IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

THE SCO GROUP, INC., Plaintiff/Counterclaim-Defendant, vs. INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant/Counterclaim-Plaintiff.	Case No. 2:03-cv-0294

Transcript of Miscellaneous Hearing

BEFORE THE HONORABLE DALE A. KIMBALL

December 13, 2005

Mindi Powers, RPR
121305MP

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Salt Lake City, Utah, December 13, 2005, 10:30 a.m.

* * *

THE COURT: We're here this morning in the matter of the SCO Group versus IBM 2:03-cv-294. Plaintiff is represented by Mr. Ted Normand and Mr. Brent Hatch, defended by David Marriott and Mr. Todd Shaughnessy.

MR. MARRIOTT: Good morning, Your Honor.

THE COURT: Good morning. We're hearing SCO's objection to magistrate's order, Mr. Normand and Mr. Hatch?

MR. NORMAND: That's correct.

THE COURT: Mr. Normand?

MR. NORMAND: Good morning, Your Honor. May it please the Court, my name is Ted Normand. I represent the SCO Group. As you mentioned the SCO Group has filed a limited objection to the Magistrate Court's October 12th order. SCO asks this Court to order IBM to produce the bulk of the nonpublic internal IBM materials that concern IBM's contributions of technologies of Linux operating system and that SCO asked IBM to produce at the outset of this litigation.

THE COURT: Now, you folks have the motion to compel in front of Judge Wells. Now, does this affect that?

MR. NORMAND: The motion to compel filed with Judge Wells is a motion to compel IBM to respond to SCO's seventh request for documents, which are more specific versions, a very broad request for documents in which we requested the Linux development materials.

THE COURT: If I uphold her ruling that you're objecting to, what will that do to your motion to compel?

MR. NORMAND: I think the motions are parallel, so that I think if you, if I understood the words you used, uphold our objection, then I think it moots the motion to compel. I think however either court resolves either motion affects the other motion, and we said that in both of the motions.

THE COURT: What if I uphold her order?

MR. NORMAND: I think if you uphold her order, it's unlikely that she is going to reach a different conclusion as to whether IBM should produce these materials.

THE COURT: If I uphold her order does that mean going back to her is basically a motion to ask her to reconsider?

MR. NORMAND: As a practical matter, I think that's true. We went through the same exercise, you might recall, Your Honor, in January of this year when the magistrate judge entered an order. IBM moved to reconsider that order and explain to Your Honor that that's what they were doing and you said that's fine, instead of objecting with me, you can file a motion to reconsider with the magistrate court. So as a practical matter, I think your resolution of the issue would affect how the magistrate judge views it.

THE COURT: Tell me why I shouldn't uphold her order and tell me what your view of standard of review is.

MR. NORMAND: I think the standard of review is to the extent the Court concluded that she has not addressed an issue that the Court agrees should be raised to a level, if she has not addressed the issue -- the question is whether her failure to address the issue was clear error. If you find that she has addressed the issue, I think IBM argues that she has at least implicitly addressed the issue. If you conclude that she has implicitly addressed the issue, the question is whether she resolved it in a way that was abuse of discretion.

THE COURT: Go ahead.

MR. NORMAND: With the Court's permission I will address the three main points on which the parties have addressed in the briefing. Let me point out at the outset, as Your Honor may know, the October 12th order implements IBM's offer to produce these materials from 20 Linux developers. At the end of the hearing before the magistrate court on October 7th, IBM offered to produce these materials from 20 developers and the magistrate court implemented that offer in her October 12th order.

What SCO needs is the materials from the files of the remaining Linux developers. And I want to frame our argument with three main points: First, the direct development of materials that SCO seeks; second, the absence of any undue burden on IBM to produce these materials and; third, briefly SCO's diligence in pursuing these materials. I want to focus Your Honor on the question of all of those.

SCO admits that the materials are plain and relevant. We seek materials such as programmer notes, design documents, white papers, comments, e-mails and interim versions of source code that IBM's Linux developers have generated internally, and that's part of the reason that the documents are so relevant is that they are internal IBM documents created for the most part before litigation, before anyone had any incentive to say one thing or another.

The materials are often included in what is called the developer's sandbox, which is a term typically referring to a computer hard drive that describes the environment in which the developer works on code, comments on code, and sorts e-mails regarding code that the developer has developed.

SCO has brought claims, as Your Honor may recall, the breach of contract, copyright violation, and unfair competition among other torts.

THE COURT: I do recall that.

MR. NORMAND: For each of those claims, SCO seeks to show that IBM has contributed to Linux technologies, that IBM was not entitled to contribute to Linux, and SCO also seeks to show as to damages that the contributions that IBM has made to

Linux were important contributions, were important in making Linux enterprise ready and commercially viable.

To date SCO has identified to IBM more than 217 technologies that SCO submits IBM has improperly contributed to Linux. The technology includes verbatim copies of source code, non-literal copies of source code and implementation of protected methods and concepts.

SCO argues that by contributing such technology from Unix System V and from the AIX and Dynix operating systems, IBM has breached contracts with SCO, has violated SCO's copyrights and has engaged in unfair competition.

The nonpublic contribution material that SCO seeks is directly relevant to the fight that we expect will play out with IBM over the hundreds of technologies that, in SCO's view, IBM has improperly contributed to Linux, and let me explain that in some more detail.

The materials are relevant to SCO's defense as well as IBM -- in which IBM seeks a clean bill of health for all of its Linux activities. To the extent, as Your Honor will recall, other litigations that have been stayed pending the resolution in this litigation of whether IBM is entitled to a clean bill of health for all of its Linux activities, and yet we cannot recover, according to IBM, the materials from its 300 Linux developers.

For most of the technologies that SCO has identified, IBM, we expect, will dispute that the technology originated from Unix System V or originated from AIX or Dynix, and will also dispute that the technology was important to the growth and development of Linux. SCO expects that the material it seeks today will contain direct evidence refuting those arguments from IBM. Indeed, as I mentioned, IBM has produced the materials from 20 developers that SCO identified in response to the Magistrate Court's October 12 order and SCO has found from those materials documents that will assist SCO's claims.

So the materials SCO seeks is relevant in three main ways: One, the material will contain evidence that will directly support SCO's arguments that technologies in Linux are copied from Unix System V and AIX and from Dynix, two, the materials contain important evidence that directly supports SCO's arguments regarding the importance of IBM's contributions to Linux, IBM's own developers' views of the importance of the contributions to Linux; and, three, for purposes of tracking IBM's implementation of methods and concepts in Linux, the documents will assist in that. And we will address those in some detail one by one.

On the first point, evidence that will support SCO's arguments about misappropriated technology, SCO expects the material, as the material from the 20 developers that we received, contained admissions from IBM's Linux programmers that the source of the contributions they have made to Linux are Unix System V, AIX and/or Dynix. That evidence is critical because it is unlikely that IBM will agree or admit that most of the technologies at issue were copied from Unix System V, AIX or Dynix.

It is true, as IBM says, that in many instances, SCO will show the fact finder a comparison of the code in Linux with the code in AIX or Dynix, and through that means SCO can prove that the technology in Linux was taken from those other operating systems. But that's not the only way SCO can prove that. SCO also is entitled to support that comparison, which is really a subject of expert testimony. SCO is entitled to support that comparison with evidence showing how the technology in Linux came from those operating systems and the internal IBM documents show how that is true.

And as I mentioned, Your Honor, I want to remind the Court, these are internal documents, so what we're finding and what we expect to find is IBM's developers' admissions where they say, I am taking this material from AIX, from Dynix, from Unix System V. I've seen it, and I think it will help the sufficiency in Linux. This is what I propose to do: I propose to develop the source code, the method, the concept from those operating systems, and I will fix the sufficiency in Linux, and those are what we call admissions.

It's important to note that both magistrate court must review this court's order, this court, has essentially agreed with the notion that SCO is not limited in proving its claims to a code by code comparison between on the one hand Linux, on the other hand Unix System V. Again, that's an issue for expert discovery. SCO's entitled to show through IBM's own words, own internal documents, how these technologies in Linux were derived and how they were implemented. Those materials like Linux development materials, meaning the interim versions of AIX and Dynix that this Court and the magistrate court ordered IBM to produce, those interim versions of AIX and Dynix are, just like the Linux development materials, are relevant because they may contain information regarding IBM's misuse of the technology. And that is what the magistrate court said in her January 2005 order requiring IBM to produce all versions of AIX and Dynix. As we read that order, and as we read this Court's allusion to that order in its order denying motions for summary judgment, the Court reached a consensus that SCO is not limited to a mechanical code by code comparison to prove its claims.

The second point that most of the materials are relevant is that it will contain evidence that directly supports SCO's arguments about the important of IBM's contributions of misappropriated technology. I've already touched on this a couple of times. Of course, the parties will fight with experts and other evidence over whether IBM's contributions made Linux enterprise ready, made Linux commercially viable in a way that it hurts SCO's business.

We seek to support our arguments on that by representing internal IBM documents in which the developers themselves say, I think this is a deficiency in Linux, I think Linux can be improved if we were to take the following steps, and then in some cases after the steps have been taken, saying this has improved Linux. Linux is now something different by virtue of the contribution that I propose to make, and those are the kind of documents that would be relevant to our claim.

The third main point in which these materials would be relevant is that they would allow SCO to track IBM's implementations and methods and concepts. Again, this is another issue that will be the subject of expert testimony, and one way to avoid merely an expert fight from the fact finder, whoever it may be, is to find other evidence that IBM itself was using and admitted it was using methods and concepts that were protected in improving Linux. And if there is one area in which a code by code comparison is insufficient, it would be in terms of identifying the implementation of methods and concepts from Linux. And we have found trails of e-mails from some of these 20 developers and from other discovery in which it's clear that a developer comes up with the idea of using a method or concept or a structure, some kind of module in an operating system, in a way that we say is protected, and takes that technology, develops it, puts it into Linux, and then it gets implemented in Linux. If we have a chain of e-mails, we have a chain of documents showing how that happened, it will assist us in identifying exactly how it was implemented, and Linux then will assist us in doing that in a way that is not solely the subject of expert testimony.

IBM has previously tried to convince the court that the only way SCO can prove any of its claims is to demonstrate that Linux's source code and Linux are taken verbatim from Linux's source code and Unix System V. For all of these reasons I have explained, it's just not true.

SCO will show in support of its contract claims, in particular, that IBM has breached those contracts by contributing protected methods and concepts of Linux, as I mentioned. And as SCO has told this Court since the beginning of the litigation, the task of tracking and identifying implementation of such methods and concepts is not simply a matter of running code comparisons. This very argument was made in February of 2004 before the magistrate court.

And it is precisely because that is true, because of the insufficiency of the code by code comparisons, that the fight between the parties over whether and how IBM implemented protected methods and concepts of Linux will be document intensive, and we seek as many documents as we can on the IBM side to support our arguments.

SCO expects that the internal Linux development materials will demonstrate that IBM recognized the need to implement certain methods and concepts and that IBM recognized that it had access to and expertise with respect to such methods and concepts by virtue of Unix System V, AIX and Dynix, which under SCO's contract theory are protected technologies.

Now, how much of this is directly relevant material, these internal documents containing what we think will be admissions and have contained admissions, how much of this material has IBM produced to date? That's a subject of some dispute between the parties as to what IBM says in its own brief. By its own estimate, IBM has produced about 16 percent of the approximately 300 Linux developers' files. That means that SCO has not had access to the vast majority of internal IBM documents concerning the contributions to Linux at the very heart of SCO's claim. We actually disagree with the 16-percent number. The proper number is probably 16 over 300, whatever percentage that comes out to be, 5 and a half percent or something, but even by IBM's lights, 16 percent of 300 developers is a pretty insignificant fraction of the material that we seek, and yet IBM argues that this should be sufficient.

That brings me to my second main point, which I won't spend a lot of time on, but which is a burden, and I think I can address this point more briefly than I have, the relevance point. IBM's argument about burden is flawed in this main sense, whatever burden IBM faces in producing these documents is a function of the broad scope of IBM's Linux activities. The very scope of those activities is, of course, part of what prompted SCO's lawsuit and is part of SCO's very claims that IBM has been able to, has decided to, has followed through on devoting such a substantial amount of resources towards developing Linux. Yet now we hear that as a function of the volume of that activity, it's too burdensome for them to produce the documents relating to that. It's a bit of a catch-22 in that arguing burden, IBM turns the facts of its substantial involvement in Linux on its head.

IBM's argument is that because IBM is so involved in its contributions to Linux because it has 300 developers involved in those contributions, it should only have to produce 16 percent at most of the evidence from those developers, and we think that's wrong. Under the federal rules and within its discretion, this Court can reject that argument. That is, the Court can consider the relative amount of discovery a party has produced. In IBM's own lights, it has produced only a very small fraction of this material.

And this is particularly true, Your Honor, when you consider how IBM has been able to devote such resources to its

Linux activities. In other context, IBM has repeatedly told this Court that IBM is a company of 100,000 employees, and that is how IBM has been able to devote hundreds of its employees to make a contribution to Linux. One example is when IBM opposed SCO's efforts to depose IBM's CEO. IBM argued that as the CEO of a company with 100,000 employees, you should not be subjected to a full seven-hour deposition. Yet now we hear that notwithstanding the 100,000 employees, notwithstanding that number of employees as part of what has enabled IBM to have a substantial involvement in making contributions to Linux, IBM ought to be treated as a company with 5,000 employees, so that it only has to produce the materials from 20 of its developers instead of all 300 who are involved.

One final point on burden, Your Honor, showing why in SCO's view the Court should take IBM's arguments with a grain of salt. IBM repeatedly opposed SCO's efforts to obtain the interim versions of AIX and Dynix on the grounds that it would be unduly burdensome to produce those materials. Yet now in its briefing, IBM acknowledges that there is a central repository where IBM stores AIX and Dynix source code, and that the existence of that central repository makes the production of the Linux development material a different task than the development of the AIX and Dynix development material.

I think that conception undercuts the reliability by their burden argument. And as we pointed out in our brief, I won't deal on it here, IBM submitted a declaration in support of its burden argument, but the declarant testified in his deposition that the estimates of burden in the declaration were really counsel's and not his, and the declarant was the director of the Linux technologies center, Daniel Frye, and as we read his testimony, what he said was, I am not personally responsible for this estimate. I'm not sure how long it will take. I'm not sure what the burden will be.

Now, of course, it's not unusual for counsel to be the ones making the burden argument, but we think here that a fast one has been pulled. We're not sure who is responsible for coming up with the arguments as to the extent of this burden.

Let me briefly address a couple more points, Your Honor. The third main point is that SCO has diligently pursued the production of these materials. IBM's main argument on this point is not that SCO has actually waived its right to bring this motion, but that if SCO really thought this evidence were important, according to IBM, that SCO could file a motion to compel the production of material a long time ago. That assertion is incorrect and we think it's inconsistent with other arguments that IBM makes.

The first indication SCO had that IBM would refuse to produce the Linux development materials was when IBM moved to reconsider the Magistrate Court's January 2005 order, and IBM does not dispute that since that time SCO has diligently pursued this discovery, and let me walk through the relevant chronology in a little detail.

SCO first requested these materials in June of 2003, and I don't think IBM disputes that. In October 2003, counsel for IBM wrote SCO a letter in which IBM said they were beginning to compile materials from the Linux technologies. In November of 2003, SCO filed a motion to compel IBM to produce several categories of documents. Among the categories mentioned in that motion were the Linux development materials. SCO said, consistent with the allegations against IBM, it should be required to identify and produce all of its contributions and development work in Linux. And IBM acknowledged that argument in its opposition brief in the late fall of 2003.

In February of 2004, the parties argued SCO's motion to compel as well as the motion to compel that IBM had filed, and the Linux development material was not a focus of that argument. However, there were other areas of discovery that had been briefed for purposes of the argument that were not discussed at length in the area. So it's not unusual that the parties didn't focus on the Linux development materials.

In March 2004, the magistrate court issued a discovery order, and SCO interpreted that order to require IBM to produce Linux development material. The magistrate court has since disagreed with that interpretation and has since disagreed with our interpretation of the letter that IBM's counsel wrote in November of 2003, and we don't take issue with that, but what IBM is arguing about is SCO's state of mind. They're attributing to us a state of mind that must not be -- this is relevant or else we would have done X, Y and Z. Well, the magistrate court made no findings that SCO didn't reasonably believe that IBM had said start to compile these materials, and the magistrate court made no finding that SCO didn't actually believe that the March 2004 order ordered IBM to produce these materials.

And by IBM's own lights, the March 2004 order set up a discovery protocol whereby SCO would not have admitted to file a motion to compel or production of such materials until SCO had met certain threshold burdens on its own. And indeed IBM argues that the protocol is still in place, so it's a little unclear if IBM even thinks we could have filed a motion to compel until the issue of the amount of AIX and Dynix source code had been resolved.

Following the March 2004 order, the parties had essentially a nine-month fight, almost a yearlong fight, over whether IBM was obligated to produce the AIX and Dynix source code. IBM's own theory is that until that issue was resolved, that is the protocol set up a system whereby SCO would have to produce the evidence of misappropriated technology, SCO argued that we couldn't do that until we get the AIX and Dynix source code. Until that issue was resolved, the question of whether SCO could move IBM to produce the Linux development material was beside the point. That issue was ultimately resolved in April of 2005 when the magistrate court resolved IBM's motion to reconsider the January 2005 order.

SCO waited until August 1st, 2005 to see what IBM produced in response to the Magistrate Court's April 2005 order, and when we saw that IBM hadn't produced the development materials we, you know, put into place the mechanisms that have led us here today. So I think that SCO has acted diligently in pursuing the materials.

And, again, I mentioned the April 2004 order, the magistrate court specifically found against us as to our interpretation of the April 2005 order, but that doesn't mean that we didn't believe the April 2005 order said what we thought it said. The magistrate court made no finding about our state of mind and whether our interpretation of that order was reasonable. So for IBM to say that you must not have thought the stuff was relevant because we didn't move to compel IBM to produce it until the last four or five months I think is incorrect.

And then one last point, Your Honor. The Court would not need to change the deadline for the end of fact discovery if the Court ordered IBM to produce these materials. SCO expects that the materials will serve primarily --

THE COURT: Your contention is that the deadlines could remain.

MR. NORMAND: The deadlines for the end of fact discovery, which is I think mid March 2006. And let me explain why that is so. We expect that materials will serve primarily to provide SCO with the internal IBM evidence to help prove that IBM has contributed technology to Linux from Unix System V and AIX and Dynix, to prove that IBM knew it was doing that and to show that the IBM contributions to Linux is important as I've explained.

To the extent the evidence would help SCO to identify how these methods and concepts have been implemented into Linux, SCO can update its interrogatories accordingly during the January to March discovery period, and during that period, IBM is entitled to take discovery regarding the misappropriated code. There would be no prejudice to IBM.

To the extent the evidence identifies two or three additional Linux developers who SCO might seek to depose, the Court could easily permit SCO to take such a deposition before the end of discovery. And this two or three is probably the maximum number.

Your Honor, as you may know, we have a limit of 50 depositions. SCO certainly feels compelled to take the vast majority of those depositions, to finish them within the next four or five weeks. We wouldn't say, that by reviewing this material, there would be seven more developers we could depose. We don't expect that we could get an extension of the limited 50 depositions, so we are talking about a small number of depositions of additional developers that could occur in January, February and March.

And one last point on this deadline, as the Court may be aware, we're filing a submission on December 22nd. The discovery we're seeking could result in amendments to that submission, but not substantial amendments. The submission identifies the code that IBM has misappropriated. We actually don't expect these materials to help us identify code that IBM has misappropriated. We expect the materials to help us further prove that the material we've identified that has been misappropriated was misappropriated, that IBM knew it had been misappropriated, but we do not expect that upon receipt of this discovery if it were produced, we would amend the December 22nd submission in any substantial way. The only potential amendment that could result, one which IBM could address during the January, February or March discovery period that has been set aside for IBM to do just this, the only potential amendment is to update the interrogatories to further specify how methods and concepts have been implemented in Linux, and that is a task that the materials we seek are particularly relevant in helping us to finish. Thank you, Your Honor.

THE COURT: Thank you. Remind me when the hearing on motion to compel is in front of Judge Wells.

MR. NORMAND: Is it October 20th or -- I mean December 21st?

MR. SHAUGHNESSY: I think it's next Tuesday.

MR. NORMAND: Next week, Your Honor.

MR. MARRIOTT: It's on the 20th, Your Honor.

THE COURT: 20th? So it's a week from today?

MR. NORMAND: Yes.

THE COURT: Thank you.

MR. NORMAND: Thank you.

THE COURT: Mr. Marriott?

MR. MARRIOTT: Thank you, Your Honor. Just to be clear in response to Your Honor's question, the hearing that's set for argument next Tuesday is not the motion that's related to this one. Two arguments are set on different motions, not one that bears relationship to the appeal before Your Honor today.

THE COURT: Not the motion to compel.

MR. MARRIOTT: A motion to compel, but a different motion to compel and the one in which SCO seeks the same relief from Judge Wells that it seeks from Your Honor by way