

1 produced the documents after the amendment deadline, but that
2 we requested the documents before the amendment deadline. So
3 if there is no undue delay under Rule 15, there's no place for
4 Rule 16. It doesn't apply. We asked for the documents
5 before. We got them afterwards. We also asked for the
6 documents two or three months into the case, Your Honor, in
7 June of 2003.

8 So the relevant analysis of Rule 15, which I'll
9 turn to now, Your Honor I'm sure is familiar with the refrain
10 from liberal granting of motions to amend, reflect the basic
11 policy that pleadings should enable the claims to be heard on
12 the merits.

13 THE COURT: I have heard that before.

14 MR. NORMAND: I suspected it.

15 The rule for undue delay is the following, Your
16 Honor. Where the parties seeking amendment knows or should
17 have known of the facts upon which the proposed amendment is
18 based but failed to include them in the original complaint,
19 the motion to amend is subject to denial.

20 Our claim is based on facts in the documents that
21 we saw for the first time since the last amendment deadline.
22 Those documents show, as I described, Your Honor, that IBM
23 copied more than 200,000 lines of the SVR-4 code into IBM's
24 AIX For Power product without authorization. And that during
25 the project, IBM knew that its limited release of the AIX For

1 Itanium product did not authorize IBM to copy the code as it
2 had done. As soon as we reviewed those documents and
3 undertook an investigation, we brought a proposed claim, and
4 IBM doesn't argue that we weren't diligent in acting after we
5 received the production that they produced after the amendment
6 deadline.

7 Given these basic facts, our amendment is not
8 unduly delayed. It's not delayed at all. The function of
9 Rule 15, which provides generally the amendment of pleadings,
10 is to enable a party to assert matters that were overlooked or
11 were unknown at the time he interposed the original complaint
12 or answer. The Court admitted there is no delay if the
13 plaintiff uncovered the facts supporting the amendment during
14 discovery.

15 And we cited in our brief two cases that we think
16 are good examples in particular of that. The Journal
17 Publishing case from the Southern District of New York, a
18 three-and-a-half year lapse between the original complaint and
19 the amended complaint were justified where the plaintiffs
20 proposed amended complaint was based at least in part on
21 documents that came to light during discovery.

22 The Koch case, District of Kansas, there is no
23 undue delay to seek leave to amend if plaintiffs acquire
24 knowledge of the facts behind the new claim only through
25 recent discovery.

1 As we see it, Your Honor, IBM would have this Court
2 apply a standard whereby as soon as the plaintiff in
3 litigation had any conceivable basis for bringing a claim, it
4 would be obligated to assert that claim rather than await the
5 production of documents that the plaintiff has requested and
6 expect to bear on the issue. Again, we take it that that is
7 the point of the amendment deadline. That is not standard and
8 one that IBM opposes that the Court should impose. And,
9 indeed, the very point of Rule 15 is to impose a different
10 standard. Under the precedent, the plaintiff should be
11 entitled to a critical mass of evidence of high probative
12 value supporting the claim. And that's a quote from the
13 case -- one of the tabs to the binder.

14 And we think, Your Honor, that IBM's own cases make
15 that point. And we discussed these cases and distinguished
16 them in detail in our reply brief. I'll mention a few of
17 them. In particular, from the 10th Circuit, in the Panis
18 case, 10th Circuit 1995, the plaintiff's proposed amendments
19 were not based on new evidence. In the Pallottino case, 10th
20 Circuit, 1994, the proposed amendment was not based on new
21 evidence. In the Frank case, 10th Circuit, 1993, plaintiff's
22 counsel conceded that the failure to amend was strategic
23 decision. In the Woolsey case, 10th Circuit, 1991,
24 plaintiff's counsel acknowledged that no new evidence that was
25 unavailable at the time of the original filing had come to

1 plaintiff's attention. Those cases make the point that focus
2 on undue delay is on the plaintiff in litigation and
3 plaintiff's efforts to find the documentation to support the
4 new claim.

5 IBM's response to these points is to argue that the
6 question of undue delay requires the Court to impute to the
7 SCO Group the limited knowledge that certain employees of
8 SCO's predecessor Santa Cruz might have regarding the same
9 general subject matter, that is, Project Monterey and products
10 being created.

11 Now, IBM does not argue, nor present any evidence
12 that Santa Cruz or the SCO Group had concluded it actually had
13 a copyright infringement arising out of Project Monterey. And
14 IBM does not argue, nor present any evidence that anyone from
15 Santa Cruz or the SCO Group knew anything about IBM's internal
16 views of its pretextual release as reflected in the documents
17 that were produced. What the evidence does show is that those
18 key facts were hidden from view until discovery in this case.

19 And one of the internal IBM documents that I cited
20 earlier illustrates the point, and we'll quote, Your Honor, at
21 Tab 7, but it is the document, internal IBM e-mail that
22 expressly draws the distinction between the internal position
23 that IBM has taken on Project Monterey is not worth pursuing.
24 And in the e-mail the author said, we need to take an external
25 position, and the external position is that Project Monterey

1 goes on. We're still working on the AIX For Itanium product.
2 That is the kind of information that the world and that we
3 were aware of, the external position.

4 The excerpt from the first deposition taken in this
5 case, and I also mentioned earlier, further illustrates the
6 point. While IBM was asking witnesses questions to defend its
7 worldwide release, IBM had documents in its possession
8 reflecting the fact that IBM itself did not regard the
9 Monterey product release as one that would authorize IBM to
10 copy the SVR-4 system.

11 Although SCO had served numerous document requests,
12 IBM would not produce the documents in response to those
13 requests until after the amendment deadline. IBM relies on
14 several documents with respect to Santa Cruz' supposed
15 knowledge. We believe those documents are not compelling, and
16 they fall into two basic categories. One, documents that SCO
17 did not see and Santa Cruz did not see and had no reason to
18 see, such as private consulting for its software announcements
19 and memoranda for IBM licensees and manuals that IBM's
20 technical support organization published for IBM licensees.
21 Santa Cruz was not an IBM licensee.

22 The second category of documents show what products
23 certain people envisioned would be created in Project
24 Monterey. These are not documents that reflect any actual
25 knowledge on the part of anyone at Santa Cruz about any claim

1 for copyright infringement. These facts are no grounds for
2 the Court to conclude there has been any undue delay on the
3 part of the SCO Group.

4 And it's worth pointing out, Your Honor, because I
5 will briefly get to the point, IBM can and does raise such
6 arguments in support of the statute of limitations argument on
7 futility. These are accrual arguments that are subject to
8 different standards. And we put cases in the binder that show
9 the courts analyze the question of undue delay distinctly from
10 the question of whether the limitations period. I won't dwell
11 on that point, Your Honor, but I do think there are important
12 policy differences between Rule 15 and the application of the
13 statute of limitations. I quoted Wright, et al, earlier, the
14 function of Rule 15, to enable a party to assert matters that
15 were overlooked or unknown, the purpose of policy underlying
16 all statutes of limitations. And this is from a Utah Supreme
17 Court case in the last few months, Your Honor. To promote
18 justice by preventing surprises through the revival of claims
19 that have been allowed to slumber until evidence has been
20 lost, memories have faded, and witnesses have disappeared.

21 None of those things is true here.

22 In addition, Your Honor, there's essentially a
23 policy for statute of limitations conflicts with the policy
24 under Rule 15, which is to promote claims to be brought even
25 if they were overlooked. That's not the case here, but right

1 from the middle to point out the policy.

2 IBM's next claim under Rule 15 is that our claim
3 would be futile. And we think that's wrong, as well. As an
4 initial matter, an amendment is futile only if the proposed
5 amendment could not have withstood a motion to dismiss.
6 That's the general standard. I'm sure the Court has heard
7 that one, as well.

8 SCO alleges that only through copyright to the
9 SVR-4 code that IBM copied in excess of 200,000 lines of that
10 code into the AIX For Power product. IBM did it without
11 authorization, that those are the elements of copyright
12 infringement. IBM does not dispute the merits of those
13 allegations, but they made several procedural arguments.

14 IBM first invokes a statute of limitations
15 provision in the joint development area for JDA. That
16 provision states:

17 Any legal or other action relating to a breach of
18 disagreement must commence no later than two years from the
19 date of the breach.

20 And the Court cited that in the state of New York.
21 Now, IBM does not dispute that the Court must strictly
22 construe a contractual provision modifying a statute of
23 limitations, which it does. In fact, under a reasonable
24 instruction, let alone a strict instruction, IBM's
25 interpretation of Section 22.3 does not make sense. It cannot

1 encompass (unintelligible).

2 THE REPORTER: Excuse me. Cannot encompass?

3 MR. NORMAND: SCO's copyright claim.

4 The reading that IBM offers fails to reconcile
5 other provisions in the JDA and creates an unreasonable
6 result. First, IBM actually ignores parts of the provision
7 interpreting Section 22.3. That is, IBM does not even argue
8 that the accrual portion of Section 22.3 applies to SCO's
9 claim.

10 You'll note that the portion of the provision, Your
11 Honor, saying that the claim under Section 22.3 must be
12 commenced no later than two years from the date of the breach.
13 IBM ignores that part of the rule because it creates an
14 unreasonable result. IBM argues that the rule of the accrual
15 should be the rule of accrual for the copyright act. And we
16 think the reason that IBM does that is because when you read
17 the provision as a whole, it would mean that under IBM's
18 interpretation, Section 22.3 would eliminate both the rule for
19 when a copyright claim accrues as well as the rule that the
20 plaintiff can bring a copyright claim on the defendant's
21 continuing infringement. That is not a reasonable reading.

22 If the scope of Section 22.3 were as broad as IBM
23 argues, the copyright claim would have to be commenced within
24 two years of the breach of the contract. Under that reading,
25 if during Product Monterey IBM copied SCO's code but then

1 waited two years to release the part containing the code,
2 SCO's claim would have been time-barred. We think that's an
3 unreasonable result. IBM relied only on the first part of the
4 language of Section 22.3 because it knows the section read as
5 a whole, it creates an unreasonable result.

6 The fact that Section 22.3 clearly does provide for
7 a discovery rule of accrual -- excuse me -- that Section 22.3
8 does not provide for a discovery rule of accrual is a reason
9 to reject items of interpretation, not to parse the language
10 as IBM has.

11 In addition, Your Honor, IBM's interpretation fails
12 to reconcile other provisions of the JDA. You'll see at
13 Tab 19, Your Honor --

14 THE COURT: 20.1.

15 MR. NORMAND: 20.1. The entire liability of each
16 party for any cause whatsoever regardless of the form of
17 action, whether in contract or tort.

18 Section 20.1 shows the parties knew how to include
19 in broad fashion any claims under the agreement, which is
20 effectively the interpretation IBM gives of Section 22.3.
21 It's not reasonable to give different conditions the same
22 meaning.

23 In addition, Your Honor, we think these arguments
24 made clear that Section 22.3 can reasonably be interpreted as
25 SCO's (unintelligible). We think that the provision is clear

1 in our favor. At an absolute minimum, the provision is
2 ambiguous. And because it's ambiguous, the Court cannot
3 resolve the party's intent and, therefore, cannot preclude
4 SCO's amendment at this stage of the proceedings.

5 Given that Section 22.3 does not apply, Your Honor,
6 we enter into the world of accrual of copyright claim and
7 statute of limitations of copyright claim. There shouldn't be
8 any dispute on this point. Under the copyright act, every
9 court that has addressed the issue has concluded that the
10 copyright claim in which claims based on infringement that has
11 occurred in the previous four years under the statute of
12 limitations. I think it's actually three years, Your Honor.

13 IBM argues that there's some dispute in the case
14 law as to the doctrine of continuing infringement. That's
15 wrong. There's a dispute as to whether a copyright claim of
16 who brings a claim 10 years after the copyright claim has
17 accrued can recover damages for the entire 10-year period.
18 There is no dispute under the case law that plaintiff who
19 brings a copyright claim can recover the damages for the
20 infringement that has occurred the previous three years.
21 Where the copyright claim accrual and limitations period
22 applies, there is no question that our amendment is not shield
23 from.

24 IBM argues that venue is improper in this court.
25 Given that Section 22.3 does not apply, that argument fails.