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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

SCO GROUP, INC.,
Plaintiff/Counterclaim-Defendant,
-vs-
INTERNATIONAL BUSINESS MACHINES,
CORPORATION,
Defendant/Counterclaim-Plaintiff.)

2:03-CV-294 DAK

COPY

BEFORE THE HONORABLE DALE A. KIMBALL

DATE: SEPTEMBER 15, 2004

REPORTER'S TRANSCRIPT OF PROCEEDINGS

ARGUMENT ON MOTION

Reporter: REBECCA JANKE, CSR, RMR

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1 SEPTEMBER 15, 2004

SALT LAKE CITY, UTAH

2 P R O C E E D I N G S

3 * * *

4 THE COURT: We're here this afternoon in the
5 matter of the SCO Group vs. International Business
6 Machines, 2:03-CV-294. For plaintiff, Mr. Frederick Frei,
7 Mr. Brent Hatch, Mr. Mark James and Mr. Robert Silver.

8 For defendant, Mr. Evan Chesler.

9 MR. CHESLER: Good afternoon, Your Honor.

10 THE COURT: Mr. David Marriott.

11 MR. MARRIOTT: Good afternoon, Your Honor.

12 THE COURT: Good afternoon.

13 Mr. Todd Shaughnessy.

14 MR. SHAUGHNESSY: Good afternoon, Your Honor.

15 THE COURT: And Mr. Chris Kao, correct?

16 MR. KAO: (Nods)

17 THE COURT: There are four motions set for
18 hearing today: SCO's motion to dismiss or, in the
19 alternative, stay defendant's counterclaim 10, Count X;
20 IBM's motion for partial summary judgment on IBM's Tenth
21 Counterclaim; Plaintiff SCO's Rule 56(f) motion; IBM's
22 motion to strike material submitted by SCO in opposition to
23 IBM's cross-motion for partial summary judgment.

24 Let's argue this way. Let's take SCO's motion to
25 dismiss or, in the alternative, stay, and argue that one.

1 And then the other three we'll argue together.

2 MR. HATCH: Your Honor, Mr. James will be
3 handling the motion to dismiss. We also had filed recently
4 an expedited motion to deal with some of the discovery
5 issues as well.

6 THE COURT: That hasn't been responded to. It's
7 not in front of me today.

8 MR. HATCH: Okay, Your Honor. We're hoping, at
9 some point, maybe, we can discuss some scheduling issues
10 and other issues as well.

11 THE COURT: On motions that aren't yet in front
12 of me or fully briefed? Is that what you're hoping?

13 MR. HATCH: Well, yes. We asked for an expedited
14 review of that as well.

15 THE COURT: Do you want a review before the other
16 side has responded? Is that what you want? You're not
17 likely to get that, are you?

18 MR. HATCH: I understand the rhetorical basis
19 you're -- I appreciate that. We can address those
20 issues during --

21 THE COURT: We can talk about when they are going
22 to respond and then when you can reply and when I might
23 rule on it, if that's what you're asking me.

24 MR. HATCH: Yeah. What we have raised, Your
25 Honor, is --

1 THE COURT: I know what you've raised. You want
2 no motions for summary judgment filed until after discovery
3 is done. That's basically what you want, isn't it?

4 MR. HATCH: In a nutshell.

5 THE COURT: Yeah, that's what you want. They
6 don't want that, I would guess. There are two more motions
7 filed that are not yet briefed that you've already been
8 given 30 extra days to respond to those, but you don't want
9 to respond to them at all until discovery is done, right?

10 MR. HATCH: Correct, Your Honor. There's also
11 the issue -- as Your Honor knows, we originally were
12 scheduled to have hearings on several motions that had been
13 outstanding, in our view, longer than the motions we're in
14 here for today that weren't heard by the Magistrate
15 yesterday because of a request by IBM to get some
16 additional time to respond to a supplementation that we
17 made, given the length of time those motions had been
18 sitting. Those hearings yesterday got put off.

19 We're becoming very concerned about the schedule,
20 but particularly about our ability to proceed without
21 having some of these basic discovery motions resolved.
22 Some of them have been outstanding for a considerably long
23 period of time.

24 THE COURT: That are in front of the Magistrate?

25 MR. HATCH: They were to be heard yesterday.

1 The Magistrate struck that hearing.

2 THE COURT: Let's take all this up for a minute
3 after we're done arguing these motions, all right?

4 MR. HATCH: That would be fine. If we could just
5 have a minute afterwards, I guess that would do it.

6 THE COURT: All right.

7 MR. HATCH: Thank you, Your Honor.

8 THE COURT: We're going to start with SCO's
9 motion to dismiss or, in the alternative, to stay IBM's
10 counterclaim, Count X. Mr. James. Who's going to argue
11 this for IBM?

12 MR. CHESLER: I am, Your Honor, Evan Chesler.

13 THE COURT: Mr. Chesler.

14 MR. CHESLER: Thank you.

15 THE COURT: Mr. James?

16 MR. JAMES: Good afternoon, Your Honor.

17 THE COURT: Good afternoon.

18 MR. JAMES: Your Honor, in what is already a
19 complex case, laden with what we believe to be some very
20 significant discovery problems and issues, IBM seeks to
21 inject into this case what we also view as an
22 extraordinarily broad and very complex Tenth Counterclaim
23 that would impose very significant burdens in this case.

24 Now, back on June 10, when Your Honor extended
25 the discovery cutoff in this case, it did so to provide

1 more time and a reasonable schedule; and under the
2 circumstances that existed at that time, more time to do
3 discovery. And the problem that Your Honor attempted to
4 address at that time has not been fixed and is exacerbated
5 by the Tenth Counterclaim, and I want to discuss why that
6 is the case and why we believe Your Honor should either
7 stay or dismiss if the Tenth Counterclaim.

8 We believe that it is IBM's strategy, at least in
9 part, to attempt to control the timing and the schedule in
10 this litigation to the extent possible, through
11 counterclaims which are very broad, very
12 discovery-intensive and very burdensome. And in that
13 context, IBM has argued to Your Honor that you have no
14 discretion, that the Tenth Counterclaim is compulsory and
15 that it must go forward. In fact, Your Honor, I submit
16 that the Tenth Counterclaim is permissive and, for reasons
17 that I will attempt to discuss, it should be either stayed
18 or dismissed.

19 In arguing that the Tenth Counterclaim is
20 compulsory, the first and primary argument --

21 THE COURT: If it's compulsory, I, of course,
22 don't have any choice, right?

23 MR. JAMES: I believe that is accurate, although
24 I think you, potentially, could stay or sever and handle
25 it that way. But I'm going to tell you why right now, Your

1 Honor, why it's not compulsory, why it's permissive, and
2 why you should stay it.

3 The first and primary argument that IBM makes, in
4 support of its claim that the Tenth Counterclaim is
5 compulsory, is that IBM claims that its Tenth Counterclaim
6 is simply the mirror image of SCO's Claims in this case
7 because, according to IBM, SCO has challenged all of IBM's
8 Linux activities. And this assertion, Judge, is factually
9 inaccurate. It relies, we believe, on a significant
10 mischaracterization of SCO's Claims.

11 The Tenth Counterclaim that SCO -- or excuse
12 me -- that IBM has asserted in this case is extremely broad
13 to declaratory judgment, and we have given you a binder of
14 some slides that we're going to be showing, and I'll be
15 trying to make this gun work to show some slides on the
16 screen, too.

17 THE COURT: I'm sure you will be able operate it.

18 MR. JAMES: I hope so.

19 As you can see, the Tenth Counterclaim asks for
20 a declaratory judgment that IBM does not infringe, induce
21 the infringement of, or contribute to the infringement of
22 any SCO copyright through its Linux activities, including
23 use, reproduction and improvement of Linux and that some or
24 all of SCO's purported copyrights in UNIX are invalid and
25 unenforceable.

1 These claims go far beyond the issues that SCO's
2 Claims raise in this case. SCO's Claims, Your Honor, are
3 based primarily on issues arising out of what we contend
4 are breaches by IBM and Sequin, a company that IBM
5 acquired, of contractual agreements, license agreements
6 with SCO.

7 In this case --

8 THE COURT: Do you believe there is any overlap
9 at all between this Tenth Counterclaim and claims raised by
10 SCO in its Complaint?

11 MR. JAMES: There is some overlap, and I intend,
12 in a few moments, Your Honor, to address that overlap. We
13 think it's quite small, the overlap.

14 Our case focuses principally on the contractual
15 arrangements. We look to the contractual restrictions that
16 existed in the license agreements between SCO and IBM, and
17 the only counterclaim that we've asserted in this case
18 against IBM relates to IBM's continued use of AIX and Dynix
19 after the license agreements were terminated.

20 In stark contrast to SCO's Claims in this case,
21 IBM's Tenth Counterclaim goes far beyond those issues.
22 IBM's Tenth Counterclaim injects a broad range of new
23 issues concerning the propriety of literally thousands of
24 contributions to Linux by at least hundreds of third
25 parties; many of those contributions which occurred long

1 before IBM ever made any contribution to Linux.

2 We believe, Judge, that if Your Honor allows IBM
3 to expand the scope of this case to include all of IBM's
4 Linux-related activities, a whole host of new, complex
5 issues are brought into the case, including the
6 contributions of millions of lines of source code into
7 Linux by numerous third parties that, as I indicated, many
8 of which occurred before IBM ever made a contribution to
9 Linux.

10 And the reason why, Judge, those are brought in
11 is because if Linux contains SCO's copyrighted material, no
12 matter who contributed it, then IBM, as an end user, a
13 copier or a distributor of Linux, would be liable for
14 infringing SCO's copyrights, and SCO would have to take
15 discovery to investigate the issue of the propriety of all
16 of those third-party contributions, including all of the
17 contributions that occurred before Linux ever made any
18 contribution -- or before SCO -- IBM ever made any
19 contribution to Linux.

20 The Tenth Counterclaim thus injects into the case
21 all of IBM's many related Linux activities and seeks an
22 extraordinarily broad declaration that all of IBM's
23 activities relating to Linux do not infringe SCO's
24 copyrights. And, Your Honor, those activities are
25 numerous; many of which we know, but many of which we

1 don't. We do know that IBM's revenues from Linux
2 activities in 2003 alone exceeded \$2 billion.

3 We do know that SCO's Claims do not challenge
4 and, in fact, they don't challenge many, in fact they don't
5 challenge most of IBM's Linux activities. But if IBM's
6 Tenth Counterclaim goes forward, it puts those activities
7 squarely at issue, every one of those activities, in the
8 context of the declaration that IBM seeks in this case.

9 SCO has cited for Your Honor a recitation of the
10 cases that IBM references as alleged support for its mirror
11 image argument. The cases, Judge, are not mirror image
12 cases. They do not support what IBM says they support and,
13 contrary to IBM's argument, their counterclaim is not the
14 mirror image of SCO's Claims in this case. Their
15 counterclaim injects many, many issues that go, in fact,
16 far beyond the issues placed at issue in this case by SCO's
17 Claims.

18 And I guess I would note, Judge, that in the
19 event IBM were correct -- and we think it's not -- but were
20 it correct with respect to its mirror image and were its
21 Tenth Counterclaim merely a mirror image of SCO's Claims in
22 this case, those counterclaims would be redundant and thus
23 unnecessary.

24 In the Driver Music case that we have cited to
25 Your Honor, a Tenth Circuit case, the Court sets forth four

1 factors that the Court should consider in determining
2 whether a claim is compulsory or permissive. First, the
3 Court said that compulsory claims must arise from facts,
4 involve legal issues that are largely the same. And the
5 factual issues between SCO's Claims and IBM's Tenth
6 Counterclaim are not closely the same, let alone largely
7 the same.

8 And, again, IBM's Tenth Counterclaim, Judge,
9 seeks to inject new factual issues that include all of
10 IBM's activities and the numerous third-party contributions
11 to Linux, including who those parties that made
12 contributions are, what those parties contributed and
13 whether a particular third party's contribution into Linux
14 violated SCO's copyrights.

15 The legal issues, as well, are not the same or
16 even largely the same. The additional legal issues that
17 are injected into this case, if the Tenth Counterclaim is
18 allowed to go forward, include the liability of third-party
19 contributors for potential improper use, the liability of
20 end users of Linux for copyright infringement if any
21 independent third party has contributed material from the
22 UNIX System 5.

23 Thus, Your Honor, I submit that the Tenth
24 Counterclaim raises numerous new facts and new legal issues
25 that are very complex, and they go far beyond SCO's Claims

1 in this case.

2 Similarly, res judicata would not bar IBM from
3 subsequently litigating third-party contributions to Linux.
4 IBM suggests, Your Honor -- and you asked me a moment ago
5 about the overlap question.

6 THE COURT: I did.

7 MR. JAMES: And I'm going to try and answer that
8 now. IBM indicates that, because there is some overlap of
9 its counterclaim with SCO's Claim, that res judicata would
10 Apply if the Tenth Counterclaim is not litigated in this
11 case, and that's not right. In fact, the significant part
12 of SCO's Claim does not overlap with the Tenth
13 Counterclaim. For res judicata to apply, it's not enough
14 that there is some overlap.

15 And if you look at the Petro Management case,
16 which is the case here, you will see that four elements or
17 four factors must be satisfied in order for res judicata to
18 apply. The facts at issue must relate in time with the
19 facts at issue from the counterclaim. They are not related
20 in time here. Hundreds and perhaps thousands of the
21 contributions into Linux pre-dated any contribution to
22 Linux by IBM.

23 Second question. Are they related in space?
24 Again, they are not. Numerous third parties have made
25 contributions to Linux independent of IBM. Those

1 contributions are not placed at issue by SCO's Claims.

2 Are the facts related in origin? Again, they are
3 not. SCO challenges IBM's conduct only, not the conduct of
4 the numerous independent third parties.

5 And, finally, are the facts of the claims related
6 in motivation? Again, they are not. The third parties'
7 motivations are completely different from IBM's motivations
8 in connection with UNIX and Linux.

9 As to whether the same evidence supports or
10 refutes the claims, another factor, it does not. IBM's
11 Tenth Counterclaim raises significant additional new
12 issues. IBM's cases that are cited for the concept of res
13 judicata in this case, similarly, are inapplicable, similar
14 to the cases they cited, and I showed you the screen
15 previous. And this screen, Your Honor, summarizes those
16 cases.

17 Let me come back a little more to the overlap
18 because the last element or the last factor that the Court
19 asks the District Courts to look at, the Tenth Circuit asks
20 the District Courts to look at, is whether the claims are
21 logically related. And it is here where IBM says that,
22 because there is some overlap, the claims are logically
23 related. And what they do is they say their claim is at
24 least in part the flip side of SCO's Claim in this case
25 and, therefore, because of that, they are logically related

1 and must be compulsory.

2 In other words, if you think about that,
3 according to IBM's theory, a defendant can assert a
4 counterclaim that is simply the other side or, as IBM calls
5 it, the flip side of a plaintiff's narrow claim, then can
6 add additional claims or issues as part of that
7 counterclaim, take that entire package and, according to
8 IBM, that claim would then be compulsory if there is at
9 least some overlap.

10 And were that true, a defendant could make every
11 counterclaim compulsory by bundling claims arising out of
12 different transactions into a single sweeping counterclaim
13 that included at least, as a part, the flip side of the
14 plaintiff's claim and claim that because there are
15 overlaps, the counterclaim is compulsory. And the District
16 Court, in the Mille Lacs case, indicated that some overlap
17 of issues is not enough.

18 As the Tenth Circuit stated in the Driver Music
19 case, the issues between the claim and counterclaim must be
20 largely the same. And that is not the case here. And, in
21 fact, if you look back in our reply memorandum, we cited a
22 number of cases where the relationship between the claim
23 and the counterclaim was much tighter in those cases than
24 it is here, yet the Courts in those cases held that the
25 counterclaims were not compulsory.

1 Thus, because there is not a logical relationship
2 between the claim and counterclaim, the counterclaim in
3 this case, the Tenth Counterclaim, is not compulsory. In
4 fact, as I've indicated, Your Honor, there are very, very.
5 significant portions of the Tenth Counterclaim that do not
6 overlap SCO's Claim, and they go far beyond SCO's Claims in
7 this case.

8 Therefore, the counterclaim is permissive and
9 Your Honor should dismiss or at least stay the
10 counterclaim.

11 Let me talk about that for a minute. Courts have
12 said that when a counterclaim unduly complicates
13 litigation, when it significantly expands litigation, when
14 it adds significant factual or legal complexities to an
15 already complex case, if it would necessitate additional
16 expensive discovery, threaten jury confusion or hinder or
17 delay resolution of the case, it is an appropriate claim to
18 be stayed or dismissed. And in this case, Your Honor, the
19 Tenth Counterclaim --

20 THE COURT: The jury wouldn't otherwise be
21 confused in this case if the Tenth Counterclaim were gone,
22 right?

23 MR. JAMES: I think the issue is the risk of
24 additional confusion. I think that risk would be great.

25 THE COURT: Thank you.

1 MR. JAMES: You're welcome. As to the various
2 bases that I've just listed, all of those bases exist in
3 this case, Judge, all of them.

4 Your Honor has alluded to this, and let me make
5 that point. Claims that are already at issue in this case
6 are complex. They involve complex legal and factual
7 questions even without the Tenth Counterclaim. Independent
8 of the status of discovery in this case, the Tenth
9 Counterclaim would impose significant burdens and
10 significant factual and legal complexities into this case.

11 Judge, when you combine that fact with the
12 significant discovery issues that we do have in this case,
13 the dismissal of the Tenth Counterclaim becomes even more
14 compelling. Without question, if the Tenth Counterclaim is
15 allowed to go forward, it will create substantial
16 additional, expensive and time-consuming discovery, one of
17 the factors that I listed previously for dismissal of the
18 Tenth Counterclaim.

19 Your Honor has been made aware of what we believe
20 are some very, very significant discovery problems and
21 issues in this case. Independent of those problems, the
22 Tenth Counterclaim injects a whole new realm of discovery
23 complexity and burdens into this case. When you add to
24 that the discovery problems that we're having, Your Honor,
25 I submit it becomes absolutely compelling that the Tenth

1 Counterclaim should be dismissed.

2 We have had motions to compel pending for months.
3 We believe that IBM has refused to produce to us absolute
4 basic relevant discovery and, at the same time, we're being
5 faced with multiple, fact-intensive summary judgment
6 motions that place further burden and interfere with the
7 discovery schedule in this case. Your Honor, I'm not here
8 to talk in detail about discovery issues, but there are a
9 number of discovery issues that play into our request that
10 Your Honor dismiss this counterclaim, and we think that the
11 Tenth Counterclaim would inject very, very significant and
12 undue burden into this case given the context of the case
13 as it currently exists.

14 Your Honor, SCO has been seeking, for a long
15 time, some basic discovery in the base, and I am here to
16 tell you that IBM has stonewalled us on discovery while
17 proclaiming to the Court discovery compliance; accusing SCO
18 of not providing evidence of the very nature that we think
19 IBM has blocked our discovery efforts and pushing
20 aggressively forward with dispositive motions. Then it
21 comes before the Court with a very, very broad counterclaim
22 and tries to tell Your Honor that it's compulsory, you must
23 go forward with this claim, and we must inject all of these
24 additional claims into this case.

25 And the point of all of this is this: The Tenth

1 Counterclaim -- and I've said it four or five times, and
2 I'll say it one more time and sit down -- injects some very
3 significant burdens and complex issues into this case. We
4 will be faced, literally, with deposing numerous third
5 parties who would -- or who have contributed code into
6 Linux. Numerous of those parties contributed that code
7 before IBM ever had anything to do with Linux. If the
8 counterclaim proceeds, we'll be in the position of having
9 to take discovery regarding all of IBM's Linux-related
10 activities because IBM seeks a declaration as to all of
11 those activities.

12 As the Court said in the ABC case, "Where the
13 plaintiff's Complaint involves highly complex legal and
14 factual issues and the counterclaim would add similarly
15 complex questions, even concerns --" and, in particular, in
16 that case, the same statute -- "dismissal of the
17 counterclaim is warranted."

18 And, Your Honor, that is the position of SCO in
19 this case. The Court should dismiss the Tenth
20 Counterclaim. At a minimum, it should stay that
21 counterclaim. Thank you.

22 THE COURT: Thank you, Mr. James.

23 Mr. Chesler?

24 MR. CHESLER: Good afternoon, Your Honor.

25 THE COURT: Good afternoon.

1 MR. CHESLER: Thank you for the Court's courtesy
2 in allowing me to appear as a pro hac vice admission to the
3 Bar. I'm happy to be here.

4 Your Honor, I think the most surprising thing
5 about what I just heard and what the Court just heard is
6 what we didn't hear and didn't see with all these charts
7 that counsel put up. This is a pleadings motion. I didn't
8 see their pleading nor ours. If the Court has a copy of
9 the Second Amended Complaint, I won't need to hand one up,
10 but we've brought some copies just for everyone's
11 convenience.

12 THE COURT: I've got one, but it would be more
13 convenient for you to hand it up.

14 MR. CHESLER: All right. Let me do that, if I
15 may.

16 If Your Honor would, I'd like you to turn first
17 to our Tenth Counterclaim, which begins on page 39 of our
18 pleading. And, in particular, Your Honor, if you'd flip to
19 the next page, page 40. The most important paragraphs for
20 my purposes today are paragraphs 171 and 173 in which IBM
21 says, in 171, that it does not believe that its activities,
22 IBM's activities, relating to Linux, including any use,
23 reproduction and improvement of Linux, infringe SCO's
24 copyrights.

25 In paragraph 173 IBM says that it believes that

1 it's entitled to a declaratory judgment that IBM does not
2 infringe, induce the infringement, or contribute to the
3 infringement of any of SCO's copyrights through its, IBM's,
4 Linux activities.

5 Now, counsel put a chart up for Your Honor that
6 said our counterclaim was very broad because it related to
7 infringement, inducement of infringement, and contribution
8 to infringement of their copyrights. And that was
9 extraordinarily broad and unwarranted in this case given
10 what counsel here says their counterclaims are about.
11 Well, I learned in law school, when you want to know what
12 the claim is to which you counterclaim, you read the claim
13 in the Complaint. And so I ask Your Honor to turn to their
14 Complaint.

15 And, in particular, first, I'd like Your Honor to
16 look at paragraph 179 of their Complaint, which appears at
17 page 52. This is the critical paragraph for us. I'm going
18 to walk Your Honor through, as quickly as I can, why it's
19 perfectly clear, we believe, that our counterclaim is
20 compulsory in light of what they have pleaded, as opposed
21 to what counsel chooses to say today.

22 In paragraph 179 SCO pleads, "IBM's breaches of
23 the IBM-related agreements --" I'll come back to those --
24 "and the Sequin agreements and its post-termination actions
25 have infringed, have induced infringement of, and have

1 contributed to the infringement of copyright registrations
2 of SCO and its predecessors."

3 The three verbs which counsel told you indicate
4 the enormous breadth of our counterclaim come directly from
5 their Complaint, in which they have accused us of
6 infringing, inducing the infringement of, and contributing
7 to the infringement of their counterclaim. We didn't make
8 this stuff up. We simply pleaded back at them for a
9 counterclaim to clear the air of all the charges their
10 chairman has been making running around the country, saying
11 we have done all sorts of terrible things. We are entitled
12 to clear the air about that. And we took the verbs right
13 from their Complaint.

14 Now, what does the Complaint actually mean by
15 that? First, what do they mean by IBM-related agreements?
16 Well, Your Honor, you will notice those are capitalized
17 terms in paragraph 179. That's because it's a term of art
18 in the Complaint. And If Your Honor would turn to
19 paragraph 62 of their Complaint, Second Amended Complaint,
20 which appears on page 15, they have a section entitled The
21 IBM-related Agreements.

22 And I think Your Honor will see they list there,
23 on page 15, a whole series of different documents which
24 they define as the IBM-related agreements; the first of
25 which is identified in paragraph 62(a) as the software

1 agreement. And they go on to identify other agreements.
2 And so what they've said in 179 is that when we breached
3 these agreements, we infringed, induced the infringement
4 of, and contributed to the infringement of their
5 copyrights. And that's what they are suing us for.

6 So now we have to look and see what they say we
7 did to breach those agreements because they have related
8 explicitly that it is those breaches which form the basis
9 of their copyright infringement claim. So, in that regard,
10 Your Honor, as I read this many, many months ago when we
11 prepared this counterclaim, I went to their breach of
12 contract section because that's what they say forms the
13 basis for the copyright infringement.

14 And that begins, Your Honor, on page 32 of their
15 Complaint, entitled First Cause of Action: Breach of IBM
16 Software Agreement. And if Your Honor returned to
17 paragraph 113, which is on the very next page in that
18 section, they say in pretty simple English -- I'm going to
19 skip some intervening words for clarity, but it's all
20 before the Court and before counsel.

21 "IBM has violated Section 201 of the software
22 agreement by, inter alia, using and assisting others to use
23 the software products, parentheses, including System 5
24 source code --" that is the UNIX source code over which
25 they purport to have copyrights. Then dropping down --

1 "for external purposes that are different from and broader
2 than IBM's own internal business purposes."

3 Then the next phrase is critical. New sentence.
4 "By actively supporting, assisting and promoting the
5 transfer of UNIX technology to Linux." And then it goes on
6 to say, "using its access to UNIX technology, etc., to
7 misuse their code."

8 So this paragraph says, absolutely explicitly,
9 that we breached that agreement by taking System 5 source
10 code, which they say they have a valid copyright on, and
11 actively supporting, assisting and promoting the transfer
12 of that code into Linux. Now, in the same section on
13 breach of contract, if Your Honor goes to paragraph 118,
14 which appears on page 35, they say -- another breach:

15 "IBM has breached Section 710 of the software
16 agreement by, inter alia, transferring portions of the
17 software products, including System 5 source code," and
18 then if you drop down several lines, "to Linus Torvalds for
19 open distribution to the general public."

20 This is their Complaint, Your Honor. They have
21 said, "Your breaches of these agreements are the copyright
22 infringement and the inducement and the contribution."

23 So we read what it is they alleged that we did to
24 breach the agreements and, so far, we have been through two
25 of those. They say that we took System 5 source code and

1 we aided and abetted and ourselves transferred the
2 technology into Linux. And they say, here again, we
3 breached yet another section by doing the same thing,
4 transferring portions of the software products, including
5 the System 5 source code, which is what they say they have
6 a copyright on, to Mr. Torvals so it could go into open
7 distribution for the public.

8 And then again, in paragraph 122, on page 36,
9 still in the breach section, they say, "IBM breached its
10 duty of confidentiality by contributing portions of the
11 software product, including System 5 source code --" you
12 drop down to the next line -- "to open source development
13 of Linux."

14 So, Your Honor, we didn't pick this fight, but
15 they have alleged, in simple English, that we took their
16 copyrighted code, System 5 source code, and we, on our own,
17 and we assisted others to take that code and put it into
18 the public domain in Linux, thereby infringing their
19 copyrights, contributing to the infringement by others of
20 their copyrights and inducing the infringement of their
21 copyrights. It's here, in simple English, in their own
22 pleading.

23 And our declaratory judgment counterclaim says we
24 want a declaration that we have not, in fact, violated
25 their copyrights by engaging in our Linux activities, which

1 they, themselves, allege in their Complaint. That's what
2 this is about; not about Counsel's charts but what they
3 plead in the pleading.

4 Now, in that connection, Your Honor, it's also
5 interesting to me that we didn't hear anything about the
6 other cases that SCO is litigating around the country
7 because the things that they have said to those Courts bear
8 directly on the credibility of what they are telling this
9 Court. For example, there's a case in the District Court
10 in Wilmington, Delaware called Red Hat against SCO. Red
11 Hat is a provider of Linux. Red Hat, as was IBM, was
12 threatened in many, many press conferences and public
13 statements by Mr. McBride and his colleagues with all sorts
14 of lawsuits and accusations about infringing their
15 proprietary rights, infringing their copyrights. So Red
16 Hat brought a declaratory judgment action.

17 What was the action? It said, "We distribute
18 Linux. We want a declaratory judgment action that in
19 creating copies of Linux and distributing Linux we are not
20 infringing your copyrights as you're telling the world we
21 are."

22 What did SCO do in that case? They moved to
23 dismiss. And here's what they said in their motion to
24 dismiss that case, which had nothing to do with the narrow
25 question of whether IBM distributed its own version of UNIX

1 called AIX after they purportedly took back our license,
2 which is what they are telling you this case is about.

3 Red Hat had no interest in that question. It had
4 nothing to do with their lawsuit. Their lawsuit was, is
5 what Red Hat's doing, shipping Linux to thousands of
6 customers, infringing SCO's copyrights? They wanted a
7 declaratory judgment that it's not.

8 And SCO moved to dismiss. And here's what they
9 said, May 18, 2004, four months ago. "This precise issue
10 will be litigated in a case filed by SCO against Autozone
11 in Federal District Court in Nevada --" excuse me. I'm
12 misreading a little bit. This is what they said when they
13 first moved to dismiss our Complaint here. They said this
14 issue; namely, the issue we raised, will be litigated in
15 the Autozone case in Nevada. That's what they said there,
16 in the Autozone case.

17 And in the Autozone case -- I'll come back to Red
18 Hat in a moment -- the allegation in the Autozone case,
19 which they made against Autozone, is that they, Autozone,
20 are a user of Linux, and by using Linux, they are
21 infringing their copyrights. So they told this Court that
22 the questions that we were raising by this counterclaim,
23 which they now portray as a completely different question,
24 are going to be litigated in the Autozone case. And they
25 asked Your Honor to dismiss or stay this case in favor of

1 Autozone, a position which they abandoned in their reply
2 brief.

3 Now let me come back to the Red Hat case. Here's
4 what they said when they moved to dismiss the Red Hat case,
5 quote -- this is September of 2003, the motion to
6 dismiss -- "The infringement issues that Red Hat seeks to
7 adjudicate in this case are currently before United States
8 District Judge Dale A. Kimball in the SCO v. IBM case
9 pending in the Utah Federal District Court."

10 Now, how can it be, Your Honor, that when Red Hat
11 sought a declaratory judgment that the entire distribution
12 of Linux by Red Hat was not an infringement, they told that
13 Court that that's the issue you have? And now they're
14 telling you that we would be injecting so much more into
15 this case if we sought to litigate that issue here.

16 In deed, what happened in the Red Hat case was,
17 the motion to dismiss the declaratory judgment case was
18 denied, but the case was stayed on April 6 of this year.
19 In May, Red Hat moved to lift the stay, and SCO filed a
20 brief three months ago -- four months ago, opposing the
21 lifting of the stay. And here's what they said in that
22 brief.

23 "It would be a waste of judicial resources and of
24 the resources of the parties to litigate this case while a
25 substantially similar question is being litigated in the

1 Federal District Court in Utah."

2 So, all of these charts about how we're trying to
3 broaden this case and make it into some humongous monster
4 for some cynical purpose, I would submit, Your Honor, you
5 cannot reconcile that representation, that was made to you
6 today, with the representations that were made to the Court
7 in the Autozone case. That case has nothing to do with IBM
8 putting contributions into Linux or anything to do
9 individually with IBM distributing its own version of AIX
10 after they purportedly terminated our license.

11 Red Hat has nothing to do with any of that and
12 yet they told that Court those issues, the Red Hat issues,
13 are before Your Honor and, therefore, that case should
14 remain stayed.

15 The strategy, Your Honor, seems to be the
16 anywhere-but-here strategy. When we bring the
17 counterclaim, they tell you: Defer to the Autozone Court
18 in Nevada.

19 When Red Hat brings a declaratory judgment case,
20 they say to the Court in Delaware to defer to you in Utah.
21 Wherever we are, it seems to be the issues should be
22 litigated some place else.

23 Your Honor, we have a right, we believe, we
24 respectfully submit, to have it litigated here. I say,
25 again, we didn't pick this fight. We didn't write their

1 Complaint. Their Complaint is absolutely clear that it
2 says we have been aiding and abetting, assisting,
3 contributing to the infringement of their copyrights and
4 directly infringing their copyrights by taking the System 5
5 source code and putting it out in the public domain.
6 That's what we're responding to.

7 If you take the standards which counsel put
8 before Your Honor, and I agree those four bullets are the
9 standards, we plainly satisfy them for a compulsory
10 counterclaim.

11 Let me take res judicata as one example, Your
12 Honor. We are not -- their entire res judicata argument,
13 that it would not apply here, is premised on a false
14 premise. And that is that we are somehow seeking a
15 declaration for what somebody else did. We're not doing
16 that.

17 And, again, the pleading is what governs. And I
18 say again to Your Honor, in paragraphs 171 and 173 of our
19 counterclaim, we said that we are suing for a declaratory
20 judgment for our activities because that's what we've been
21 accused of doing in violation of their copyrights. Our
22 activities. They have defined the broad scope of our
23 activities, and that is what we are responding to.

24 Even, Your Honor, even if their case were somehow
25 amended by virtue of counsel's argument, as opposed to

1 pleading, to be about our continuing to sell and distribute
2 AIX, our UNIX software, after they purportedly terminated
3 our license; even if that's what this case were about --
4 and the pleading makes clear that that's only a piece of
5 what it's about -- even if that were all of what it was
6 about, we would be talking about the same SCO copyrights
7 that we're talking about in the counterclaim as it
8 presently exists.

9 We would be talking about the same issues of
10 whether those copyrights are valid, who the authors are,
11 what the ownership of those copyrights are. All the same
12 issues would apply in that case as well as this. We would
13 be talking, most importantly, Your Honor, about whether IBM
14 actively put -- actually put their protected code into
15 Linux because the purported basis for their cancelling our
16 AIX license was the very same contributions, alleged
17 contributions, of their protected code into Linux.

18 They said to us, "You, IBM, have given away our
19 copyrighted code without our consent -- that's what they
20 accused us of -- "by giving it to the Linux community. And
21 the penalty for that is we are terminating your license to
22 distribute AIX."

23 So, even if we were actually talking about that
24 narrow subset of what they in fact pleaded, we would be
25 right back to the question of IBM alleged contributions to

1 Linux in violation of their copyrights. Those are the
2 activities we are talking about and they plead, and that's
3 why this is a compulsory counterclaim.

4 Now suppose, Your Honor, you disregard everything
5 I have said up to this point and you say, "I think it's
6 permissible."

7 THE COURT: Suppose I did, then what are you
8 going to tell me?

9 MR. CHESLER: What I'm going to tell you -- and
10 I'm sure you won't be surprised to hear -- is that you
11 should clearly exercise your discretion not to dismiss or
12 stay this counterclaim because it is not going
13 unnecessarily to add to the complexity of this already
14 complex case. And it's for just a couple of very simple
15 reasons, and I'll sit down.

16 Reason number 1. The core of the evidence which
17 we've been trying unsuccessfully to get for a year, that
18 relates to this issue, is our Interrogatories 12 and 13.
19 There have been two court orders from the Magistrate Judge
20 ordering them to give us answers, neither of which has been
21 complied with. Those counterclaims, in simple English, ask
22 for just this. They say, "What is yours that we took, and
23 what did we do with it that causes you to you sue us?"

24 We've been asking those two questions for a
25 year. What did we take, and what did we do with it?

1 That's already in this case in all of the litigation before
2 the Magistrate Judge over those two questions. They never
3 once stood up and said, "Your Honor, the reason we
4 shouldn't be obligated to answer those questions is they
5 are not in the case. You will be expanding the complexity
6 of this case beyond what it already is by asking us to
7 produce that information."

8 They made lots of arguments, unsuccessfully, to
9 not to have to answer those questions. They never made
10 those arguments. That is the proof on which our
11 counterclaim will rely because they can't, as Mr. Marriott
12 will describe to the Court very soon, and as I'm sure Your
13 Honor knows from reading the papers, it is their failure to
14 provide that proof which is the basis for our summary
15 judgment motion on this very counterclaim. It's not adding
16 anything to the case that isn't already in the case, Your
17 Honor. It's the information we have been chasing all this
18 time.

19 What they need to do to prove their claim is very
20 simple. It's like every other copyright claim. You take
21 the copyrighted work, which they have, and you match it
22 against the allegedly infringing work, which anybody in the
23 world can download off the internet, and you see if they
24 are sufficiently similar to constitute infringement. And
25 then you litigate any defenses, if there are any, if they

1 are sufficiently similar.

2 They have, and have had all of that information
3 from the time they brought this lawsuit. If they don't
4 have a basis for alleging the infringement, then I would
5 wonder where they got the basis for suing Autozone for
6 allegedly infringing the copyrights for using Linux.
7 They've got the basis or they don't. We have been asking
8 for it for a year. They won't tell us. This is not about
9 complicating this case, Your Honor. It's about the
10 anywhere-but-here strategy. It's always some other Court
11 in some other place, but not here, that ought to litigate
12 these issues.

13 And lastly, Your Honor, why it would be in the
14 case properly even if permissiveless. This is not about
15 third-party claims. It's not about third-party activities.
16 They pleaded that we violated their copyrights. We plead
17 for a declaratory judgment that we did not violate their
18 copyrights. They want to turn that into a war about what
19 thousands of other people did in hundreds of other
20 contributions to Linux. The reason they want to portray it
21 that way is to get this claim out of here so it isn't
22 litigated here.

23 That isn't what they plead. It isn't what we
24 plead. Thank you, Your Honor.

25 THE COURT: Thank you, Mr. Chesler.

1 You get to reply, Mr. James.

2 MR. JAMES: Your Honor, and I'm going to, and
3 when I'm finished, what I'd like to do, if Your Honor will
4 allow, is Mr. Silver was very involved in the Red Hat case
5 and the other cases, and I haven't had the involvement, and
6 with Your Honor's indulgence, if you will allow him to make
7 a couple points, I would appreciate it. And I'm going to
8 ask you to allow him to do that.

9 THE COURT: Go ahead.

10 MR. JAMES: Thank you. We have not put at issue
11 all of IBM's Linux-related activities. We have not placed
12 at issue the contributions made by numerous third parties
13 into Linux. And let me see if I can make that point clear,
14 Judge.

15 THE COURT: Your Complaint is reasonably broad,
16 is it not?

17 MR. JAMES: It is, as all Complaints, reasonably
18 broad, but it does not pick up the claims that you are
19 hearing today that it does. When we talk about third-party
20 contributors of code into Linux and how that relates to
21 IBM, the only third parties that implicates are third
22 parties that acted in combination or in conjunction with
23 IBM, a very small group.

24 On the other hand, what their claims put at
25 issue, Your Honor, is all of the third-party contributions

1 into Linux even before the year 2000, when IBM first made a
2 contribution into Linux. IBM couldn't have acted with
3 those third parties because those third parties made their
4 contributions before IBM ever did.

5 But by saying, "We want a declaration from this
6 Court that we don't violate SCO or infringe SCO's
7 copyrights," the problem with that is, is to the extent
8 that all of those third parties preceded IBM's
9 contribution, to the extent they do violate SCO's
10 copyrights, and to the extent that IBM then distributes,
11 copies, uses Linux, they are violators as well. And,
12 therefore, that question must be decided and therefore it
13 injects into this litigation all of that discovery.

14 And we have made that point very clearly in our
15 reply. IBM has never denied it. That is clearly the law.
16 That is clearly, Judge, the case.

17 Now with respect to a couple of additional points
18 relating to Red Hat, relating to the Autozone case --

19 THE COURT: I thought you said that's what
20 Mr. Silver is going to talk about.

21 MR. JAMES: That was my lead in. Mr. Silver has
22 been very involved in those cases, and with Your Honor's
23 permission, I'll have him address those.

24 THE COURT: Mr. Silver.

25 MR. SILVER: Yes. Thank you. Thank you, very

1 much, Your Honor. If I may proceed very, very briefly.
2 Your Honor, there seems to be some contention about how
3 broad our Complaint is, what is included, what is not
4 included, what the Complaint encompasses. I'd like to make
5 just a very few points about that.

6 THE COURT: I thought you were going to make
7 points about Red Hat and Autozone. He has already made
8 points about the breadth of the Complaint. He said you
9 have been involved and Red Hat and Autozone.

10 MR. SILVER: Actually, I believe there may be
11 confusion about that. My perspective on Red Hat and
12 Autozone is the perspective that I have in retrospect
13 because of my understanding of the breadth of these
14 actions. I do not actually have direct involvement in Red
15 Hat and Autozone, and if the only reason Your Honor is
16 allowing me to speak is on that premise, I should sit down.

17 THE COURT: I thought that was the premise.
18 Isn't that what you said, Mr. James? Did I misunderstand
19 you? I mean, you have made your arguments about the
20 Complaint, and you and Mr. Chesler have made those
21 arguments about what the Complaint says and what it doesn't
22 say and how broad it is and how broad it isn't.

23 MR. JAMES: Let me say at this point, then, Your
24 Honor, if I may: At a minimum, counsel's familiarity with
25 Autozone and with the Red Hat case is significantly greater

1 than mine. He wrote the portions of the reply memo that
2 address those cases. He has perhaps not entered an
3 appearance, but he has much more familiarity. I will
4 struggle through those if you'd like me to, but Mr. Silver
5 will do it more succinctly.

6 MR. SILVER: My familiarity, Your Honor, is with
7 the overview of the entirety of the matters presented
8 before the Court, and that allows me to describe the
9 relationships between the different matters Mr. Chesler has
10 presented. If Your Honor will allow me to speak to that
11 very briefly, I would appreciate it. However, the last
12 thing I want to do is try Your Honor's patience.

13 MR. JAMES: And, Your Honor, if -- when we're
14 finished here, if counsel would like to contribute to
15 Mr. Marriott's argument, we would have no objection.

16 THE COURT: What I don't want you to do is to
17 repeat what Mr. James has already told me. He suggested to
18 me, and I understood you were going to add something new.
19 If you're just going to repeat what he has told me, then I
20 don't need to hear it. I'm not trying to be impolite, but
21 I've heard what he has to say.

22 MR. SILVER: I think that what I have to add,
23 very, very briefly, may help to put the other cases that
24 Mr. Chesler --

25 THE COURT: All right. Go ahead and tell me,

1 very, very briefly, as you say.

2 MR. SILVER: Okay. I will try to be very brief.
3 Our Complaint, our Complaint was about and is about the
4 course of conduct in which IBM is alleged to have violated
5 contracts it had with SCO and its predecessors. It is not
6 about, it never was about copyright violations. However,
7 because it alleges a course of conduct, as is true as a
8 matter of basic federal res judicata law, that will involve
9 copyright issues.

10 That is a very different thing than raising the
11 question whether contributions made to Linux, long before
12 IBM ever became involved in Linux, are involved in our
13 lawsuit. Those are two very, very different things. I
14 have not seen anything Mr. Chesler raises to connect the
15 two. There is nothing in our Complaint to connect the two.
16 Mr. Chesler has not pointed to any allegation in our
17 Complaint to connect the two. There isn't any connection.
18 None.

19 Number 2. A lot of complaints have been made
20 about what we have said in Autozone, what we have said in
21 Red Hat. The Autozone case was focused on a matter that is
22 very specific to Autozone. It doesn't have to do with the
23 world of Linux. It has to do with a specific Autozone
24 problem. If you will examine -- and Mr. Chesler, I'm sure,
25 has -- our reply papers, we have said we are not relying on

1 Autozone as a ground for staying the present action, and we
2 are not.

3 THE COURT: Okay. What do you have to tell me
4 about Red Hat, if anything?

5 MR. SILVER: Red Hat -- in the Red Hat case, what
6 we have said is the following. And this is very important
7 for everyone to understand. I believe it is essential for
8 Your Honor to understand. We began this case in the belief
9 that the principal problem we confronted was a contractual
10 violation by IBM which resulted in an improper contribution
11 of material that resulted from an uncontrolled exploitation
12 of a seminal innovation by AT&T, inherited by SCO, into
13 UNIX, a seminal innovation that drove the industry,
14 providing an innovation IBM did not want to supply for
15 itself, which it misappropriated in violation of its
16 contracts and ultimately contributed to Linux. That is the
17 core of our lawsuit.

18 Now, what that has to do with Red Hat is the
19 following: Because of that violation, obviously
20 uncertainty exists as to the status of Linux. A great deal
21 of people have concerns about that. A declaratory action
22 was brought. The Red Hat Court decided to stay that action
23 sui sponte. That sui sponte decision was litigated on
24 reconsideration. Now, a great deal of accusations have
25 been made that we have misrepresented to various Courts

1 what our position has been. I want to be clear as day that
2 that is not the case.

3 When that sui sponte decision was made, we came
4 in and we said, "At this time, IBM, has placed, by virtue
5 of its Tenth Counterclaim, all conceivable issues relating
6 not only to its contributions to Linux, but to every
7 contribution by any person on earth into Linux," which is
8 precisely why it has unduly complicated this case to the
9 point where any hope of making it manageable has
10 disappeared, but it has done it.

11 And, therefore, we told the Red Hat Court that
12 that is what has happened. The Red Hat Court was under no
13 illusion. At the very same time we told the Red Hat Court
14 we were opposing that, the Red Hat Court was under no
15 illusion about that either. The Red Hat Court still has
16 not resolved the matter. But the suggestion that we
17 mislead any other Court about anything is absolutely false.

18 As to Autozone, that suit was about something
19 very specific to Autozone.

20 THE COURT: You have already told me that.

21 MR. SILVER: Okay. I want to be clear about all
22 these matters. Your Honor, I wish to thank you very much
23 for the time you have given me.

24 THE COURT: Thank you, Mr. Silver.

25 All right. That motion is taken under

1 advisement. Now we'll argue the three remaining motions:
2 IBM's motion for partial summary judgment under its Tenth
3 Counterclaim. Mr. Marriott you're going to argue that.

4 MR. MARRIOTT: I am, Your Honor.

5 THE COURT: You are going to tell me why I ought
6 to grant that, and you're going to tell me why, while
7 you're up there, why I ought not to grant the Rule 56(f)
8 motion, and you're going to tell me why I ought to grant
9 your motion to strike as well, right?

10 MR. MARRIOTT: I will.

11 THE COURT: All right.

12 Who's going to argue these for the plaintiff?

13 Mr. Hatch?

14 MR. HATCH: Your Honor I will, as well as some
15 of the technical issues, Mr. Frei is going to address.

16 THE COURT: All right.

17 MR. FREI: Your Honor, I'll also be addressing
18 the motion to strike issues along with the 56(f).

19 THE COURT: Very good.

20 Go ahead, Mr. Marriott.

21 MR. MARRIOTT: Thank you, Your Honor. Your
22 Honor, there are three principal reasons why the Court
23 should enter summary judgment in favor of IBM on its Tenth
24 Counterclaim. The first reason, Your Honor, is that SCO
25 has failed to supply evidence to substantiate its public

1 accusations of copyright infringement by IBM and others.

2 THE COURT: They are going to tell me that part
3 of the reason for that is that you haven't given them the
4 discovery. Isn't that what they are essentially going to
5 tell me?

6 MR. MARRIOTT: I have no doubt in my mind that
7 that is what they will tell you.

8 THE COURT: So what are you going to say when
9 they claim that?

10 MR. MARRIOTT: I'm happy to address that now, or
11 I can come to it momentarily. Would you like me to address
12 that now?

13 THE COURT: Whatever you want, whatever order you
14 want.

15 MR. MARRIOTT: That's the third point I would
16 like to make. I can make it now or --

17 THE COURT: Make it third, then.

18 MR. MARRIOTT: Okay. Thank you, Your Honor.

19 The first point I want to make is that despite
20 its public accusations of infringement by IBM, SCO hasn't
21 produced any evidence of copyright infringement by IBM or
22 anyone else with respect to Linux. The summary judgment,
23 Your Honor, as you know, is appropriate unless SCO can
24 demonstrate a genuine issue of material fact as to two
25 things; that it owns valid copyrights and that IBM has

1 copied protectable elements of those copyrights.

2 With the Court's permission, I would like to hand
3 up, if I may, a little booklet.

4 THE COURT: Sure, as long as everyone gets it.

5 MR. MARRIOTT: Your Honor, from the beginning of
6 this case, SCO has publicly claimed that Linux is an
7 unauthorized derivative work of UNIX and that the use of
8 Linux by anybody infringes SCO's alleged copyrights. And
9 with respect to IBM in particular, SCO has claimed that IBM
10 is responsible for dumping SCO's allegedly proprietary UNIX
11 code into the Linux operating system.

12 SCO has represented that in press releases. It
13 has sent letters to the Fortune 1000 companies, and it has
14 sent letters to every member of Congress making the point.
15 It has basically told the world, Your Honor, that if you
16 use Linux, you have infringed SCO's alleged copyrights.
17 And we have provided a listing of those allegations for
18 Your Honor at pages 2 through 4 of our book, and I won't
19 repeat those here.

20 From the beginning of the case, Your Honor, SCO
21 has publicly claimed to have substantial evidence to
22 support its allegations of copyright infringement. Its CEO
23 is on record as saying that it has done a deep dive into
24 the Linux code, that it has compared Linux to UNIX ever
25 which way but Tuesday, and it has found substantial

1 evidence of copyright infringement. And if I may refer the
2 Court to pages 5 through 7 of our book, I would like to
3 focus, Your Honor, if I may, on a couple of those.

4 In April of 2000 the company SCO said, "We are
5 using objective third parties to do comparisons of our UNIX
6 System 5 source code."

7 In May of 2003, SCO said that it had hired
8 outside consultants to compare source code from the Linux
9 kernel to its System 5 source code and that those experts
10 had found line-for-line copying. May of 2003 it said that
11 over the past several weeks, it had three different teams
12 of people from outside SCO going through various
13 distributions of Linux and comparing the code to its System
14 5 code and that what those individuals had been finding,
15 Your Honor, is that there were chunks of code from SCO's
16 UNIX System 5 in Linux.

17 At page 6 they said that in June, 2003, that they
18 had hired three teams of experts, including from the MIT
19 math department, that they analyzed UNIX and Linux and that
20 they had, quote, all three found several instances where a
21 UNIX source code had been found in Linux, close quote.

22 In June of 2003, the company's CEO said, quote,
23 "Everybody has been clamoring for the code. Show us two
24 lines of code. We're not going to show two lines of code,
25 we're going to show hundreds of lines of code. And that's

1 just the tip of iceberg of what's in this."

2 In August of 2003 the company said that it had
3 retained pattern recognition experts who had already,
4 quote, found mountains of code.

5 The same month, Your Honor, they said that they
6 knew exactly which version of UNIX System 5 the code came
7 from and which licensee was responsible for illegally
8 contributing to Linux.

9 Finally, on page 7, in November of 2003, the
10 company's CEO said, quote, "Along the way, over the past
11 several months, once we had the copyright issue resolved
12 where fully we had clarity around the copyright ownership
13 on UNIX and System 5 source code, we have gone in and done
14 a deep dive into Linux. We have compared the source code
15 of Linux with UNIX every which way but Tuesday. We have
16 come out with a number of violations that relate to those
17 copyrights."

18 November of 2003, Your Honor, again the company
19 said, quote, "There are other literal copyright
20 infringements that we've not provided. We'll save those
21 for Court," close quote.

22 And then, finally, and most recently, the company
23 said to the Red Hat Court that it had discovered
24 significant instances of line-for-line, substantially
25 similar copying of code from UNIX System 5 to Linux.

1 It was in light of those allegations, Your Honor,
2 that IBM propounded its Interrogatory Numbers 12 and 13.
3 And you will see those at page 8 of our book. Those
4 requests, I think, quite clearly ask, simply, that SCO
5 substantiate its allegations, its public allegations of
6 wrongdoing by IBM.

7 Interrogatory Number 12 says, "Please identify
8 the material in Linux which plaintiff has rights to and the
9 nature of plaintiff's rights."

10 And then Interrogatory Number 13, Your Honor,
11 says, "Please state whether, A, IBM has infringed
12 plaintiff's rights and, for any rights IBM is alleged to
13 have infringed, describe in detail how IBM is alleged to
14 have infringed plaintiff's rights."

15 SCO repeatedly declined to respond to those
16 interrogatories, Your Honor. At no point did it disclose
17 the copyrights we were alleged to have infringed. At no
18 point did it disclose a single line of UNIX code which we
19 were alleged to have infringed, and at no point did it
20 disclose a single line of allegedly infringed Linux code.

21 It was against that backdrop that we made our
22 position motion to compel to Magistrate Judge Wells. We
23 asked Judge Wells to require SCO to provide complete and
24 full and detailed responses to those interrogatories. And
25 Magistrate Judge Wells did that. If you will look at the

1 next page of the book, Your Honor, you will see that in a
2 December 12 order Magistrate Judge Wells ordered SCO to,
3 quote, respond fully and in detail to Interrogatory Numbers
4 12 and 13, as stated in IBM's second set of
5 interrogatories.

6 SCO didn't provide the information called for by
7 those interrogatories, Your Honor. It didn't identify the
8 copyright we were alleged to have infringed, and it didn't
9 identify a line of allegedly infringing UNIX System 5 Code,
10 and it didn't identify any allegedly infringing Linux code.
11 We approached Magistrate Judge Wells and asked again for an
12 order requiring SCO to provide the information we
13 requested. And, again, this time on March 3, Magistrate
14 Judge Wells ordered SCO again to comply.

15 In this connection, by the way, Your Honor, she
16 indicated that SCO, by this time, had provided enough
17 discovery with respect to IBM's other claims that she found
18 good faith sufficient to lift the stay, which she had sui
19 sponte imposed, because SCO had failed to comply with IBM's
20 discovery requests.

21 Nevertheless, that same day, she enters another
22 order ordering SCO to provide responses to Interrogatory
23 Numbers 12 and 13. And, again, Your Honor, SCO did not
24 provide answers to IBM's Interrogatory Numbers 12 and 13.
25 To this day, we do not have responses to those

1 interrogatories which indicate which copyright we
2 supposedly infringed, which lines of code in UNIX are
3 supposedly infringed, and which code in Linux is the
4 allegedly infringing code.

5 Now, why is that the case, Your Honor? That is
6 the case, we respectfully submit, because SCO has no
7 evidence whatever that IBM's Linux activities, the copying
8 and the distribution of Linux, infringe SCO's alleged
9 copyrights. And Your Honor need look no further than SCO's
10 own documents, which we have cited in our papers and which
11 I'm constrained somewhat from disclosing and describing in
12 any detail here today, but I would like to provide the
13 Court, nevertheless, with a copy, if I may, of that e-mail.

14 The document, Your Honor, has been marked
15 confidential by SCO and therefore I'm not at liberty to
16 describe it in great detail, but Your Honor can read it for
17 himself. I think the document is quite clear that the
18 reason SCO has not provided evidence responsive to IBM's
19 interrogatories is because, simply put, it has none.

20 Now, SCO claims, Your Honor, in its opposition
21 papers, that IBM bears the burden here of proving that its
22 Linux activities do not infringe SCO's alleged copyrights.
23 And, respectfully, Your Honor, that's wrong as a matter of
24 law. And I would refer the Court to the cases cited in our
25 papers and also here at page 10 of our book.

1 It is well established, Your Honor, that when a
2 declaratory judgment plaintiff seeks a declaration of
3 non-infringement, the party claiming infringement -- here
4 the declaratory judgment defendant -- bears the burden of
5 proof. And the moving party -- in this case IBM -- need
6 not, the Tenth Circuit has said, negate the non-movant's
7 claim with any evidence in order to prevail on its motion.
8 Rather, according to the Tenth Circuit, the moving party is
9 entitled to summary judgment if it can point the Court, as
10 I believe I just did, to a lack of evidence from the
11 non-movant on an essential element of the non-movant's
12 claim.

13 The cases cited by SCO, Your Honor, in support of
14 the proposition that it is in fact IBM that bears the
15 burden here to negate their claim of infringement, are
16 simply not supportive of that proposition. One is a Tenth
17 Circuit Court of Appeals case called Steiner Sales from
18 1938 in which SCO cites to a West headnote, not to the
19 holding of the case; which holding, in any case, does not
20 support the proposition that the declaratory judgment
21 plaintiff, seeking a declaration of non-infringement, bears
22 the burden of proof.

23 SCO cites to a decision from the Northern
24 District of Texas called Erickson v. Harris. That
25 decision, Your Honor, was vacated by the Court following a

1 motion for reconsideration on grounds relating to the
2 burden of proof.

3 SCO cites a decision from the Eighth Circuit
4 called Reliance Life, which has subsequently been
5 distinguished by the Eighth Circuit Court of Appeals as not
6 standing for the proposition for which it's cited by SCO
7 That, Your Honor, is my first point.

8 The second point which I would like to make is
9 that the alleged evidence submitted by SCO in its
10 opposition papers is in no way competitive to the entry of
11 summary judgment here.

12 SCO relies entirely upon the declaration of one
13 of its employees, a Sandeep Gupta, and Mr. Gupta's
14 testimony, however, fails for at least three reasons.
15 First of those reasons, Your Honor, is that SCO submitted
16 the Gupta declaration for the very first time in response
17 to IBM's motion for summary judgment. The contents of that
18 declaration are not found in SCO's response to IBM's
19 Interrogatory Numbers 12 and 13. They aren't found in what
20 we got in response to Magistrate Judge Well's orders. They
21 still don't exist in response to IBM's interrogatories.

22 SCO can't, Your Honor, we would respectfully
23 submit, in fairness, rely upon the contents of that
24 declaration in opposition to this motion.

25 Second, the testimony of Mr. Gupta is, in any

1 case inadmissible for the reasons that we lay out in our
2 motion to strike. SCO has failed to show, Your Honor, that
3 Mr. Gupta is an expert. Indeed, SCO goes out of its way to
4 make clear that Mr. Gupta is not an expert and that it is
5 not submitting expert testimony in support of this motion.
6 The fact that it hasn't submitted expert testimony is part
7 of its argument why it needs more time to respond to this
8 motion.

9 Mr. Gupta is simply a lay witness, Your Honor, as
10 SCO acknowledges, and as such, he can't offer his opinion,
11 as he does, that, quote, "Several routines and groupings of
12 code, for which SCO has copyright protection, were copied
13 into the Linux operating system."

14 That kind of testimony is not rationally based
15 upon the perception of the witness. That kind of testimony
16 is plainly scientific, technical and otherwise specialized
17 knowledge. It is expert testimony dressed up as fact
18 testimony. Mr. Gupta's testimony is inadmissible and
19 should be stricken.

20 Third, Your Honor, even if you ignore the fact
21 that we get the Gupta declaration for the very first time
22 in response to our motion for summary judgment, and even if
23 you ignore the admissibility of the Gupta testimony, the
24 Gupta testimony is, nevertheless, no impediment whatsoever
25 to the entry of summary judgment. Mr. Gupta identifies

1 less than 300 lines of code as to which he says there is a
2 similarity between Linux, on the one hand, and UNIX on the
3 other hand.

4 However, Your Honor, Mr. Gupta's commentary about
5 that code is flawed as a matter of law. He fails
6 altogether to take the count of the controlling test of
7 this Circuit and most Circuits relating to substantial
8 similarity. That is the lynch pin of a claim for copyright
9 infringement. The test is set out in the Tenth Circuit's
10 decision in Gates Rubber, and as set out in the Gates
11 Rubber decision, Your Honor, before a Court compares two
12 works -- here Linux and UNIX -- to determine whether there
13 is substantial similarity, the Court must first filter
14 out --

15 THE COURT: The extraction, filtration and
16 comparison test?

17 MR. MARRIOTT: You've got it.

18 THE COURT: I don't know if I've got it. I know
19 how to say it.

20 MR. MARRIOTT: You said it, and I think you've
21 got it, Your Honor. You must first filter out of the
22 allegedly protected work those elements which are not
23 protectable. Mr. Gupta doesn't even attempt to filter out
24 the unprotectable elements. The only similarities
25 identified by Mr. Gupta here, Your Honor, are similarities

1 of absolutely no legal significance. They are the result
2 of Linux and UNIX both being operating systems; utilitarian
3 works written in the same computer operating system
4 language and based upon basically the same industry
5 standards and programs and practices.

6 The kinds of similarities, Your Honor, which are
7 identified by Mr. Gupta, are the very similarities that
8 Your Honor will see referenced at the end of the e-mail
9 which I handed the Court, if you will look at the last
10 paragraph. The kinds of similarities identified by
11 Mr. Gupta, Your Honor, without reading that, are
12 similarities of no legal significance. SCO recognizes
13 that.

14 We have submitted for Your Honor's review a
15 declaration of Professor Brian Kernighan. Professor
16 Kernighan is one of the leading authorities on the
17 language, the computer program language, in which Linux and
18 UNIX are written. He's one of the authors of the leading
19 text on that subject. And as explained in Professor
20 Kernighan's declaration, the less than 300 lines identified
21 by Mr. Gupta are plainly all filterable. They are ideas,
22 processes, merger material, scenes a faire material, and
23 material dictated by externalities.

24 Moreover, Your Honor, when you actually look at
25 the code identified by Mr. Gupta, it is instructive -- and

1 if the Court would permit. For one thing, Your Honor, the
2 300 or so -- less than 300, actually, lines of code
3 identified by Mr. Gupta are plainly edited and rearranged
4 and juxtaposed to give the appearance of similarity when,
5 in fact, no similarity exists. And Your Honor can see that
6 by comparing the two pieces of paper that I have provided
7 to the Court.

8 One, entitled Exhibit H, is Mr. Gupta's. That is
9 from his declaration. The other is a book we put together
10 which contains the actual files of code from which
11 Mr. Gupta has selected, juxtaposed, cherry-picked code to
12 give the impression of similarity. And if Your Honor flips
13 through the larger book, you will see that where there is
14 yellow highlighting is where Mr. Gupta says there is
15 matching code. It is that matching code that he then
16 replicates in his Exhibit H for the proposition of
17 suggesting that somehow the allegedly infringing code
18 identified by him appears continuously in files, which
19 demonstrate blatant copying.

20 Put that aside, Your Honor, entirely, if you
21 would. Look solely at Mr. Gupta's Exhibit H. It doesn't
22 require any technical experience for a non-technical type
23 like myself, Your Honor, to look at Exhibit H and see that
24 the very code which appears in the far left column and the
25 far right column, which Mr. Gupta says is substantially

1 similar, if not identical, isn't anything remotely close to
2 being substantially similar or identical.

3 And we have laid out in detail, in Professor
4 Kernighan's declaration -- or, rather, he has laid out why
5 it is that, in fact, there are here no similarities of
6 consequence. Even if, Your Honor, you were to assume that
7 Mr. Gupta had properly done a filtration analysis, as the
8 Tenth Circuit requires, and even if you were to assume that
9 the code he identifies is in fact all substantially similar
10 or identical code, which it clearly isn't, the 300 or so
11 lines of code he identifies is plainly insufficient to give
12 rise to a genuine issue of material fact with respect to a
13 finding of substantial similarity.

14 The universe of UNIX code to which SCO contends
15 it has copyright protection, Your Honor, consists of tens
16 of millions of lines of code. Mr. Gupta identifies 300.
17 And there is nothing substantial about that either
18 quantitatively, or as Professor Kernighan explains,
19 qualitatively.

20 And if that's not enough, Your Honor, the Court
21 ought to look carefully at the opposition memorandum
22 submitted by SCO in connection with IBM's motion to strike.
23 If I could refer the Court to page 11 of our little book.
24 In opposition to IBM's motion for summary judgment, SCO
25 said in its brief, and I think Mr. Gupta's declaration is

1 quite clear that SCO is setting out evidence sufficient to
2 create a genuine issue of material fact. And we have
3 provided the citations for Your Honor on our page 11.

4 Mr. Gupta and SCO were quite clear that what
5 Mr. Gupta had to say was sufficient to create a genuine
6 issue of material fact.

7 Now, Your Honor, in opposition to IBM's motion to
8 strike, SCO concedes that the Gupta declaration, quote,
9 does not discuss whether any of the Linux code he observed
10 infringes any of SCO's copyrights. SCO claims that, quote,
11 "Mr. Gupta's declaration was offered not to show IBM's
12 copyright infringement of SCO protected code. Rather," it
13 says, "it was submitted for the," quote, "very narrow
14 purpose," close quote, to support SCO's Rule 56 request.

15 SCO effectively concedes, Your Honor, that the
16 very evidence submitted by Mr. Gupta, notwithstanding all
17 of its other problems, is insufficient to create a genuine
18 issue of material fact. That's my second point.

19 Third point, Your Honor, and one I hope is
20 responsive to the Court's question, is the following:
21 SCO's opposition, in the end, hangs on a single untenable
22 proposition. And that proposition is, Your Honor, that SCO
23 should be allowed more time and more discovery to find the
24 evidence which it's publicly told the whole world that it
25 has but which it plainly does not have.

1 The only information, Your Honor, that is
2 necessary to show copyright infringement has been available
3 to SCO, as Mr. Chesler said in his remarks, from the very
4 beginning of this litigation. There is no need for any
5 discovery on this claim, and SCO's Rule 56(f) application
6 should be denied. Under Rule 56(f), Your Honor, as you
7 well know, a party is not entitled to relief simply because
8 it can compose a long wish list of desired discovery.

9 We have laid out some of the principles for the
10 Court at page 12 of our book. "A party may not invoke Rule
11 56(f)," quote, "by merely asserting that discovery is
12 incomplete or that specific facts necessary to oppose
13 summary judgment are unavailable," close quote.

14 If the information sought is irrelevant or
15 cumulative, no extension, says the Tenth Circuit, will be
16 allowed.

17 Now, a Rule 56(f) application, Your Honor, needs
18 to be evaluated in light of the elements at issue in the
19 claim under motion. Here the summary judgment is
20 appropriate, as I indicated at the outset, unless SCO can
21 show two things. And the 56 analysis, Your Honor -- Rule
22 56(f) analysis should focus on those two things. SCO has
23 to show, in order to avoid summary judgment -- this is in
24 the first page of our book -- that it owns valid copyrights
25 in UNIX software and that IBM has copied protectable

1 elements of the allegedly copyrighted UNIX software.

2 And with those elements in line, Your Honor -- or
3 in mind, rather, let me explain why the Rule 56(f)
4 application here is meritless. First of all, SCO doesn't
5 need any discovery from anybody to determine whether it
6 owns the alleged copyrights. It's the supposed owner of
7 the copyrights. Although it has failed utterly here to
8 prove that it has valid copyrights, it has publicly claimed
9 for more than a year and a half that it owns them. It has
10 sued Autozone for infringing them. It has sued IBM for
11 infringing them.

12 It can't sit here and say it needs discovery with
13 respect to whether it owns copyrights that it sued IBM and
14 Autozone for infringing and for which it was required,
15 under Rule 11, to have a good faith basis for bringing in a
16 claim of copyright infringement.

17 Secondly, Your Honor, SCO doesn't need any
18 discovery regarding IBM's copying, which is the second and
19 the last --

20 THE COURT: Regarding what?

21 MR. MARRIOTT: IBM's copying, IBM's copying of
22 Linux, which is the second and the last element essential
23 to a claim for copyright infringement. There is absolutely
24 no question, Your Honor, that IBM has copied and has
25 encouraged others to copy Linux. We admit it. It is in

1 our statement of facts. SCO doesn't contest it. It is
2 deemed admitted for purposes of this motion. The only
3 remaining question is whether Linux, which IBM indisputably
4 copies, is substantially similar to Linux. That's the
5 question.

6 And determining substantial similarity, as we lay
7 out at page 13 of our book, Your Honor, is about a
8 comparison. It's a comparison between Linux, on the one
9 hand, and between UNIX on the other hand. And the Tenth
10 Circuit has said as much. Quote -- according to the
11 Autoskill case. "Substantial similarity analysis
12 involves," quote, "a comparison of portions of the alleged
13 infringer's works with the portions of the complaining
14 party's works which are determined to be legally
15 protectable under the Copyright Act.

16 SCO concedes this, Your Honor. If you look at
17 the declaration submitted by Mr. Sontag in support of SCO's
18 opposition, he says, quote, "To show that Linux code is
19 substantially similar to UNIX code requires a comparison to
20 that code."

21 The only question is whether the two bodies of
22 code compare or are. That's it. The only materials, Your
23 Honor, that SCO or anyone else needs to determine whether
24 Linux is substantially similar that UNIX is Linux and UNIX.
25 That's it. SCO has had those materials from the beginning

1 of this case.

2 Linux, as Mr. Chesler has indicated, is written
3 publicly over the internet, and it is available free for
4 download by anybody. SCO was founded in 1994 as a Linux
5 distributor. It has distributed thousands of versions of
6 the Linux kernel. It doesn't need Linux or IBM or anyone
7 else for purposes of that comparison.

8 What about the UNIX code? They purport to be the
9 owner of the alleged UNIX code. They say, at least as of
10 their 2001 acquisition of certain divisions of the Santa
11 Cruz Operation, Inc., that they have the code. The only
12 materials necessary, Your Honor, they have. And they have
13 long had it.

14 Now, they suggest -- SCO suggests, in opposition
15 to IBM's motion, that it needs years of additional
16 discovery to determine whether or not Linux infringes UNIX.
17 In fact, Mr. Sontag says, Your Honor, at one point, that up
18 to 25,000 additional man-years are required in order to do
19 this comparison. That estimate, of course, is based
20 entirely upon his opinion which, for the reasons we set out
21 in our motion to strike, is an impermissible opinion.

22 He has no personal knowledge of that, and much
23 like Mr. Gupta, he's not qualified as an expert. SCO
24 doesn't pretend Mr. Sontag has been submitted here as an
25 expert, and whether or not there is substantial similarity

1 between Linux and UNIX is clearly a question of expert
2 testimony. It is a question, Your Honor, that Mr. Sontag
3 is not capable of opining as to. Now, putting aside
4 entirely the admissibility of Mr. Sontag's opinions, they
5 are untenable on their face, Your Honor.

6 We asked the question of how long it would take
7 to compare UNIX to Linux to Professor Randall Davis of MIT,
8 the same school from which SCO's purported experts come.
9 He was the Court-appointed expert, Your Honor, in the
10 Computer Associates Case, which is one of the leading cases
11 on substantial similarity, and as he explains in his
12 declaration, it would take capable programmers no more than
13 a couple months to compare Linux to UNIX to determine
14 whether there was infringement.

15 Mr. Sontag's opinions about 25,000 man-years
16 being required to compare UNIX to Linux, Your Honor, cannot
17 be reconciled with SCO's public statements. I mean, SCO
18 said, as I indicated at the outset, and has been saying for
19 15 months, that it has three separate teams of experts
20 doing deep dives into Linux and UNIX, comparing Linux to
21 UNIX every which way but Tuesday, and finding substantial
22 evidence of similarity; evidence which, by the way, we have
23 never seen.

24 Moreover, Your Honor, if you need any further
25 indication as to how long it really takes to do the

1 comparison, look at the e-mail, in which it's quite clear
2 that it didn't take anything like 25,000 man-years to do a
3 comparison between Linux and UNIX. Mr. Sontag says, Your
4 Honor, that comparing a single version of UNIX to a single
5 version of Linux would take this 25,000 man-years. The
6 e-mail, which Your Honor has before you, makes reference to
7 comparisons of Linux to multiple versions of UNIX. It
8 doesn't appear that took anything near 25,000 man-years.

9 Now, having created the straw man of the need for
10 25,000 man-years in order to do this comparison which,
11 parenthetically, it's already done, SCO says the only way
12 that we can avoid the conundrum of the 25,000 man-year
13 comparison is if the Court gives them what amounts to four
14 categories of discovery. And what I would like to do, Your
15 Honor, with your permission, is to explain to you,
16 category-by-category, why none of that matters at all to
17 this motion.

18 First, SCO says it needs discovery with respect
19 to IBM's Linux activities. IBM seeks a declaration that
20 its Linux activities, its copying of Linux and its
21 encouraging of others to copy Linux, doesn't infringe SCO's
22 copyrights. As I indicated, it's not disputed that we
23 copied Linux and we encourage others to copy Linux. That
24 isn't in dispute. It is unimaginable to me, therefore, why
25 they need any discovery with respect to the only Linux

1 activity of any consequence. The relative discovery, Your
2 Honor, is determined and framed by the elements of the
3 claim they have to substantiate.

4 Copy. We admit that we copied. No discovery
5 with respect to IBM's Linux activities is required, let
6 alone the, quote, "substantial and time-consuming
7 discovery" that SCO imagines is necessary here.

8 The second category of discovery they are
9 seeking, Your Honor, is discovery with respect to IBM's
10 access to the allegedly copyrighted materials. Well, IBM's
11 motion is not focused on the question of access, Your
12 Honor. Your Honor may assume access, if you wish, for
13 purposes of this motion, because a mere showing of access
14 is insufficient, in any case, to create a question of
15 material fact unless there is substantial similarity.

16 SCO must show, to avoid summary judgment, there
17 is substantial similarity, and that's something they cannot
18 show. Discovery as to access is under development as to
19 that question, so assume full access, if you wish, for
20 purposes of evaluating this motion.

21 The third category of discovery they seek, Your
22 Honor, is with respect to IBM's AIX and Dynix products.
23 This is the one about which they are making such a big
24 deal. IBM has produced in this litigation already, Your
25 Honor, hundreds of millions of lines of AIX and Dynix code.

1 And just to be clear, AIX and Dynix code aren't Linux code,
2 and they aren't the System 5 code which SCO says has
3 allegedly been infringed here. They are IBM's separate
4 products.

5 We have produced hundreds of millions of lines of
6 that code, not sporadic productions of the code. For the
7 period for which they have originally asked for that
8 discovery, we have produced every release of that code. It
9 amounts to hundreds of millions of lines of code. That,
10 they say, isn't good enough, though, frankly, that's
11 entirely irrelevant to the question of copyright
12 infringement.

13 And, parenthetically, that is cited, in the
14 first instance, not for purposes of copyright infringement,
15 Your Honor, because as you heard them say they didn't put
16 the copyright question, which we say should be here, in the
17 case. That isn't what they were seeking originally. They
18 were seeking discovery with respect to their contract
19 claims and, indeed, a good portion of their opposition to
20 IBM's motion for summary judgment is about their contract
21 claim.

22 We produced hundreds of millions of lines of the
23 AIX and Dynix code. None of it has anything whatsoever to
24 do with the question of substantial similarity. Whether
25 UNIX is infringed by Linux, Your Honor, depends upon a

1 comparison of UNIX to Linux. Even if certain code
2 originally originated from AIX or Dynix and made its way
3 into Linux, it makes no difference if UNIX and Linux are
4 not, at the end of the day, substantially similar.

5 Now, in any event, if you look closely at the
6 Sontag declaration, what Mr. Sontag seems to be saying is
7 the conundrum is this 25,000 man-year comparison. If we
8 can get all this discovery from IBM, and particularly the
9 AIX and the Dynix code, that will be the map that will
10 guide us to the smoking gun evidence. Your Honor, the code
11 that they want, the additional AIX and Dynix code, is code
12 that is effectively, for most of the period, draft code,
13 iterative code, not the actual releases that IBM made for the
14 period '99, I think it was, to the present.

15 The code amounts to two plus billion lines of
16 source code. So if Mr. Sontag says if you compare one
17 version of Linux, which they say is about 4 million lines
18 of code, to one version UNIX, which they say is about 3
19 million lines, they say is going to take 25,000 man-years,
20 well, how long do you think it's going to take to compare
21 two plus billion lines of code to whatever it is they want
22 to compare it to?

23 The notion that the production of two plus
24 billion lines of code, none of which has anything to do
25 with substantial similarity between Linux and UNIX, is

1 somehow going to cure the problem presented by the straw
2 man of 25,000 man-years of discovery is, Your Honor,
3 untenable.

4 Finally, the fourth category of discovery that
5 SCO seeks concerns the third-party contributors to Linux
6 and their supposed contributions to Linux. Again, here,
7 Your Honor, what matters is whether Linux is substantially
8 similar to UNIX. It doesn't matter where the code came
9 from. It doesn't matter how it got there. What matters is
10 whether they are, in fact, comparable.

11 In any event, all SCO could ever possibly hope to
12 know and have with respect to Linux is publicly available.
13 Your Honor could go to www.Linuxhq.com. Now, at that
14 website, you can find every version of the Linux kernel,
15 from version 1.0.0. Not just that, but you can find every
16 change that was ever made to the kernel since its
17 inception.

18 So the notion that more discovery is required,
19 depositions of Mr. Torvals and others, is simply, Your
20 Honor, untenable. There is no reason, in any event, for
21 Mr. Torvals or the other contributors, who are no secret,
22 who will be deposed already.

23 To conclude, Your Honor, IBM's motion should be
24 granted for three reasons. It should be granted because,
25 despite the public accusations of infringement by IBM, SCO

1 has no evidence whatever to support its allegation.
2 Mr. Gupta's evidence of infringement, Your Honor, is
3 insufficient, and they now acknowledge it's insufficient to
4 create a genuine issue of material fact. And the sole
5 proposition that they can stand here and argue for is
6 delay, more discovery, and there is no additional discovery
7 or delay required to compare Linux to UNIX when they have
8 had it since well before the inception of the case.

9 Thank you, Your Honor.

10 THE COURT: Thank you, Mr. Marriott.

11 Mr. Hatch.

12 MR. HATCH: Your Honor, would it be appropriate
13 to ask for a short recess at this point?

14 THE COURT: Yes. We'll take 10 minutes.

15 (Short recess.)

16 You may proceed, Mr. Hatch.

17 MR. HATCH: Thank you very much, Your Honor. At
18 the beginning of the hearing today, Your Honor, I raised
19 issues regarding discovery, and I want to raise those again
20 in the following context: What we -- a lot of
21 Mr. Marriott's argument that we just heard was very good,
22 very polished, in the following way: It's now about the
23 third or fourth time we've heard all of that.

24 The problem is that we heard a little bit of it
25 in front of you the last time we were here. We have heard

1 it repeatedly over the course of several hearings in front
2 of Magistrate Judge Wells. Regrettably, and I think that
3 was part of our frustration that caused me to raise the
4 issue at the beginning of this hearing, and also was the
5 cause of the pleading, the emergency expedited pleading
6 that we filed just recently before Your Honor, was that
7 these matters -- and this really kind of, I think, shows
8 the danger of going forward on summary judgment motions of
9 this type this early -- at this stage in the case, let's
10 say.

11 THE COURT: Well, but he says with respect to
12 this particular claim, you claim what you had at the
13 beginning, and all you have to do is compare yours to what
14 everybody can get.

15 MR. HATCH: Yeah. That's real nice, and I
16 appreciate him saying that, but, Your Honor --

17 THE COURT: He read your client's public
18 statements about that.

19 MR. HATCH: Well, and I'm going to address those
20 in a few minutes because I think, one, he mischaracterizes
21 those quite a bit. And, you know, I really view this as
22 somewhat akin to -- if this were the legal principle going
23 forward, it would be really a defendant's bonanza because
24 what essentially they are saying, at this stage of the
25 game, is that you can have enough to go forward and make

1 your claims and push forward, but where the claims are such
2 that, in this instance IBM -- but say it was a products
3 liability case before the -- a securities case, it could be
4 the brokerage house, where the defendant actually controls
5 a good portion of the documents and information, it would
6 be real nice for defendants to be able to come in at a
7 preliminary stage, after they haven't given any discovery,
8 and say, "Gee, you can't show enough. We are out of here."

9 THE COURT: Well, but UNIX is yours, and Linux
10 everybody can get a hold of; isn't that right?

11 MR. HATCH: Well, no. It's somewhat
12 disingenuous, Your Honor.

13 THE COURT: Show me how it's disingenuous.

14 MR. HATCH: Well, Mr. Frei is going to deal with
15 that a little bit on the 56(f), but let me at least put it
16 short. This is why this is unfortunate we're here arguing
17 this now.

18 THE COURT: Well, but we are.

19 MR. HATCH: We are. We expected that this would
20 be argued yesterday so that we would have the benefit of
21 that argument and potentially Judge Wells' ruling because
22 we have now -- what Mr. Marriott fails to mention is that
23 we have now, for the second time, renewed a motion to
24 compel in front of Judge Wells to get the information from
25 them that they have repeatedly refused to get us. Now they

1 are saying "Well, you refused to give us stuff."

2 We are saying, "You refused to give us stuff."

3 And instead of arguing that either in front of
4 Judge Wells or in front of you -- and I'm happy to do it
5 either place, with the Judge who's deciding it having the
6 benefit of the briefing on the issue and understanding --
7 we have now argued this two or three times in front of
8 Judge Wells -- he now wants to do it in front of you
9 without the benefit of those briefs, without the benefit of
10 the hearing yesterday and say, "Give us summary judgment,"
11 when we can't even get, after a year and a half, get
12 predicate discovery out of IBM.

13 Now he wants you to just take it on good faith
14 that -- "trust me, you know, I'm a good defendant."

15 And Mr. Marriott is a highest caliber lawyer.
16 But he's an advocate, and I don't think we put ourselves in
17 a position where, without briefing, without anything else,
18 we come in and just say, "Trust me, even though this matter
19 is over in front of another judge and hasn't gotten to you
20 yet, which it may, and on that basis give us summary
21 judgment."

22 THE COURT: Well, the discovery matter is in
23 front of the Magistrate Judge, but the partial summary
24 judgment matter is in front of me now, here.

25 MR. HATCH: I understand.

1 THE COURT: What is it you think you need? Well,
2 you say Mr. Frei is going to address that.

3 MR. HATCH: Well, if I can address that because,
4 I mean, part of what you just said, I think is -- it was
5 their lead argument; in their brief, their lead argument --
6 and I'm going to play the gun game, too, if you don't mind.

7 THE COURT: No. Let's see if you can work it
8 better than Mr. James worked it.

9 MR. HATCH: Boy, you're really creating
10 controversies there. In their opening brief, this is what
11 they said. And this was the basis. I mean, there are a
12 lot of new issues that have been raised in Mr. Marriott's
13 argument today, and we're going to address those. It will
14 take a few minutes. But let's go to what their lead
15 arguments were.

16 They went back to this discovery dispute, and
17 what they don't give us is a little bit of a framework. We
18 had, understandably, both parties at the earliest stages of
19 this saying, "We need your stuff."

20 "No, we need your stuff."

21 And Judge Wells -- and I don't think it would be
22 unfair to her to say she kind of threw up her hands and
23 said, "Someone has got to go first." So she ordered us to
24 produce what we had and ultimately said, "Fine. Now you've
25 gone. IBM, you produce stuff."

1 But, initially, this is what they said, and they
2 have taken this kind of discovery dispute and turned it on
3 its head and said that we have -- "Despite certifying twice
4 it has complied with the Court's orders, SCO has in fact
5 failed to comply with the orders."

6 Okay? So they are saying now that we have
7 violated orders.

8 THE COURT: They say you haven't answered
9 Interrogatories 12 and 13.

10 MR. HATCH: That's correct. And this is not a
11 motion they have got in front of Judge Wells. This is just
12 a statement to you that now they want sanctions on. Okay?
13 So then they go forward and, as Your Honor just said, they
14 say, "You haven't answered completely Interrogatories 12
15 and 13."

16 And what they want from this --

17 THE COURT: Which, arguably, is your evidence of
18 their copyright infringement.

19 MR. HATCH: Right. And what they want from this,
20 even though it was an interrogatory imposed near the
21 beginning of the game, is they want to say, "Guess what.
22 This now bars the game. We're done. Litigation is over.
23 Discovery is over. Despite the fact discovery now ends in
24 February, it should end now. You've had your chance."

25 THE COURT: At least as to Counterclaim 10.

1 MR. HATCH: I understand. But, Your Honor, what
2 Judge Wells left open, that they didn't cite in their
3 brief, is -- well, you see here from the order itself, it
4 says, "SCO does not have sufficient information in its
5 possession, custody or control to sufficiently answer any
6 of IBM's requests that are subject to the order. SCO
7 should provide an affidavit."

8 Okay? So she didn't say, "Give everything now
9 and you're done," because that would be absurd. I mean,
10 litigation doesn't work that way. You give what you have
11 and then you -- if they won't give you discovery, you
12 indicate what you need, and we're going to -- Mr. Frei will
13 do that in the context of the 56(f) motion. But, as a
14 summary, we indicated, and we argued vociferously in front
15 of Judge Wells, that we need something. And she has
16 ordered them to produce things.

17 So the next light is, again, from their summary
18 judgment brief. And this is their lead argument. They
19 say, "Despite the Court's orders, SCO failed fully to
20 respond."

21 And they again are admitting -- I mean omitting
22 the fact that SCO stated -- we did respond. They quibble
23 with how extensive our response was, and we indicated that
24 we required complete discovery from IBM, including versions
25 of AIX and Dynix and that there, undoubtedly, will be

1 additional information that we will need. Okay?

2 And then we provided other discovery
3 certifications that were in front of Judge Wells, and we
4 were indicating what we were missing from their discovery.
5 Now, I have been involved in my share of cases but, you
6 know, I have never been really faced with the kind of issue
7 that we are dealing with here, which is, at a preliminary
8 stage of the game, and particularly where someone wants to
9 file summary judgment motions, the litigants are saying,
10 "We are going to determine relevance. You don't need this
11 stuff."

12 You know, the new discovery rules have been
13 pretty clear. If it's at all relevant, then you should
14 have it. And then we can argue later whether or not there
15 was something in there or not. And Mr. Frei is going to go
16 through, at some length with you, I believe, one of the
17 things that has been being argued about in front of Judge
18 Wells for some time and is directly at issue in our renewed
19 motion to compel because we believe it's been -- you know,
20 that they have been ordered to produce this, and in the
21 context of the information it contained in the system and
22 what's called the CMV system and the RCS system.

23 Now, the information that's in there, they have
24 been asked to supply. They have not been specifically
25 asked yet to -- ordered yet to produce those systems.

1 We've got another lengthy memorandum called Memorandum
2 Regarding Discovery in front of Judge Wells that addresses
3 this issue. And pursuant --

4 THE COURT: Is Mr. Frei going to go over all
5 this? Because I don't want you to go over it twice. I
6 don't want you to go over it and then I don't want him to
7 go over it.

8 MR. HATCH: Okay.

9 THE COURT: I just want to hear stuff once. So,
10 I assumed he was going to do something different than you
11 are going to do.

12 MR. HATCH: Okay. Right. My point is, solely,
13 these are issues that are in front of Judge Wells to impart
14 the information they were supposed to provide us and they
15 didn't, and we still need that information. And, again,
16 you're handicapped because those motions aren't in front of
17 you. And we're all handicapped because the hope was that
18 those motions would have been decided before we were here
19 and, one way or another, they would have impacted this
20 motion pretty substantially.

21 Well, the upshot of it all, as one of the slides
22 shows, Your Honor, is there isn't some issue out there that
23 we haven't been producing discovery. Judge Wells
24 specifically found that we had complied in good faith. And
25 that included our responses to Interrogatories 12 and 13

1 that they are complaining about now. So they want to turn
2 this discovery dispute on its head and say, "Guess what,
3 you're cut off."

4 And that's not what the Judge said. The Judge
5 said, as I would have expected the Magistrate Judge would
6 say -- and she is an excellent Magistrate Judge -- is that
7 we have gotten where we need to be at this preliminary
8 stage of the litigation. Then what did she do? She
9 ordered IBM to turn over information.

10 Now, give me just a second, Your Honor. Based on
11 Mr. Marriott's arguments, I'm kind of taking this out of
12 order. To show you we're still kind of in the same
13 posture, I'm sure you will recall, Your Honor, that -- and
14 this wasn't in the body of what I was going to present, so
15 that's why it took me a second longer. You recall last
16 time we talked about some of the discovery problems we were
17 having in the context of changing the scheduling order.

18 And you will recall that I raised the fact that
19 we had given an interrogatory to IBM that specifically
20 asked for who worked on AIX, Dynix and Linux at IBM and
21 what were the precise contributions. And you will recall,
22 Your Honor, that we were a little disappointed that -- and
23 we presented a -- I think it was an article, you know, if
24 we're going to both use the press to get after each
25 other -- I used an article where someone from IBM had

1 limited that -- had said it was a few hundred people.

2 That's not on the slide, but we talked about that
3 at the last hearing. They said it was going to be a few
4 hundred people. But in response to the request, we got a
5 list of 7200 people, and none of them were identified with
6 contact information, and not a single one of them were
7 identified as to what they contributed. And it's pretty
8 clear from the question that -- what we were getting at.
9 And what we got was 7200 people which, you know, it has
10 never been disputed included probably secretaries,
11 administrative staff, people who had absolutely nothing to
12 do with the subject matter of this litigation.

13 Well, since that hearing, Your Honor, we filed
14 motions to compel, and actually that was before this
15 hearing I am talking about with you. And the Magistrate
16 Judge ordered them to provide the information. So, what
17 they ended up doing is they eventually gave us contact
18 information on the 7200 people -- or portions of the 7200
19 people -- and still have not -- we're still fighting about,
20 and it's part of the discovery dispute in front of Judge
21 Wells, who are these relevant people? How do we proceed
22 here? Which programmers are we going to depose?

23 IBM is still fighting with us because the
24 original scheduling order said we get 40 depositions a
25 side. And you recall when we were in front of you last

1 time, Your Honor, we said the copyright counterclaims --
2 all their counterclaims came after that decision was made
3 and 40 was a ridiculous amount. Well, we still have not
4 resolved that before Judge Wells, and IBM has still been
5 taking the position with us --

6 THE COURT: How does that relate to this motion,
7 at this time, on this counterclaim?

8 MR. HATCH: Well, the following way, Your Honor,
9 is -- and if I can go -- it relates in the following way:
10 Their argument essentially is, Your Honor, and it's a
11 truism, is they have a right to bring a summary judgment
12 motion at any time. Okay? But the corollary to that is
13 the Judge, in his gatekeeping opportunities, is -- it has a
14 right to decide whether or not to stay the briefing on that
15 and the decision on that.

16 THE COURT: I clearly do have that discretion if
17 I decide to utilize it in that way.

18 MR. HATCH: And they have completely ignored
19 that, and they have ignored the discovery that we need.
20 Now, the interesting thing is the arguments that they raise
21 as those lead arguments, and why we were at the end and we
22 are precluded from going any further, those were their lead
23 arguments. But in their reply brief, once we showed that
24 that isn't what Magistrate Wells ordered, that we were at
25 the preliminary state of discovery -- the Magistrate did

1 say that we had complied in good faith. She didn't say, "I
2 still think you're weak on 11 and 12, Interrogatories 11
3 and 12." She said, "You complied with good faith. Let's
4 move on."

5 We haven't gotten anywhere. They clearly can't
6 cut it at that point. Now, in our opposition papers,
7 you've heard a lot about Mr. Gupta. And I don't want to
8 address specifically, because Mr. Frei will, what Mr. Gupta
9 had to say and why that's relevant and shouldn't be enough,
10 but it's very interesting the kind of theme that goes here
11 because if you go to page 12 and 13 in their reply -- now,
12 in their reply they completely abandon essentially, because
13 they don't discuss it, and they don't deal with the issues
14 about how we have complied with Judge Wells' orders and the
15 discovery going forward, but they say this as to Mr. Gupta,
16 who presented evidence:

17 They say, "SCO never disclosed the information
18 contained in the Gupta declaration in response to IBM's
19 discovery requests or the Court's discovery orders. The
20 Court should, therefore, disregard Mr. Gupta's declaration
21 considering IBM's motions."

22 Well, in other words, the last time I checked,
23 that's the way you do -- one of the ways you oppose a
24 summary judgment motion is to provide declarations, and we
25 are at a preliminary stage. What they are essentially

1 saying is, "Okay, if you really weren't cut off back in
2 April, you know, from these declarations you made, and
3 maybe it's true that Judge Wells had said that we can move
4 on and you have produced in good faith," they are now
5 saying, every time we pick up some piece of evidence, is:
6 "Well, it's too late. You shouldn't be able to put this
7 in."

8 Well, we are not even at the end of discovery.
9 And then they complain about Mr. Gupta because he says he
10 does expert things. We are not even at the end of expert
11 discovery. And, Your Honor, your -- that goes directly to
12 the issue of whether or not this matter, as a matter of
13 law, is premature. And I draw your attention to a case
14 that I'm sure, given the amount of opinions I saw in the
15 reporters on this, is probably near and dear to your heart.

16 THE COURT: It's one of my favorite cases.

17 MR. HATCH: One of your favorite cases. I won't
18 ask you to rank it with this case. But the same type of
19 argument was being made, apparently, and it was not as
20 clear to me from the opinion, the full stage of where that
21 was at, but they were making a similar argument in that
22 case, apparently, is that it was a preliminary enough stage
23 that they weren't coming up with evidence on their own and
24 they needed, apparently, additional evidence from the other
25 side. And Your Honor said, and I think rightfully so, that

1 P&G's evidence is not fully developed and that Amway's
2 motion is premature.

3 And for a lot of reasons, not the least of which
4 is that IBM is really, through this process, trying to
5 restructure how the discovery process should be; in other
6 words, they are saying, "You should have to take your
7 experts now." Okay? "And you should have all your
8 discovery done on this counterclaim," which is really --
9 you know, this case primarily is --

10 THE COURT: One of the things they are saying is
11 discovery isn't going to help on this counterclaim.
12 Discovery is not going to illuminate anything on this
13 counterclaim. That's one of the their arguments. They say
14 you know what you own and have, and anybody can find out
15 what's in Linux. And so, you know, you compare it. That's
16 what they are saying, discovery won't get us anywhere on
17 this particular matter.

18 MR. HATCH: And that's just not true, and that
19 will become more evident with the things Mr. Frei is
20 saying.

21 THE COURT: All right.

22 MR. HATCH: The cases are fairly clear, and the
23 Huthwaite case is not really different than any other case
24 out there, but it was a little bit more directly on point.
25 It did say the motion is premature at this point because

1 it's brought before the submission of expert reports on the
2 substantial similarity question and, you know, rightfully
3 it talked about that being a significant question in, of
4 course, a copyright claim. He cited, I think, Tenth
5 Circuit law on that point. And there are a number of cases
6 that deal with that.

7 But that is the quintessential expert opinion
8 that has to be given through expert evidence, and we're not
9 even anywhere close yet to our discovery cutoff. So
10 essentially what, again, they are doing is attempting to
11 push that up. Where we are all trying to manage this thing
12 and get this thing done in time, they are trying to push
13 that up. And that's another basis for why this Court
14 should use its discretion to not hear this motion -- not
15 hear it, but not to decide this motion at this time.

16 There are a number of reasons. I wanted to put
17 them together in this form because I wanted to go through
18 them reasonably quick. But Rule 56(f) -- what I'm talking
19 to you about, your discretion, and what Mr. Frei is going
20 to talk about in technical detail are indeed 56(f)
21 arguments. But that's to provide a safeguard against an
22 improvident or premature grant of summary judgement, and I
23 think that goes directly to my part of the argument --
24 certainly Mr. Frei's argument, but my part of the argument
25 that this stuff is all preliminary.

1 We haven't even gotten a hearing in front of
2 Judge Wells on this matter yet. The fact-intensive nature
3 of the substantial similarity test is a classic issue for
4 the jury, and Mr. Marriott has spent a considerable amount
5 time arguing about, you know, what we can or cannot show
6 there and whether, you know -- and that ultimately will
7 be -- once we get to that point, that's ultimately a
8 question for the jury. And then the use of experts, as
9 I've just talked about, is really a paramount necessity
10 here.

11 I want to make a couple of other quick points.

12 THE COURT: You could have put in a declaration
13 of an expert as part of your response to their motion for
14 partial summary judgment on the counterclaim and 59.

15 MR. HATCH: Well, as a theoretical matter, yes.
16 As practical matter here, and I think that's what we're
17 arguing in front of Judge Wells, too, is a lot of the
18 predicate discovery that would be necessary for that and
19 that would make it meaningful -- certainly make it more
20 meaningful -- is still required. So I think it's obviously
21 premature.

22 I want to talk about, quickly, two issues that
23 Mr. Marriott raised; one of which he raised, the Davidson
24 e-mail, because it's very interesting. He indicated, well,
25 this Davidson e-mail seems to indicate that we could do all

1 this stuff without discovery for them. One, it begs to the
2 question of whether we are entitled to discovery anyway.
3 Mr. Frei is going to tell you, you know, what we're looking
4 for is the most efficient way of dealing with the type of
5 evidence -- they talk about -- I think Mr. Marriott -- I
6 wrote down this. He said, "How long do you think this --
7 there's two billion lines of total code that has to be
8 compared, how long do you think that's going to be if we
9 were saying it's going to be 25,000 man-years?"

10 Well, Mr. Frei is going to go to some length and
11 show you how IBM knows that that can be done in a rather
12 efficient manner with materials that they have in place and
13 refuse to give us.

14 THE COURT: At some length? Maybe he'll give us
15 the summary version.

16 MR. HATCH: Well, okay. I'm sure he will. But
17 they raise this e-mail for that purpose. But a couple of
18 things that they don't point out -- and I'll go to that --
19 is the study itself because one of the things that is
20 talked about in the e-mail -- and that was confidential, so
21 I would ask Your Honor to just turn to -- I think in your
22 book it's tab 55.

23 THE COURT: Are you looking at the e-mail?

24 MR. HATCH: Yeah. It's a quote from the e-mail.

25 THE COURT: Okay.

1 MR. HATCH: I mean, essentially what they did is
2 they left out information that said he worked with him, but
3 he may have done things. Finally -- I don't think that's
4 confidential -- and that, I don't have copies.

5 Okay? And so he's working, and at some period of
6 time, years after this report -- and it's being offered in
7 some fashion in front of Your Honor to say that this -- you
8 know, that it should be easy and that we have already made
9 conclusions that there is no copyright problem here. And
10 nothing could be further from the truth.

11 If Your Honor would go to the next -- and this
12 one is not confidential, so I'll put it up. The actual
13 report itself -- if Your Honor would like, I could give you
14 a copy of the report itself.

15 THE COURT: If you want to.

16 MR. HATCH: I mean the actual report.

17 THE COURT: That's fine.

18 MR. HATCH: I mean, the conclusions were a little
19 different than were represented in the brief and in
20 argument today. In the brief I understand somewhat because
21 I don't -- my understanding is they did not have a copy of
22 the report at the time they wrote their brief. The report
23 itself makes some very interesting actual findings. First,
24 that many portions of Linux were clearly written with
25 access to a copy of UNIX sources. Okay? That's somewhat

1 different from what we're being told.

2 Second, there is some code where Linux is
3 line-for-line identical to UNIX. Again, somewhat slightly
4 different than what we're being told.

5 It says, thirdly, there are also portions of the
6 program which appear to have been rewritten, perhaps only
7 for purposes of obfuscating that the code is essentially
8 the same. These techniques also apply if whoever modified
9 the code did just that because there are a few lines which
10 are completely identical.

11 Fourth, it says that we did not look through the
12 programs to find substantial similarities or structural
13 similarities.

14 So, he's starting out by saying kind of the
15 opposite of what the e-mail was used for, to say, well,
16 there really isn't any copying. There is nothing there.
17 He's actually saying there's quite a bit there, but then he
18 indicates in the last two highlighted portions, he
19 indicates that, yeah, my study is somewhat limited and
20 there's obviously still a lot that has to be done.

21 So I think Your Honor needs to be aware of that,
22 because the Davidson thing offers absolutely no support for
23 their allegations that this somehow has already been done
24 and what have not. The interesting thing, too, is even
25 though the Davidson e-mail, Your Honor, is dated three

1 years later, the interesting thing is the date of that
2 report. That report is actually pre-IBM. As we understand
3 the dates at this time, this report was done previous to
4 IBM's beginning to engage in the behavior that we have sued
5 them for here.

6 So, again, it certainly can't be evidence, some
7 kind of conclusive evidence, that we have already done this
8 and can't find anything because he did find those. He
9 doesn't say -- and he doesn't say who he found them
10 regarding because IBM wasn't an issue at the time. And so
11 it's somewhat disingenuous to say that, oh, we have already
12 found this stuff, and the Davidson memo says we have,
13 because, yeah, we found stuff, but it was stuff from other
14 people. They are not here. They are not defendants here.
15 But that can't be a basis for saying that we have already
16 done all the work regarding IBM or that we can.

17 The last point I wanted to make, real quickly, is
18 they raised at some length today in the argument, and it
19 was interesting because they didn't really raise it in
20 their initial brief, but they did mention it in the reply,
21 is they started raising for the first time in the reply
22 brief issues about ownership. And those just aren't
23 properly before the Court.

24 In their opening brief, this is what they said
25 about that issue. And you raised this earlier, Your Honor.

1 They said, "Ownership of these copyrights is a central
2 issue in SCO's lawsuit against Novell, which is currently
3 pending before this Court, but the Court need not decide
4 that question on this motion."

5 That's what their opening brief said. And when
6 we dealt with the opposition, we took them at their word,
7 and I think they have made that statement elsewhere in
8 front of the Court. And so we expressly noted that and
9 understood that they were excluding from this present
10 motion issues on ownership. Well, then, in their reply,
11 they raised them and again today they raised them.

12 And I think, as a matter of law -- and I will
13 just cite, because we don't get a surrebuttal on this
14 thing, but the Wagner vs. Guy's Foods case, the Tom vs.
15 First American, and the Malhotra vs. Cotter case, which
16 indicate that summary judgment shouldn't be granted on
17 issues first raised in reply briefs. And so, you know, I
18 think raising that now, particularly where it really, one,
19 it isn't an issue and, two, they said it wasn't an issue,
20 and to now kind of slide down to hope to put that in at the
21 last minute, it shouldn't a part of that, your decision.

22 Your Honor, at this point I think it would be
23 appropriate for me to turn the podium over to Mr. Frei --

24 THE COURT: All right.

25 MR. HATCH: -- to discuss the aspects of

1 discovery under 56(f) and answer some of those questions
2 that you raised.

3 THE COURT: Okay. Thank you, Mr. Hatch.
4 Mr. Frei.

5 MR. FREI: Your Honor, I'm Frederick Frei. I'll
6 be presenting argument on the 56(f) motion and on the
7 motion to strike the three declarations.

8 THE COURT: All right.

9 MR. FREI: I will endeavor to answer every
10 question you have on this discovery issue, and at end of
11 the argument, I hope you will have an understanding of what
12 we are asking for, why we need it, and what we are going to
13 do with it when we get it.

14 I want to start off with, IBM says that all we
15 need is the UNIX code, UNIX source code, which we have, and
16 the Linux source code, which is publicly available, that we
17 have. And as they say on page 28 --

18 THE COURT: Are you're going to tell me why
19 that's isn't so.

20 MR. FREI: I'm going to tell you why that's not
21 so. I'm going to show it to you graphically. They say
22 that it's nothing more than a side-by-side comparison, and
23 I believe Mr. Chesler said, a while ago in court, it's very
24 simple. Well, that is the Linux kernel, 4 million lines of
25 code, 8,750 files. Those files contain anywhere from tens

1 of lines of code to over 10 thousand lines of code. UNIX
2 is of a comparable size; somewhat smaller, but of a
3 comparable size.

4 Now, if you were to line up 8,000 files on the
5 left-hand column and 8,000 files on the right-hand column,
6 and I said to you, "Compare them," well, your first thing
7 would be, where do I begin? Do I compare the top file with
8 all 8,000 and then the second with all 8,000? If you did
9 that, you would have 64 million comparisons. The number,
10 25,000 years, that Mr. Marriott made so much of, that was a
11 hypothetical number that was based on manual comparison,
12 and the exact assumptions and calculations were set forth
13 in the declaration. Okay?

14 We will use software comparison tools. We will
15 rely on the expertise of people who know UNIX and people
16 who know Linux, but even with that knowledge, it is a huge,
17 huge task. It's like if I sit -- you know, put you --

18 THE COURT: Are you saying that you need more
19 time to make the comparisons or that you need something
20 from IBM to make the comparisons or both?

21 MR. FREI: Both.

22 THE COURT: What is it you think you need from
23 IBM?

24 MR. FREI: What we need from IBM is the
25 information that will constitute a road map, that will

1 enable us to zero in on particular parts of Linux to
2 compare with particular parts of UNIX. That's what we need
3 from IBM as to their AIX and Dynix contributions.

4 THE COURT: One might conclude, from some
5 statements previously made, that a lot of these comparisons
6 had already been done before the lawsuit was even filed.

7 MR. FREI: I believe that many of those
8 statements referred to that 1999 report that you were just
9 given, and that was when Linux was half the size of what it
10 is now. That was when Linux was maybe two-and-a-half
11 million -- 2.9 million lines, and now it's, I think, 5
12 million. So there's double the amount since then. There's
13 everything that IBM put in since then. So I read those
14 statements in IBM's brief. And most of them, if not all of
15 them, seem to relate to what was done in that 1999 report.

16 But even aside from that, those analyses were not
17 done by lawyers applying copyright law, applying
18 abstraction, filtration, and comparison. Those were done
19 by computer programmers who were trying to identify
20 segments of code to show that one was the same as something
21 else or was similar, from the standpoint of a computer
22 science person, not from the standpoint of what we, as
23 plaintiffs, would need to establish or what we need to
24 defend IBM's motion.

25 And there's a world of difference between what

1 was done in the past and what must be done in this
2 litigation. Now, I have a case, Your Honor, that I came
3 across when I was preparing for this argument, not cited in
4 our briefs, but I would like to give you a copy. May I
5 approach the bench?

6 THE COURT: You may.

7 MR. FREI: Thank you. I think this case is
8 pretty on point factually, and I'm just going to read a
9 very tiny point from the -- I guess it's the third page.

10 THE COURT: How come it wasn't cited if it's on
11 point?

12 MR. FREI: It's June 28, Your Honor. I didn't
13 find it until -- I think I found it September 8.

14 THE COURT: All right.

15 MR. FREI: This was a case involving two software
16 programs. One had several million lines of code, the other
17 had several million lines of code. But in this particular
18 case, five employees from the plaintiff went to work for
19 the defendant and took the source code with them and
20 started coming up with this competitive product. The Court
21 said, "There does not appear to be any perfect way to
22 compare millions of lines of source code."

23 THE COURT: Where are you reading from?

24 MR. FREI: It's on page 3, Your Honor. It's at
25 the tail end of the third -- it's on the third page of this

1 opinion, the paragraph beginning with, "The methodology,"
2 right below the footnote 1. "There does not appear to be
3 any perfect way to compare millions of lines of source
4 code, especially in a case like this, where the plaintiffs
5 claim both literal and non-literal copying. Hubel began by
6 attempting to use software programs to count the number of
7 identical lines in the two codes. He claims these programs
8 were both over- and under-inclusive and returned results
9 that did not make any sense. He then manually compared the
10 source codes, directing his attention to the areas of the
11 program that they believed copying would be found."

12 And those were the areas that the five individual
13 defendants, who bolted with the source code, worked on. A
14 real focus, a real target. We've been seeking that
15 information. We haven't gotten it yet.

16 There are such things as automated tools. We
17 have used them. We have modified them. We found they
18 weren't all that helpful. If the code is copied
19 identically, it will help you. If the code is
20 substantially similar, it's not going to help you. When
21 you change words, when you change punctuations, if you
22 insert a line, if you put something out of sequence, if you
23 put it here when it should be there, it doesn't help you.
24 And that was the experience that we found.

25 So, even if all we had to do was compare lines of

1 source code, side-by-side, it's still very labor-intensive,
2 and that's a very long process.

3 But we're going way beyond that. We say there is
4 non-literal infringement. Software is much like a book.
5 It can be broken down into non-literal elements, like in
6 software you have source code, in a book, you have the text
7 of a book. But you also have the plot of a book. No
8 software developed can read a book and identify the plot
9 and compare that plot with the plot in another book. You
10 have to read both books, just like in this kind of a
11 situation, when you are trying to identify and compare the
12 sequence, structure and organization of a program or
13 compare algorithms of a program.

14 You don't get that by just eyeballing it. You
15 don't get that by having your sixth grade son compare
16 letters and symbols on a page to see if what's on the left
17 is the same as on the right. You have to use people with
18 knowledgeable backgrounds. You have to use all the tools
19 available to you to identify what you're comparing. Then,
20 when you identify what you're comparing, then you do the
21 manual comparison, looking for substantial similarities in
22 the non-source code parts.

23 And the Courts are clear, including Gates Rubber,
24 that non-literal elements of software are copyrightable,
25 and non-literal elements of books and written materials can

1 be copyrightable and protectable. The facts are not, but
2 the organization or the sequence of facts or how they are
3 arranged can be protectable. And that is the part of this
4 process of comparison that is very time-consuming. Your
5 Honor, may I approach the screen?

6 THE COURT: Yes.

7 This is from UNIX. That is from Linux. These
8 code segments were not picked up by hardware -- or, I'm
9 sorry, by software, by comparison. This I determined
10 manually. You see some differences. Right here you see a
11 semicolon, semicolons all the way down. On the left you
12 see comas, but with the comas you have this INT only once.
13 With the semicolons, you have the INT in every line. You
14 have the same words here, the same sequence of those same
15 words.

16 Now, words are arbitrary. Programmers can pick
17 and use any words they want. They could have called that
18 catnip, but they picked that. Well, whether or not the
19 software picked that up as being identical, that's
20 verbatim. The Deseret Jacobson case would say that even
21 though there are changes in the text, that's verbatim
22 copying because what the semicolon means is you repeat the
23 INT. What the comma means is you don't repeat it. It just
24 keeps on repeating because of that coma, so it's like you
25 copy something and you put in dittos. Or it's like,

1 instead of saying -- you have five names and you say Mr. X,
2 Mr. Y, Mr. Z, you say Messrs X, Y, Z. Same thing. They
3 have stolen the expression.

4 So that is an example of something that had to be
5 manually determined.

6 Here's an example of something that works
7 beautifully in software comparison. This is out of Linux.
8 That's out of UNIX. It's identical. The software tool
9 picks something like that up in a minute. Now, there's an
10 issue about whether that is -- or IBM has raised an issue
11 as to whether that is protectable, that that may have been
12 given to the public. I've got a slide, and I'll tell you
13 that we're looking into that, and there are a variety of
14 depositions that need to be taken to make that
15 determination. It's not clear.

16 This is an example, I guess, of something in
17 between. These sets of programs look pretty different. I
18 mean, it's not identical copying. They didn't just
19 substitute a comma, this type of thing. There are three
20 segments of code. The segment in the middle is identical
21 copying. These segments here are very similar. Yes, they
22 stuck in an extra line in it, so a comparator pool, the MSG
23 pool is not in this piece of code. But you see MSG, MAP,
24 MAX, MMB, MMI, you see all those things that are the same.

25 Software wouldn't pick that up, but you pick it

1 up manually. And then you have to understand, what does it
2 mean? I represent to you, and this comes out of the Gupta
3 declaration, that they are substantially similar; not in
4 the copyright infringement sense, substantially similar to
5 computer science people. Just like I can say, without even
6 being computer science, those things are identical, I can
7 say those are pretty darn similar, just a few differences.

8 So, as we can see, automatic comparison is not
9 feasible. That's what the case that I gave Your Honor
10 said. That's what our declaration says, and that's what
11 those slides show you. It's done manually. That was done.
12 Those slides and the six slides attached to Gupta, they
13 were done in June of this year. They weren't done before
14 April 19. That's why they couldn't have been produced.
15 They were done, generated in response to this motion, and
16 I'm told that it was almost a two man-year effort to
17 analyze code to come up with that.

18 We seek a road map to help us in this comparison,
19 to help us in the source code side-by-side comparison,
20 because the software comparison tools won't, but to help us
21 in the non-literal elements comparison that you have to
22 extract out of it. Just like you have to extract a plot
23 out of a book or a scene out of a book or a character
24 development out of a book, we have to extract structure,
25 sequence, algorithms, data structures. They have to be

1 taken out of the book. It's like between the lines or
2 underneath the surface, but it is -- it may be protectable.

3 Now, what do we want to get this road map and
4 what are we going to do with it? Okay. Picture yourself.

5 I put you in Aurora, New York, and I say, "Drive to Los
6 Angeles the shortest route."

7 And you say, "Okay. Give me a map."

8 No map, just do it. But you could get there.
9 You could get to Los Angeles through trial and error. Buy
10 a cheap compass and just head west and, ultimately, by
11 stopping and asking people at service stations or
12 whatever --

13 THE COURT: Where is Aurora?

14 MR. FREI: Pardon me?

15 THE COURT: Where is Aurora?

16 MR. FREI: I would actually -- in my example, I
17 would tell you where it is, but it's up near -- it's right
18 next to Cornell University, so it's off the beaten path.

19 THE COURT: It's near Ithaca, New York?

20 MR. FREI: It's near Ithaca, New York. It is not
21 near any interstate. So, I put you there and say, "Go to
22 Los Angeles the shortest route."

23 You couldn't do it. You would make a lot of
24 errors. It would take a lot longer. Okay? That's what
25 IBM is telling us to do. They are telling us to compare

1 this code in the most grossly inefficient and the most
2 time-consuming way that you can imagine, and they won't
3 give us the tools that they have because they say it will
4 take several weeks to get that information to us.

5 Well, the information is relevant. We've been
6 asking for it for a long time, and we need it to get this
7 comparison done.

8 Now, what do we want? Well, we want this
9 information to prioritize, focus, target and identify key
10 individuals, such as the programmers, IBM programmers. We
11 asked for that. They gave us 7200 names. Then they gave
12 us 7200 contact addresses, including secretaries. Well,
13 what do we do? We have 40 depositions in the case per
14 side. We have a motion to dismiss that's pending, filed
15 before this summary judgment motion.

16 We weren't going to go out and hire experts to
17 start analyzing code and start taking all these
18 depositions. One, it couldn't be done in any reasonable
19 time for briefing, but, two, if the counterclaim is stayed
20 or dismissed, it would have been a tremendous waste of time
21 and waste of expense in an already complex case where
22 everyone is working full out on many other issues.

23 We want to -- let's take, as to the third parties
24 that we need the discovery from, these thousands of Linux
25 contributors. IBM states they agree that it's thousands of

1 Linux contributors. They say all their contributions are
2 in on the internet, all of their names and everything is on
3 the internet. Well, we said in our renewed motion to
4 compel, which is pending before the Magistrate, that's not
5 the case.

6 What you have on the internet, oftentimes, are
7 handles of some of these contributors, like Cool Whiz at
8 Yahoo.com. Maybe it's Yahoo.com in Belgium or something.
9 A lot of these people are from all over the world. We
10 can't identify that. There are kernel maintainers, maybe a
11 dozen or so, who have maintained the kernels for Linux
12 through the different releases. Those people know who the
13 key contributors are. We want to get the key contributors,
14 focus on them, identify the key contributions; key as to
15 the quantity of code, key as to the importance of code to
16 Linux, and key as to, based on the knowledge of our people
17 and the knowledge of technical people, what code is likely
18 going to result in some kind of copying or match.

19 So we get their names. We take their
20 depositions. We seek testimony and documents from these
21 key contributors and kernel maintainers about the
22 contributions. And what do we do with it? Well, we want
23 access. IBM says, "We, IBM, will admit access."

24 Fine. We wouldn't have had much of a burden of
25 proof. They were a licensee. They had access. They are

1 not admitting that the 3,000 contributors had access, and
2 the Court knows, from the Gates Rubber case, that the more
3 access you have, the less showing of substantial
4 similarity. So, we want to show access. That helps us.
5 We want to talk to them about the purpose of their
6 contribution and the other ways to do it. These are
7 factors relative to the filtration. If there's only one
8 way to do something, well, we're not going to assert that
9 it's copyrightable. But if there are many, many different
10 ways, then it can be protectable.

11 We are going to ask them, "Why did you pick the
12 exact same symbols and words? Where did you get that from?
13 Why didn't you use "catnip"? Why did you use these things?
14 We are going to ask them that. We are going to seek to get
15 testimony from them about the non-literal elements. Where
16 did they get the structure from? Where did they get the
17 sequence from? Where did they get the algorithms from?
18 Where did they get the data structures from?

19 And we are going to seek admissions, and we are
20 going to seek to get these witnesses to say that they had
21 access to the code and they copied it, or they tried to use
22 the essence of it, use the non-literal elements of it.
23 They copied that and obfuscated the source code.

24 That's very helpful to our case, but we need to
25 know who to go to. Even if we had 200 depositions a side

1 in this case, we can't depose 3,000 Linux contributors. So
2 that's what we get from the depositions.

3 Then we go back to the office and the computer
4 science people and the programmers and experts. They then
5 do the manual comparison. They then look at the sequences
6 and part of 4 million lines of code that have been put into
7 issue. Actually there are more than that because IBM's
8 motion and Complaint do not limit Linux to the kernel.
9 It's the whole kit and caboodle, 6 million lines or so, but
10 it's not just the kernel.

11 So we take that back. We examine it. We pare it
12 up. We get underneath the surface. We get in between the
13 lines, and we then draw conclusions about substantial
14 similarity.

15 Now let's see what we're going to do with IBM.
16 Okay. IBM contributed AIX and Dynix to Linux. Now they
17 want a declaration that none of that infringed. Well, AIX
18 and Dynix were worked up as a UNIX licensee. They are a
19 flavor of UNIX. And we asked them: "Okay, who are the
20 programmers? Who are the contributors? Who made the
21 contributions because we want to do the same thing with
22 them that we are going to do with the Linux people. We
23 want to get the key programmers. We want to find out what
24 their contributions are."

25 But, in addition to that, we want to take the

1 deposition of maybe every IBM programmer on AIX and Dynix.
2 every one of those guys or women who was also a contributor
3 to Linux. So, if you worked on AIX and Dynix and had all
4 the access and knew the ins and outs of UNIX, and you made
5 a contribution of something to Linux, we want to talk to
6 you because we think that would uncover relevant evidence.

7 Well, they won't give it to us, they haven't
8 given it to us. But we want to talk to these people about
9 the same thing we do with the Linux contributors. We are
10 going to rank them by quantity of source code, by the
11 importance of the source code, by the likelihood that it
12 was derived from Linux. And we're going to want -- we'll
13 get access. We'll get the purpose of the source code
14 segment. We'll inquire about the non-literal elements.
15 We'll seek admissions. We'll inquire about any changes
16 that were made from UNIX to see if they are going to admit
17 that they obfuscated. And then we're going to repeat that
18 for other versions of Linux and AIX as necessary.

19 Now, version control. One of the tools we have
20 asked for to get this information is version control
21 information. You may have seen the initials CMVC. CMVC is
22 an IBM program, database system, and it contains a lot of
23 information. It contains all the versions of AIX, every
24 version. Mr. Marriott says there are six releases. I'm
25 not going to argue with that. Maybe there were six, maybe

1 there were more.

2 But we are also talking about versions, and there
3 were a lot more versions than six releases. The Court
4 knows there has been Windows 95, 98, XP, Windows 2000.
5 Every one of those has had versions of them, many, many
6 versions. They are constantly making changes to these
7 things.

8 This is an example from SCO's version control
9 system of a part of UNIX, printer error code part of UNIX.
10 It's a short segment of code. I think it's 28 lines of
11 code. The white areas -- that's a white area. White area.
12 The white areas represent the same code. They are
13 identical. The yellow areas represent where there's been a
14 change in the code. And the pink area inside the yellow
15 area shows you what the change is. So, in this particular
16 example, these were changed. These were added. You see
17 they didn't exist over there.

18 Now, the one on the left is version 1. The
19 right-hand column is version 17. So, version 1 and version
20 17, boy, if you looked at that -- I mean, I'm looking at it
21 right now, and I see a lot of yellow, a lot of pink and not
22 a lot of white. So, if you are -- as IBM wants to force us
23 to do, you know, look at the last version of something and
24 compare it to the copyright, look at the first and look at
25 the last, well, that's what we're doing right here, the

1 first one and the 17th one.

2 And you would look at that, and I would venture
3 to say even a sophisticated programmer would look at that
4 and he would say, "Wow, that's all different."

5 Well, the fact is that there are actually 16 of
6 the 28 lines of code in the original, version 1, 16 of
7 those 28 lines are in version 17 identical. That's a
8 pretty significant amount. I'm not going to argue now
9 whether that's substantially similar or whatever.

10 Slide 15, Your Honor, shows you, step-by-step,
11 the comparison of versions. Unfortunately -- what we're
12 doing is comparing version 1, and we're tracking it all the
13 way to the end. Each of those things represent subsequent
14 versions. The changes from version 1.1 to 1.3 -- I think
15 we skipped 1.2. 1.1 to 1.3 are not a whole lot. Again,
16 this whole light area is identical. That represents the
17 changes. Not a whole lot.

18 I think you could certainly say that if that was
19 the infringing product on the right, it would definitely
20 infringe what's on the left. I mean, They are almost
21 identical except for a couple of lines. But this provides
22 step-by-step for this program, this sequence, every version
23 of it.

24 Now, that's what we've been asking for for a good
25 long time, and that's what IBM won't give us. And it's

1 automatically available in their system. My gosh, they
2 have a 272 page marketing manual, portions of which were
3 attached to Mr. Sontag's declaration, that touts how great
4 their version control system is. It can do everything.

5 And while they are trying to tell the world what
6 their version control system will do, they are trying to
7 strike Mr. Sontag's declaration, the one he filed before
8 Magistrate Wells to tell her what version control would do,
9 and they are trying to strike it in front of you so that we
10 can't tell you what version control will do.

11 Version control is, in many respects -- and this
12 is all overly simplified -- similar to the red-lining
13 capability that you see in Microsoft Word when you track
14 changes, but it additionally contains the comments, and it
15 contains the whole history. And it will help you connect a
16 trail or draw a trail between the 8,000 files on the left
17 and the 8,000 files on the right so that you don't have to
18 do 64 million comparisons. It will draw a trail, just like
19 it does in this slide.

20 Now, when you have the trail and you know which
21 two files to compare, you still have to manually compare
22 them, and it may or may not show infringement, but at least
23 you have simplified this task, and IBM has no right,
24 whatsoever, and certainly not under any of the Federal
25 Rules, to require us to do something that would take months

1 and months, and probably squander most of the financial
2 resources of the company, to do this manually.

3 And the Court would be waiting and waiting and
4 waiting for us to finish it. And we are not trying to
5 delay this case. I think it's fair to say that if SCO
6 could wake up in the morning and be in front of a jury that
7 day, it would be a very happy day for SCO.

8 Version control systems, in addition to
9 containing comments of programmers -- comments of
10 programmers tell you why they did something, why they did
11 it a particular way. They may contain admissions. We are
12 entitled to see those. They contain the comments directly
13 linked to a particular change of code. They specify the
14 changes, modifications and comments across the entire
15 history of AIX. And AIX started with UNIX, and it's ended
16 in Linux. It will identify programs for us, something IBM
17 has refused to do.

18 This is an example of a version control report
19 from SCO's version control system for something on UNIX,
20 and it identifies the programmer, Pascal Hobanks. It tells
21 you what he did. This happened to be that giving the
22 system capability to express results in different
23 languages. If you wanted to express the result in Spanish,
24 you could put it into the catalog. But this is the example
25 of something that we are looking for because if we think

1 there is substantial similarity or we see that he was the
2 key programmer on a particular sequence that we believe,
3 based on our knowledge and experience, is a likely
4 candidate to investigate, we want to talk to him.

5 They won't give it to us.

6 Here's another tool, Your Honor. It's called a
7 bug tracking log. Bugs are constantly being detected in
8 computer software, and they are constantly being fixed,
9 maybe on a daily basis. But this is an example of a bug
10 report that shows that the error control sequence was not
11 checking for errors less than zero. So they said that the
12 code should either declare an error as unassigned or check
13 for it being less than zero. That's what the bug tracking
14 report says. Accompanying that would be a version control
15 log like you just saw that shows exactly what they did to
16 correct that bug.

17 What the version control systems and the bug
18 tracking log will do will allow us, beginning with UNIX, to
19 track a Dynix or an AIX code segment through its many
20 derivative versions to its ultimate location in Linux.
21 It's the road map that we've been asking for. It's the
22 road map that's clearly relevant. I don't think there's
23 anyone who could say it's not relevant. And all IBM has
24 said is, "Well, they don't need it, and it's going to take
25 us several weeks to get it to them."

1 Well, they don't say what we need. It's for the
2 Court to determine what we need. We, sure as heck, have
3 said it. Our declarants have said it. And we have said it
4 in virtually every brief we have filed for the last four or
5 five months. We need it. We don't have all day to do this
6 investigation. We want to get it done, and we want to get
7 it done fast, and we want to get to a jury as soon as
8 possible.

9 THE COURT: What else do you want to tell me?

10 MR. FREI: The motion to strike. I'm finished on
11 56(f), Your Honor. If you have any questions about what
12 we're looking for or why we need it?

13 THE COURT: No. Go ahead on the motion to strike
14 briefly.

15 MR. FREI: Let me just mention, Your Honor, that
16 this binder that Mr. Marriott gave to everyone was not in
17 the record, was not attached to any declaration. It
18 appears to have just come to us today. There are three
19 declarations that were filed. We were not filing them to
20 create a genuine issue of fact opposing this motion. They
21 do that. They do raise a genuine issue of fact, I think.
22 I think they show infringement. But we were filing them in
23 support of the motion for continuance. And we were filing
24 them, basically, pursuant --

25 THE COURT: Are you filing them in support of

1 your 56(f) motion?

2 MR. FREI: In support of the 56(f) motion, and
3 they were specifically directed to footnote 7 of the Gates
4 case. Footnote 7 of the Gates case -- and, by the way, all
5 of IBM's arguments from their MIT and Princeton experts
6 really aren't relevant because whether or not the elements
7 of code we put in Gupta's declaration are protectable or
8 not is not relevant to our motion.

9 The abstraction and filtration things were done.
10 They were all done, and what was left was put into the
11 declaration, but they are not relevant because we are
12 relying on this footnote. Footnote 7 says, "We acknowledge
13 that unprotectable elements of a program, even if copied
14 verbatim, cannot serve as the basis for ultimate liability
15 for copyright infringement."

16 True. We agree with that. However, the copying
17 of even unprotected elements can have a probative value in
18 determining whether the defendants copied the plaintiffs'
19 work. And the Gates case goes on to say that Courts should
20 and the parties should consider the entirety of a program,
21 the entirety of the copying in a program, even if the
22 copying is of something that's unprotectable.

23 It can be probative of whether protected elements
24 were copied. That is because, in certain situations, it
25 may be more likely that protected elements were copied if

1 there is evidence of copying among the unprotected
2 elements.

3 So, Mr. Marriott's efforts to characterize our
4 declarations initially as being in opposition but now being
5 supporting copying, and they shouldn't be considered in
6 opposition, we don't agree. They were submitted to show
7 copying, to show the likelihood that we're not on a fishing
8 expedition, and that we will find copyright infringement.
9 But they actually do show copyright infringement, and we
10 contend they raise a genuine issue of fact about copyright
11 infringement.

12 One short point. He talked about 2 billion lines
13 of code, and we say 25,000 man-years. How could we
14 possibly -- for just two versions, how could we possibly do
15 2 billion lines? Well, if we were going to do the manual
16 comparison, hypothetically we couldn't do it. Give us the
17 tools, and I don't care if it's 4 billion lines of code,
18 the tools will help us get to that. So much of this is
19 available on electronic data bases. They would have you
20 think it's all paper and it would fill the courtroom with
21 paper. It's not like that at all.

22 I want to raise four points on the motion to
23 strike. One is, again, none of these declarations were
24 offered to show infringement. We offered Sontag's
25 declaration to show the enormity of the task that SCO faced

1 and that I discussed, hopefully demonstrated, that you have
2 to undertake. He said, in his first declaration, that he
3 had personal knowledge. And in the second declaration, in
4 opposition to the motion to strike -- there was a
5 supplemental declaration submitted in opposition to the
6 motion to strike -- he explained why.

7 I mean, he was up there in New Jersey comparing
8 code. He has used version control systems. He knows what
9 they do. He has used software comparison tools. He knows
10 what they do, and he knows what they did up in New Jersey
11 during the month of June, and he knows what they didn't do
12 in New Jersey from personal observation.

13 Gupta's declaration was offered not to show
14 infringement -- it does, as I said -- but to show that
15 discovery suggests that we'll find instances of copyright
16 infringement by IBM.

17 Mr. Harrop's declaration -- I'm thinking maybe
18 now they backed off from trying to strike that because they
19 didn't mention it. Mr. Harrop is one of the counsel for
20 SCO on the case, one of the outside counsel. But his
21 declaration was just submitted to show the procedural
22 history of our efforts to obtain discovery and relying on
23 what the Gupta and Sontag declarations were showing as to
24 the need for it.

25 Both of these individuals qualify as experts and,

1 indeed, we had a section in our brief, in our opposition
2 brief, a section that actually indicated that these people
3 qualified as experts. And if the Court were to say they
4 couldn't offer lay opinions, they should be regarded as
5 experts.

6 Sontag has got 16 years of computer science
7 experience. He's got a degree in computer technology
8 information and management. He was the chief technical
9 officer of a company. He's done these things.

10 Gupta got an engineering degree 11 years ago and
11 has been working with UNIX ever since. Programmer,
12 developer. He's the Vice-president of Engineering at SCO
13 right now.

14 I think that the Court has heard enough on the
15 motion to strike. And I was told, while I was preparing,
16 that Mr. Hatch and Mr. James would say everything because
17 they knew that I would put the Court to sleep because I'm
18 an IP lawyer.

19 THE COURT: Well, I remained very much awake,
20 Mr.Frei.

21 MR. FREI: I tried not to do that.

22 THE COURT: Thank you.

23 MR. FREI: Thank you, Your Honor.

24 THE COURT: Mr. Marriott.

25 MR. MARRIOTT: Your Honor, I will be brief. Ten

1 minutes.

2 THE COURT: All right.

3 MR. MARRIOTT: Point 1, Your Honor. SCO offers a
4 lot of reasons why it is these motions should be denied,
5 but note what they do not say. They do not disagree that
6 determining substantial similarity is about comparing Linux
7 to Unix, and they do not disagree that they have had Linux
8 and they have had Unix from far before the beginning of
9 this case.

10 What Mr. Frei says, Your Honor, in response to
11 the Court's question about, what do you actually need? He
12 says, "We need the road map." And he talks about a road
13 map coming from Aurora, New York to some place in
14 California.

15 THE COURT: Los Angeles.

16 MR. MARRIOTT: Los Angeles -- not to diminish Los
17 Angeles -- but from Aurora, New York to Los Angeles,
18 California. Presumably from Linux to Unix. And he tells
19 you that he needs a road map. The road map, however, for
20 which he asks, Your Honor, might as well be the road map
21 for China because he's asking you -- all he ever asked you
22 in the entire speech was not a road map about Linux and not
23 a road map about Unix System 5, but a road map about IBM's
24 AIX and Dynix products.

25 Substantial similarity isn't about a comparison

1 between AIX and Dynix and Unix. It's about Unix and Linux.
2 The only road map that matters, Your Honor, is what's in
3 Unix and what's in Linux. And that's the comparison. And
4 you can compare Microsoft Word source code or AIX source
5 code or Dynix source code all you want. It is entirely
6 irrelevant to the question of whether Unix is substantially
7 similar to Linux. And the only road map you heard about
8 might as well be the road map of a different country.

9 Second point, Your Honor. SCO seeks to explain
10 away the e-mail to which I referred by reference to a 1999
11 memorandum. Now, Mr. Hatch says that he understands that
12 we have this memorandum. We have it because it was given
13 to us hours before today's hearing. We got it this
14 morning. It should have been produced a long time ago, but
15 IBM is supposedly a party in breach of its discovery
16 obligations.

17 Your Honor, the memo was dated five years ago. It
18 was written three years before the e-mail which I have
19 showed to Your Honor. It is a draft. It says on its face
20 that it is provided, quote, subject to the further analysis
21 of Mr. Davidson. That's on page 5 of the fax sent to us
22 this morning by Mr. Hatch. On the last page of the
23 document, page 6 of the fax, he says, "I'm awaiting
24 analysis from Mike Davidson on some of these issues since
25 he has a better feel for the history of much of this

1 company."

2 Well, Your Honor, Mr. Davidson weighed in, in the
3 e-mail we provided to Your Honor. In that e-mail, he makes
4 abundantly clear in the last two paragraphs what he said
5 when he weighed in. I can't read it for the Court. Your
6 Honor, if you look at the very first paragraph in this
7 memorandum, you will see that the memo which is offered to
8 explain away the e-mail makes exactly the point which we've
9 been making, and I will read this for the Court.

10 It says, quote, "As you requested, below is a
11 draft of my report on existence of Unix-derived code in
12 Linux. What we tried to do was to determine if there was
13 any material from Unix in Red Hat Links, release 5.2. To
14 make this determination, we used a copy of Red Hat Links,
15 which was purchased from the local Best Buy. We then
16 compared it to multiple copies of Unix. We undertook an
17 investigation about substantial similarity by comparing
18 Linux to Unix and we did it --" not in 25 thousand
19 man-years, not with the supposed road map that you've heard
20 about today, but "with Unix and with Linux."

21 SCO says, Your Honor, that summary judgment
22 should not be entered because it has filed a motion to
23 compel, fact discovery is not concluded, and the deadline
24 for submitting expert reports hasn't passed. Courts
25 routinely grant summary judgement notwithstanding the

1 pendency of motions to compel, especially where, as here,
2 the requested discovery has nothing to do with the claim in
3 suit on the motion for summary judgment. And I refer Your
4 Honor to the Public Service decision versus Continental
5 Casualty from the Tenth Circuit, which is cited in our
6 papers.

7 The mere fact that discovery hasn't concluded is
8 not an impediment to summary judgment. Rule 56 expressly
9 provides, Your Honor, that summary judgment motions may be
10 made within 20 days of the commencement of the action. The
11 fact that the expert deadline has not passed is also not an
12 impediment to summary judgment. Rule 56(f) expressly
13 provides for the submission of summary judgment motions
14 prior to the submission of expert reports.

15 Expert reports can be helpful, but there is
16 nothing here to be helpful about, Your Honor, because no
17 evidence has been adduced that is supposedly sufficient to
18 bring a genuine issue of material fact. And as Your Honor
19 indicated in his question, there is no reason -- or
20 suggested with his question, there is no reason why SCO
21 could not have submitted expert reports in connection with
22 its opposition papers.

23 Indeed, Mr. Frei stands here to suggest that if
24 the Court finds that there isn't personal knowledge, the
25 Court might, nevertheless, consider these folks as experts

1 because, in the case of Mr. Sontag, he was the CFO of a
2 computer company and he has some undergraduate studies in
3 computer since.

4 These witnesses are not qualified as experts.
5 They shouldn't be treated as experts, and if SCO wanted to
6 submit expert reports in connection with its opposition, it
7 could have done that. It elected not to do that.

8 THE COURT: What about the issue raised, I think
9 it was by Mr. Hatch, about you didn't raise the ownership
10 of the copyright until your reply?

11 MR. MARRIOTT: That, Your Honor, is incorrect.
12 If you look at page 25 and 26 of IBM's opening memorandum,
13 we say, "To prevail on a claim of copyright infringement,
14 SCO must prove, one, ownership, two, copying. If SCO
15 cannot adduce evidence sufficient to show both ownership
16 and valid copyright copying of protected components of the
17 work that are original, then IBM is entitled to summary
18 judgment and a declaration of non-infringement."

19 What we said in our footnote, Your Honor, is that
20 the Court need not decide the ownership question in order
21 to rule for IBM. There are two essential elements of the
22 claim. If they don't satisfy either one of them, they
23 lose. And the footnote says the Court need not address the
24 question of ownership because it need not. If it finds
25 that there is insufficient evidence of substantial

1 similarity, they lose, unless Your Honor makes a finding
2 that additional discovery, and time is required.

3 The ownership issue was clearly raised, Your
4 Honor, in our opening papers, and I think our reply is
5 consistent with that.

6 Mr. Hatch, I believe it is, refers to the
7 Huthwaite decision, Your Honor, saying that that case makes
8 quite clear that expert reports are appropriate and that
9 without expert reports, summary judgment can't been
10 entered. That isn't what that case says. It is true that
11 in that case the Court made reference to the usefulness of
12 expert reports. The Court's discussion about expert
13 reports was dicta, and the Court denied summary judgment in
14 that case because it found evidence sufficient to create a
15 genuine issue of material fact; a very different situation
16 from the situation that we face here, Your Honor.

17 SCO makes a number of miscellaneous points, Your
18 Honor. It says that Magistrate Judge Wells found that SCO
19 acted in good faith in responding to IBM's discovery
20 requests. Magistrate Judge Wells' commentary with respect
21 to good faith related only to the first order. It was made
22 in the context of her lifting a sui sponte order staying
23 further discovery. She never found that SCO acted in good
24 faith in responding to IBM's 12th and 13th interrogatories,
25 and you never heard anything from SCO this afternoon about

1 where in the record you will actually find the evidence
2 responsive to the interrogatories that could have possibly
3 formed the basis of a finding by Judge Wells that they
4 acted in good faith in responding.

5 Mr. Hatch makes reference to the language, which
6 I think of as a disclaimer language, in which they say,
7 "Magistrate Judge Wells, we have provided full and complete
8 and truthful answers based solely on the information that
9 we have available to us."

10 Well, Your Honor, the information available to
11 SCO, as it relates to this claim, has been available to SCO
12 from the beginning. Linux and Unix. The answers -- the
13 supposed disclaimer that we are only doing the best that we
14 can doesn't hold water when it says it is based upon
15 information in their possession, and both Linux and Unix
16 were in their possession.

17 Mr. Frei says that the comparisons referenced by
18 IBM, Your Honor, were comparisons done in 1999. It is true
19 that the comparison done by -- referenced in the e-mail was
20 done in 1999. If you look at the book we provided Your
21 Honor, on pages 5 through 7 you will see public statements
22 by SCO making reference to comparisons done well after
23 1999, done throughout the course of this litigation.

24 SCO suggests, Your Honor, that the request IBM
25 makes for summary judgment is somehow inconsistent with the

1 rules. They don't contemplate the entry of summary
2 judgment at this time. The only inconsistency here, Your
3 Honor, is not between IBM's motion and the rules but,
4 instead, between the various positions that SCO has taken
5 in an effort to avoid the very thing Mr. Frei suggests SCO
6 wants, which is to be in front of a Jury.

7 It says publicly that IBM has infringed its
8 copyrights. It fails to point the Court today to a single
9 place in the record where there is evidence of
10 infringement. It says they have mountains, truck loads and
11 icebergs of evidence. Nowhere has that been referred to
12 today in court. SCO says publicly that it's eager to have
13 its claims resolved, but it wants a stay, apparently an
14 indefinite stay, for purposes of taking additional
15 discovery.

16 It tells the Red Hat Court that the question of
17 whether Linux infringes Unix is in this Court in order to
18 avoid dismissal of that case. And it tells Your Honor that
19 the claim is not in fact in this case, but it ought to be
20 in the Autozone case.

21 It says publicly that it has three teams of
22 experts doing a deep dive into the code, comparing it every
23 which way but Tuesday. It tells Your Honor that it has
24 retained experts to do copyright analysis, notwithstanding
25 the public statements about three teams of experts doing

1 the analysis.

2 It tells Your Honor it would take 25 thousand
3 man-years just to do the comparison of one, unless it has a
4 road map. And the only road map offered, Your Honor, is a
5 road map that relates only to AIX and Dynix, most of which
6 you heard in SCO's recitation of the discovery that it
7 needs and what it would do with that discovery, that merely
8 conflates SCO's contract claims with its copyright claims.

9 All that matters here, Your Honor, is whether
10 they can show ownership -- they haven't and they they
11 can't -- or whether they can show substantial similarity,
12 and they haven't and they can't. Thank you, Your Honor.

13 THE COURT: Thank you, Mr. Marriott.

14 The motion for partial summary judgment, the
15 56(f) motion and the motion to strike are submitted and
16 taken under advisement.

17 Now let's talk for a minute about SCO's expedited
18 motion to enforce the Court's amended scheduling order.
19 You you filed that motion, and you're going to respond
20 when?

21 MR. MARRIOTT: Your Honor, I don't know, as I
22 stand here, what the date is. I believe we have two weeks
23 to respond, and we intend to respond on time.

24 THE COURT: Mr. James.

25 MR. JAMES: Your Honor, I fear you turn the gun

1 on me for standing up, and I didn't know where Aurora, New
2 York was either.

3 THE COURT: What did you expect me to do when you
4 stood up? I didn't think you were going out to go to the
5 bathroom. I thought you were coming up to answer
6 questions.

7 MR. JAMES: I thought you might tell me to sit
8 down, candidly, Your Honor.

9 THE COURT: Stand up and tell me about this
10 motion.

11 MR. JAMES: We desperately -- we need some help,
12 Your Honor.

13 THE COURT: All right. When did you file it?

14 MR. JAMES: We filed the motion Monday or
15 Tuesday.

16 THE COURT: Just this week?

17 MR. JAMES: Of just this week. What happened
18 that prompted that, Your Honor, was that, at IBM's request,
19 our hearing on Tuesday was cancelled, and we needed to take
20 -- we need some emergency help, Judge.

21 THE COURT: All right. You respond to the
22 motion, this expedited motion, by the end of the day a week
23 from today, all right?

24 MR. MARRIOTT: Fine, Your Honor.

25 THE COURT: And then you reply -- how quickly can

1 you reply, Mr. James?

2 MR. JAMES: Give us two days.

3 THE COURT: All right. You will reply by the end
4 of the day a week from Friday. And if I need a hearing, I
5 can get you on the phone, and if I don't need a hearing,
6 I'll just rule. Okay?

7 MR. MARRIOTT: Thank you, Your Honor.

8 MR. JAMES: Appreciate that, Judge.

9 THE COURT: Now, with respect to the -- and if I
10 don't grant it, you're still within plenty of your time of
11 the 30 days you've received on these other two motions,
12 right?

13 MR. JAMES: Let me make something clear. I have
14 some confusion, and I fear that you may have some
15 confusion. We have actually filed two separate filings.
16 We filed the one filing, the big long one that kind of laid
17 a lot of things out, asking that summary judgment be pushed
18 off until the end of the discovery period.

19 THE COURT: I'm including that as part of this.

20 MR. JAMES: We filed the other one saying we
21 desperately need some discovery assistance immediately
22 because if we wait until October 19 for the hearing before
23 Magistrate Wells, and even assuming she orders the
24 discovery we want, and assuming we get it relatively
25 promptly, we're going to be so far into the discovery

1 schedule we have a major problem. And the last thing we
2 wanted to hear, Judge, was someone saying, "Why was this
3 not brought to the Court's attention sooner?"

4 THE COURT: I understand. Respond to both of
5 those motions. You filed them both on Monday?

6 MR. JAMES: One was filed last week.

7 THE COURT: That motion will be on this same time
8 table that I gave you. Now, I have to tell you
9 preliminarily, I'm not of a mind to interfere with what
10 Judge Wells is doing, but if what she does or doesn't do or
11 when she does or when she doesn't do something impacts the
12 case, the timing and so on, then we'll have to talk about
13 it. Obviously that's a possibility, and we'll talk about
14 it.

15 Mr. Marriott, do you want to say something?

16 MR. MARRIOTT: Just to agree that that schedule
17 is fine, Your Honor.

18 THE COURT: All right. So respond, then, to both
19 of these motions they have filed; one last week and one
20 Monday, by a week from today. You will reply to both of
21 them by a week from Friday. And then I'll do what I do.

22 MR. JAMES: Thank you.

23 THE COURT: Thank you all. We'll be in recess.

24

25 (Whereupon the proceedings were concluded.)

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REPORTER'S CERTIFICATE

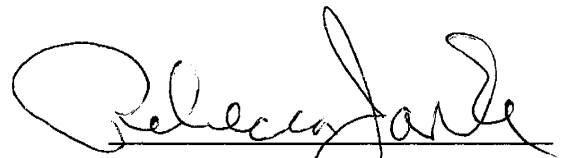
STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, REBECCA JANKE, do hereby certify that I
am a Certified Court Reporter for the State of Utah;

That as such Reporter I attended the hearing
of the foregoing matter on September 15, 2004, and
thereat reported in Stenotype all of the testimony
and proceedings had, and caused said notes to be
transcribed into typewriting, and the foregoing pages
numbered 1 through 126 constitute a full, true and
correct record of the proceedings transcribed.

That I am not of kin to any of the parties
and have no interest in the outcome of the matter;

And hereby set my hand and seal this 20th.
day of September, 2004.


REBECCA JANKE, CSR, RMR