1 MR. MARRIOTT: Okay. Should we take a
2 break?

3 THE VIDEOGRAPHER: One moment, please.
4 This marks the end of tape number one in
5 the deposition of Otis Wilson. Going off the
6 record. The time is 10:57 a.m.

7 (RECESS TAKEN AT 10:57 A.M. TO 11:21 A.M.)

8 THE VIDEOGRAPHER: Back on the record.
9 Here marks the beginning of tape number two in the
10 deposition of Otis Wilson. The time is 11:21 a.m.
11 Please, continue.

12 BY MR. MARRIOTT:

13 Q. Mr. Wilson, I hand you what has been
14 previously marked as Exhibit 77, which I believe is
15 a copy of the subpoena served on you in -- in
16 connection with this matter. Could you, please,
17 just tell me if that's the subpoena served on you
18 and whether you're appearing pursuant to the
19 subpoena?

20 A. Yes, it is, and I am.

21 Q. Thank you, sir.

22 A. Uh-huh.

23 Q. Let me now show you what I've previously
24 marked as Exhibit 78, which is a copy of a letter
25 sent from me to you on April 6th, 2004. Would you

1 take a look at that, please, and tell me if you've
2 seen that before?

3 A. Yes, I have.

4 Q. Would you just take a look in particular
5 at paragraph two and tell me whether that reflects
6 the circumstances under which you came to be
7 represented by -- by my law firm?

8 A. Yes.

9 Q. Okay.

10 MR. GANT: Yes, you can tell him, or, yes,
11 it is?

12 THE WITNESS: Yes, it is.

13 MR. MARRIOTT: Thank you.

14 BY MR. MARRIOTT:

15 Q. Let me direct your attention now, if I
16 may, Mr. Wilson, to Exhibit 75, which has been
17 previously marked. This is, I believe, a copy of
18 your declaration, dated December 11, 2003?

19 A. That's correct.

20 Q. How did you come to sign this declaration,
21 Mr. Wilson?

22 MR. GANT: Objection. Vague.

23 THE WITNESS: This -- this is what I was
24 asked to sign.

25 (MR. DAVIS THEN EXITED THE ROOM)

1 MR. GANT: Okay. I thought you said
2 paragraph six. I think you did, which is why I
3 couldn't find it.

4 MR. MARRIOTT: I apologize. It's
5 paragraph six, page 14.

6 BY MR. MARRIOTT:

7 Q. A reference is made there on page six,
8 paragraph 14 to methods or concepts. Is that a
9 term with which you're familiar, Mr. Wilson?

10 A. Yes, it is.

11 (MR. DAVIS THEN RE-ENTERED THE ROOM)

12 Q. And what rights as you understand IBM's
13 UNIX licensing agreements with AT&T does IBM have
14 with respect to the methods or the concepts of UNIX
15 System V?

16 MR. MARRIOTT: Could I have the question
17 read back?

18 (PREVIOUS QUESTION THEN READ)

19 MR. GANT: Are you sticking --

20 MR. MARRIOTT: Let me restate the
21 question.

22 MR. GANT: Okay.

23 BY MR. MARRIOTT:

24 Q. You're familiar with the term methods or
25 concepts; right?

35

36

37

1 Q. And you signed it, because you believe
2 it's true and correct?

3 MR. GANT: Objection. Leading, vague,
4 compound.

5 Q. Why did you sign the declaration,
6 Mr. Wilson?

7 A. This -- it represented the declaration I
8 made, and it's been written up, and I agree with
9 it, and so I signed it after reading it.

10 MR. GANT: Could you read back the answer,
11 and if David would like the question too, that's
12 fine.

13 MR. MARRIOTT: Sure.

14 MR. GANT: Thank you.

15 (REQUESTED PORTION OF THE RECORD READ)

16 BY MR. MARRIOTT:

17 Q. Let me direct your attention, please, to
18 paragraph six of the declaration.

19 A. Okay.

20 Q. A reference is made here to methods or
21 concepts. I believe you testified earlier that
22 that's a term with which you're familiar. Do you
23 recall that testimony?

24 MR. MARRIOTT: I'm on page six, at
25 paragraph 14, for example.

1 A. Yes, I am.

2 Q. As you understand IBM's UNIX licensing --
3 licensing agreements with AT&T, what rights does
4 IBM have with respect to the methods and concepts
5 of UNIX?

6 MR. GANT: Objection. Vague, compound,
7 lack of foundation, calls for speculation and legal
8 conclusions.

9 THE WITNESS: Of -- the phrase methods and
10 concepts was deleted from the IBM software
11 agreements.

12 MR. GANT: Objection. Move to strike as
13 nonresponsive.

14 BY MR. MARRIOTT:

15 Q. Do you have an understanding, Mr. Wilson,
16 as to whether the term methods or concepts was
17 deleted from IBM's licensing agreements with AT&T?

18 MR. GANT: Objection. Foundation, calls
19 for speculation and legal conclusions.

20 THE WITNESS: Yes, it was deleted.

21 BY MR. MARRIOTT:

22 Q. Okay. And what is your understanding as
23 to why it was deleted?

24 MR. GANT: Same objection, as in vague.

25 THE WITNESS: It was no longer applicable.

1 The -- there was nothing that we could really
2 define as methods and concepts at this time that
3 would be -- would be protected. So we just removed
4 it from the agreement.

5 BY MR. MARRIOTT:

6 Q. Is there anything, to your understanding,
7 that IBM cannot do properly with respect to UNIX
8 methods or concepts?

9 MR. GANT: Objection. Leading, vague,
10 foundation, compound, calls for speculation and
11 legal conclusions.

12 THE WITNESS: However you might want to
13 define methods and concepts, it just was no longer
14 applicable to the IBM software agreement. So
15 anything contained therein that might be considered
16 a method or concept is -- is no longer applicable.

17 BY MR. MARRIOTT:

18 Q. As you understand AT&T's intent, at least
19 by the time you left the company, did AT&T seek to
20 enforce rights to methods or concepts of UNIX as
21 they related to any of its licensees?

22 MR. GANT: Objection. Leading, vague,
23 compound, lack of foundation, calls for speculation
24 and for legal conclusions.

25 THE WITNESS: We did not.

1 BY MR. MARRIOTT:

2 Q. Would you take a look, please, Mr. Wilson,
3 at paragraphs 12 through 15 of your declaration
4 that appears in Exhibit 75, and read those to
5 yourself and tell me when you've had the
6 opportunity to do that?

7 MR. GANT: That was 12 through 15?

8 MR. MARRIOTT: Yes.

9 THE WITNESS: Okay.

10 BY MR. MARRIOTT:

11 Q. Is there anything about the content of
12 paragraphs 12 through 15 that you would change,
13 Mr. Wilson?

14 MR. GANT: Objection. Vague, compound,
15 lack of foundation.

16 THE WITNESS: I would not.

17 BY MR. MARRIOTT:

18 Q. Paragraph 16 of your declaration states
19 that, "IBM had no confidentiality obligation with
20 respect to any UNIX System V information, other
21 than to refrain from disclosing the actual UNIX
22 System V source code provided by AT&T and USL, and
23 to refrain from referring to that source code while
24 developing or providing products or services. IBM
25 was free to use and disclose any of the ideas,

1 concepts, know-how, methods or techniques embodied
2 in the software products."

3 Why did you say that, Mr. Wilson?

4 MR. GANT: Objection. Vague and leading.

5 THE WITNESS: In reading this again, it's
6 probably a little -- it's -- it's clear to me, but
7 I can see if someone else is reading it -- because
8 it says -- a clarification of this -- this
9 statement here.

10 BY MR. MARRIOTT:

11 Q. Sure. How would you clarify the contents
12 of paragraph 16?

13 A. Paragraph 16 is -- where it picks up,
14 "other than to refrain from disclosing the actual
15 UNIX System V source code," that should really be,
16 "software product."

17 Q. Okay. Is there anything else about
18 paragraph 16 that you would change for
19 clarification?

20 A. I would not.

21 (DISCUSSION OFF THE RECORD)

22 BY MR. MARRIOTT:

23 Q. In paragraph 17 you say, "I did not view
24 these changes," referring to the changes made by
25 the side letter referenced in the preceding

1 paragraphs, "as substantive. They were all
2 clarifications.

3 "Even though we may have" -- "have entered
4 into side letters or other agreements with a number
5 of licensees that clarified the confidentiality
6 restrictions and other provisions in the standard
7 software agreement, my intent was always to treat
8 all licensees the same."

9 Why was it your intent to treat all
10 licensees the same, Mr. Wilson?

11 MR. GANT: Objection. Vague, compound,
12 lack of foundation.

13 THE WITNESS: We were very careful to make
14 sure that all licensees and all licensing
15 agreements were the same for -- for all of our
16 licensees.

17 In other words, they were -- it was just a
18 matter of policy that no -- any -- any right or
19 clarification that we would give to any one
20 licensee, we would give to all of our licensees.

21 BY MR. MARRIOTT:

22 Q. In -- in the following sections of 17 you
23 say, "In fact, clarifications provided to
24 particular licensees in side letters were generally
25 shared with other licensees through informal