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International Business Machines Corporation

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

THE SCO GROUP, INC., Plaintiff/Counterclaim-Defendant, -against- INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant/Counterclaim-Plaintiff.	Civil No. 2:03CV-0294 DAK Honorable Dale A. Kimball Magistrate Judge Brooke C. Wells

DECLARATION OF ROGER C. SWANSON

I, Roger C. Swanson, declare as follows:

1.   I was employed by Sequent Computer Systems, Inc. ("Sequent") from January 1983 through late 1999. For a short period of time after Sequent was acquired by International Business Machines Corporation ("IBM") in 1999, I was employed by IBM, until April 2000.

2.   From January 1983 until late 1988, I served as Sequent's Director of Software Engineering. As Director of Software Engineering, I was involved in negotiating several agreements with AT&T Technologies, Inc. ("AT&T Technologies") for the licensing of certain UNIX software and related materials. I reported to David Rodgers, Sequent's Vice President of Engineering, during this time.

3.   In particular, I was responsible for negotiating, on Sequent's behalf, the following agreements between Sequent and AT&T Technologies:

- the Software Agreement (Agreement Number SOFT-00321) dated April 18, 1985 (the "Software Agreement"),
- the Sublicensing Agreement (Agreement Number SUB-00321A) dated January 28, 1996 (the "Sublicensing Agreement"),
- the Substitution Agreement (Agreement Number XFER-000321B) dated January 28, 1986 (the "Substitution Agreement").

True and correct copies of these agreements, referred to herein as the "AT&T Agreements", are attached as Exhibits 1, 2 and 3 to this Declaration.

4.   This declaration is submitted in connection with the lawsuit entitled The SCO Group, Inc. v. International Business Machines Corporation, Civil Action No. 2:03CV-0294 DAK (D. Utah 2003). Except as stated otherwise, this declaration is based upon personal knowledge.

5.   Based on my role in negotiating the AT&T Agreements with representatives of AT&T Technologies, I believe I have personal knowledge of the parties' understanding of, and intent behind, the terms and conditions of the agreements.

6.   It was my understanding from the AT&T Technologies representatives with whom I negotiated (including Ira Kistenberg) that the licensing agreements Sequent entered into were standard form agreements used by AT&T Technologies to license its UNIX System V software product to its users.

7.   The standard "Software Agreement" that AT&T Technologies used to license UNIX System V source code and related materials—which are referred to as the "SOFTWARE PRODUCT" or "SOFTWARE PRODUCTS" in the agreement— granted licensees such as Sequent the right to use such code subject to various restrictions.

8.   The Software Agreement that Sequent entered into with AT&T Technologies contains the following provisions, for example:

- Section 2.01 granted licensees a "personal, nontransferable and nonexclusive right to use in the United States each SOFTWARE PRODUCT identified in the one or more Supplements hereto, solely for LICENSEE's own internal business purposes."

- Section 2.05 provided: "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."

- Section 4.01 provided: "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."

- Section 7.06(a) provided: "LICENSEE agrees that it shall hold all parts of the SOFTWARE PRODUCTS subject to this Agreement in confidence for AT&T."

- Section 7.10 provided: "Except as provided in Section 7.06(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."

As I understood these provisions from my discussions with AT&T Technologies, they set forth the terms that Sequent had to follow with respect to the UNIX System V source code we were licensing from AT&T Technologies. I did not understand the Software Agreement to restrict Sequent's use, export, disclosure or transfer of anything other than such UNIX System V code, and certainly not any code written by Sequent for any of its own software programs.

9.   The Software Agreement also granted Sequent the right to modify and to prepare derivative works based upon UNIX System V source code. Section 2.01 of the Software Agreement states that Sequent's "right to use includes the right to modify such SOFTWARE PRODUCT and to prepare derivative works based on such SOFTWARE PRODUCT, provided that the resulting materials are treated hereunder as part of the original SOFTWARE PRODUCT."

10.   I did not understand this language in Section 2.01 to give AT&T Technologies the right to assert ownership or control over modifications or derivative works based on UNIX System V prepared by Sequent, except for the licensed UNIX System V code that was included in such modifications or derivative works. In fact, I recall having discussions with AT&T Technologies at the time to clarify that Sequent would own whatever source code we developed.

11.   As a small company at the time, it would not have made any sense for Sequent to have entered into an agreement that gave AT&T Technologies control over the source code that we developed for our own software programs. I never would

have agreed to a contract that would grant AT&T Technologies rights in Sequent's proprietary code, as that source code was the core of Sequent's software business.
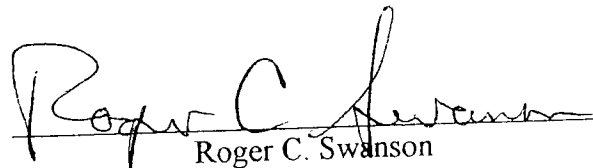
12.   As AT&T Technologies explained the agreements to me, Sequent was free to use, export, disclose or transfer all of the code contained in any modifications or derivative works of UNIX System V developed by Sequent, provided that Sequent did not improperly use, export, disclose or transfer any portion of the UNIX System V code we were licensing from AT&T Technologies (except as otherwise permitted by the licensing agreements).

13.   I was the manager of the organization responsible for developing Sequent's Dynix and Dynix/ptx products, but I was not one of the software developers who had hands-on involvement with the source code for Dynix or Dynix/ptx. In any case, as I understood the AT&T Agreements, Sequent was free to use the original source code it developed for Dynix and Dynix/ptx in any way it desired, provided that Sequent treated any UNIX System V source code that might be contained therein consistent with the terms of the AT&T Agreements.

14.   I declare under penalty of perjury that the foregoing is true and correct.

Executed: July 28, 2004.

Portland, Oregon

Roger C. Swanson