

SNELL & WILMER LLP
Alan L. Sullivan (3152)
Todd M. Shaughnessy (6651)
15 West South Temple
Gateway Tower West
Salt Lake City, Utah 84101-1004
Telephone: (801) 257-1900
Facsimile: (801) 257-1800

CRAVATH, SWAINE & MOORE LLP
Evan R. Chesler (admitted pro hac vice)
Thomas G. Rafferty (admitted pro hac vice)
David R. Marriott (7572)
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019
Telephone: (212) 474-1000
Facsimile: (212) 474-3700

*Attorneys for Defendant/Counterclaim-Plaintiff
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 STEPHEN D. VUKSANOVICH

I, Stephen D. Vuksanovich, declare as follows:

1. From 1984 to 1993, I was an account representative responsible for licensing UNIX software and related materials, first with AT&T Technologies, Inc. ("AT&T Technologies"), then with UNIX System Laboratories, Inc. ("USL") and finally with Novell, Inc. ("Novell").

2. 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.

3. In 1959, I began working for Western Electric, a wholly owned subsidiary of American Telephone and Telegraph Company ("AT&T"). From 1959 until 1964, I was loaned from Western Electric to Bell Laboratories ("Bell Labs"), the research and development arm of AT&T. Some time in 1964, I returned to Western Electric in North Carolina, working first in the Winston-Salem office, and then in the Burlington office.

4. In 1972, I again was loaned from Western Electric to Bell Labs—this time working on a classified military project in Kwajalein, Marshall Islands. I left the project in 1974 and moved to the Naperville, Illinois office of Bell Labs, still on loan from Western Electric. Around December 1975, I returned to North Carolina to work for Western Electric International, where I stayed until about 1980. In 1980, I returned to Western Electric. After AT&T's divestiture in 1984, Western Electric ceased to exist, and I became employed by AT&T Technologies.

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5. In 1989, AT&T Technologies organized the various groups responsible for UNIX software and associated software products and services into a separate business unit, known as the UNIX Software Operation. This unit was subsequently incorporated as a separate AT&T subsidiary, USL. In June 1993, Novell acquired USL and I became employed by Novell. In December 1993, I left Novell to return to AT&T.

6. During the time I was at AT&T Technologies, USL and Novell, from approximately 1984 until 1993, I was an account representative responsible for licensing UNIX System V software to a number of different licensees. As an account representative, I helped negotiate many licensing agreements for the UNIX software over the years.

7. Among the licensees I was responsible for was International Business Machines Corporation ("IBM"). As IBM's account representative, I negotiated on behalf of AT&T Technologies, and have extensive firsthand knowledge of, the following agreements between AT&T Technologies and IBM relating to UNIX System V: the Software Agreement (Agreement Number SOFT-00015) dated February 1, 1985; the Sublicensing Agreement (Agreement Number SUB-00015A) dated February 1, 1985; the Substitution Agreement (Agreement Number XFER-00015B) dated February 1, 1985; and the letter agreement dated February 1, 1985. True and correct copies of these agreements are attached hereto as Exhibits 1 through 4. These agreements are referred to herein as the "IBM Agreements."

8. I became the account representative responsible for our account with Sequent Computer Systems, Inc. ("Sequent") after Ira Kistenberg left the licensing

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group. Although I did not participate in the negotiation of the following agreements with Sequent, I am familiar with them based on my role in administering Sequent's account in subsequent years: the Software Agreement (Agreement Number SOFT-000321) dated April 18, 1985; the Sublicensing Agreement (Agreement Number SUB-000321A) dated January 28, 1986; and the Substitution Agreement (Agreement Number XFER-000321B) dated January 28, 1986. True and correct copies of these agreements are attached hereto as Exhibits 5 through 7. These agreements are referred to herein as the "Sequent Agreements."

9. Based upon my duties and responsibilities at AT&T Technologies, USL and Novell, I have firsthand knowledge and experience regarding the UNIX System V license agreements described in this declaration, including, in particular, the IBM Agreements and the Sequent Agreements. I believe I know what the parties to these agreements understood them to mean and intended them to accomplish.

10. During the period from 1984 through 1993, AT&T Technologies, USL and Novell licensed UNIX System V software and related materials to hundreds of licensees around the world. We entered into standard form agreements with our licensees and generally intended to treat all of our licensees in the same way.

11. The standard UNIX System V software agreement we entered into with our licensees granted licensees the right to use the UNIX System V source code and related materials—referred to as the "SOFTWARE PRODUCT" or "SOFTWARE PRODUCTS" in the agreement—and also placed certain restrictions on that use.

12. For example, in early versions of the standard software agreement used by AT&T Technologies to license UNIX System V, including the IBM Software Agreement and the Sequent Software Agreement:

- 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."

These provisions were only meant to define the scope of our licensees' rights with respect to the "SOFTWARE PRODUCT" or "SOFTWARE PRODUCTS", in other words, the UNIX System V source code and related materials. As I told the licensees for whom I was responsible, we did not intend these provisions to restrict our licensees' use, export, disclosure or transfer of any source code that our licensees developed on their own. During the months we spent negotiating the IBM Agreements, we made this very clear to IBM.

13. Our standard software agreements also gave licensees the right to modify UNIX System V source code and to prepare derivative works based upon the code. As I believe we intended the agreements, and as I told our licensees, our licensees

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owned their modifications and derivative works they prepared based on UNIX System V, and were therefore permitted to do as they wished with those modifications and derivative works, as long as they treated those portions of the modifications or derivative work consisting of any UNIX System V source code the same way they treated the UNIX System V source code that we provided to them. I recall that during our negotiations IBM specifically wanted to make sure that IBM, and not AT&T, would own and control code that was developed by or for IBM, even if that code was mixed with AT&T's UNIX System V code in a product. I assured IBM that we had the same understanding.

14. In initial versions of the standard software agreement used by AT&T Technologies, including the IBM Software Agreement and the Sequent Software Agreement, Section 2.01 included the following language regarding modifications and derivative works:

Such right to use includes the right to modify such SOFTWARE PRODUCT and to prepare derivative works based on such SOFTWARE PRODUCT, provided the resulting materials are treated hereunder as part of the original SOFTWARE PRODUCT.

As I communicated to our licensees during negotiations, and in particular to IBM, this language did not give AT&T Technologies the right to assert ownership or control over modifications or derivative works prepared by its licensees, except to the extent of the UNIX System V source code that was included in such modifications or derivative works.

15. Some of our licensees in fact sought to clarify that they, not AT&T Technologies, would own and control their modifications and derivative works. We always provided this requested clarification, both orally and in writing, when asked

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because it was consistent with what we had intended the language in Section 2.01 of the standard software agreement to mean all along.

16. As I mentioned, IBM was one of our licensees that was particularly interested in clarifying that it owned the code that it developed, even if it was meshed with UNIX System V. We therefore gave IBM written clarification of this in the side letter agreement, which I participated in negotiating with IBM. Paragraph A.2 of the side letter stated:

Regarding Section 2.01, we agree that modifications and derivative works prepared by or for [IBM] are owned by [IBM]. However, ownership of any portion or portions of SOFTWARE PRODUCTS included in any such modification or derivative work remains with [AT&T Technologies].

This language in the side letter was intended to address IBM's concerns. This clarification did not, however, represent a substantive change to the standard software agreement. We were only trying to make more clear what we thought our standard software agreement meant in the first place. AT&T never intended to assert ownership or control over IBM's modifications or derivative works, except to the extent of the UNIX System V source code included in such modifications or derivative works.

17. In fact, since so many licensees had requested clarification of Section 2.01 of standard software agreement in particular, we ultimately decided to change the language of Section 2.01 to better reflect what we had always understood the language to mean and what we always told our licensees the language meant.

18. In early 1985, therefore, at seminars hosted by AT&T Technologies and in a newsletter called "\$ echo", we told our licensees that we would be modifying the language of our standard software agreements to clarify even further that

licensees owned their modifications and derivative works, except for the licensed UNIX System V source code included in such modifications and derivative works.

19. I did not have any responsibility for preparing the *\$ echo* newsletters, but I did review them at the time they were created and am familiar with their content. The *\$ echo* newsletter was published by the licensing group at AT&T Technologies and was intended to communicate and apply to all our licensees.

20. The April 1985 edition of *\$ echo*, a true and correct copy of which is attached hereto as Exhibit 8, summarizes presentations made by my direct supervisor David Frasure at seminars hosted by AT&T Technologies in New York and Santa Clara. I believe that I attended and participated in the presentation that we made in New York.

21. With respect to Section 2.01 of the software agreement, the newsletter states that "[l]anguage changes will be made to clarify ownership of modifications or derivative works prepared by a licensee." As is stated in the newsletter, and as I communicated to the various licensees that I was responsible for, the changes we planned on making to Section 2.01 did not alter the meaning of the standard software agreements that our UNIX System V licensees had already entered into, but instead were intended to provide further clarification as to the original intent of the section. I recall telling a number of our licensees that this language was just to make the standard software agreement more clear for their benefit.

22. The August 1985 edition of *\$ echo*, a true and correct copy of which is attached hereto as Exhibit 9, describes the changes we made to the standard software agreement. With respect to Section 2.01, the newsletter states:

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Section 2.01 - The last sentence was added to assure licensees that AT&T will claim no ownership in the software that they developed -- only the portion of the software developed by AT&T.

This is consistent with our position that the new language we added to the standard software agreement was meant only to clarify the original intent of Section 2.01 that AT&T Technologies did not claim any right to our licensees' original work contained in modifications or derivatives of UNIX System V. The language did not represent in any way a departure from the original intent of Section 2.01.

23. An example of the revised language referred to in the *\$ echo* newsletter appears in Section 2.01 of a software agreement between AT&T Information Systems Inc. and The Santa Cruz Operation, Inc. ("Santa Cruz") entered into in May 1987, a true and correct copy of which is attached hereto as Exhibit 10.

24. The agreement with Santa Cruz includes the following language:

Such right to use includes the right to modify such SOFTWARE PRODUCT and to prepare derivative works based on such SOFTWARE PRODUCT, provided that any such modification or derivative work *that contains any part of a SOFTWARE PRODUCT subject to this Agreement* is treated hereunder the same as such SOFTWARE PRODUCT. *AT&T-IS claims no ownership interest in any portion of such a modification or derivative work that is not part of a SOFTWARE PRODUCT.* (emphasis added).

This revised language was intended only to clarify the original meaning of Section 2.01 in the standard software agreement, not to change it. We interpreted Section 2.01 of all of our software agreements the same way.

25. When we used the term "ownership", both in our conversations with our licensees and in our agreements, we meant ownership in every sense of the word. When we said to our licensees that they owned their code and we owned our code, we meant that our licensees were free to do whatever they wanted with their code,

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without any restriction, and that we, of course, were free to do whatever we wanted with our UNIX System V code, without any restrictions.

26. Although the *\$ echo* newsletter notes that all UNIX System V licensees could request "specimen copies" of the revised software agreement, we did not require our licensees such as IBM and Sequent to enter into a new agreement. We intended the clarified language of Section 2.01 (and other sections) to apply to all of our UNIX System V licensees, regardless of which version of the standard software agreement they had entered into.

27. Regardless of what version of the agreement our licensees had, or whether or not they had side letter agreements, we generally intended to treat our licensees the same way. To my knowledge, no one at AT&T Technologies ever intended to assert ownership or control over any portion of a modification or derivative work that was not part of our licensed UNIX System V source code base. Provided that it did not copy, distribute or disclose any portion of the licensed UNIX System V source code (except as otherwise permitted by the license agreements), the licensee was free to use, copy, distribute or disclose such modifications or derivative works as it desired.

28. From time to time, AT&T Technologies in fact desired to integrate into UNIX System V software technology developed by one of our licensees for its own sublicensed product. In such instances, we entered into a cooperative development agreements with the licensee because, in the absence of such an agreement, we did not have rights to the works prepared by the licensee, even if they were modifications or derivative works of UNIX System V. Under the license agreements, we did not even

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have access to the modifications and derivative works developed by our licensees in either source or object code form.

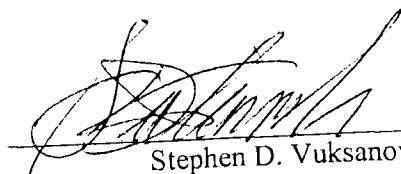
29. To my knowledge, IBM's AIX product and Sequent's Dynix/PTX product include some licensed UNIX System V source code, but I do not know whether AIX and Dynix/PTX are so similar to UNIX System V that they can be viewed as modifications of, or derivative works based on, UNIX System V. At any rate, as I understand the IBM Agreements and the Sequent Agreements, IBM and Sequent are free to use, export, disclose or transfer AIX and Dynix/PTX source code, so long as they do not export, disclose or transfer any portions of the licensed UNIX System V source code that might be contained therein.

30. I understand that plaintiff claims that IBM and Sequent have breached their license agreement with AT&T Technologies by improperly using, exporting, disclosing or transferring AIX and Dynix/PTX source code, irrespective of whether IBM or Sequent has disclosed any specific protected source code from UNIX System V. At least as I understand the IBM Agreements and the Sequent Agreements, that is completely inconsistent with what the parties intended and discussed during the negotiation of the agreements.

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

Executed: Aug 9, 2004.

Pfafftown, North Carolina


Stephen D. Vuksanovich