

1 wrong for three reasons.

2 First, Your Honor, SCO didn't raise the argument in  
3 its opening brief. It's improper for the reasons that I've  
4 already stated. Second, we haven't submitted a responsive  
5 pleading. The complaint hasn't been allowed in the case yet.  
6 Third, Your Honor, we have submitted in the case in connection  
7 with their other three complaints four responsive pleadings.  
8 In every one of those pleadings, notwithstanding their  
9 contentions to the contrary, and this is laid out, Your Honor,  
10 at Page 28 of our book, notwithstanding what their brief says,  
11 in every one of our responsive pleadings, we have asserted a  
12 defense of improper venue.

13 The second and last argument they make with respect  
14 to waiver, Your Honor, is that the claim is waived somehow by  
15 virtue of IBM's assertion of its Ninth Counterclaim. Your  
16 Honor, Section 22.1 of the Joint Development Agreement -- and  
17 that's wrong, by the way, Section 22.1 of the Joint  
18 Development Agreement, which is set out at Page 29 of the  
19 book, expressly provides:

20 No waiver of any portion of this agreement  
21 shall be effective unless it is set forth in a  
22 writing which refers to the provisions so affected  
23 and is signed by an authorized representative of  
24 each party.

25 There is no such writing.

1           Second, to establish waiver, they've got to show a  
2       voluntary and intentional abandonment of a known right. Cases  
3       to that effect are set out at 30. There has been no knowing  
4       and intentional abandonment of a known right. And the case  
5       law, Your Honor, indicates that the mere assertion of a  
6       counterclaim, as we show at Page 31, is an insufficient basis  
7       for final waiver.

8           Finally, they suggest that the Ninth Counterclaim  
9       somehow encompasses the proposed claim. That isn't right,  
10      Your Honor. The Ninth Counterclaim was intended to be narrow  
11      in scope. The Ninth Counterclaim could not have been as broad  
12      as they contend because, A, the Court wouldn't have subject  
13      matter jurisdiction over it, IBM couldn't have brought a Ninth  
14      Counterclaim seeking a declaration of non-infringement with  
15      respect to the conduct at issue in their proposed complaint  
16      because we hadn't been sued for that, one; and they had never  
17      threatened to sue us for that, two. We lacked a reasonable  
18      apprehension suit. There would have been no subject matter  
19      jurisdiction with respect to a claim of that kind. And in any  
20      event, the claim that they contemplate having somehow been  
21      swept up in Ninth Counterclaim is a claim that must be  
22      brought, if at all, in New York by virtue of the agreement  
23      that IBM entered into with its partner in Monterey, the Santa  
24      Cruz Operation, Inc.

25           In summary, Your Honor, the motion should be

1 denied. It should be denied because they've known about this  
2 claim from the very beginning of the case, and it should be  
3 denied because there is a forum selection clause here which  
4 requires this claim to be asserted in New York, not in the  
5 state of Utah.

6 THE COURT: If I let them amend as they want to do,  
7 would it affect your motion to narrow the Ninth Counterclaim?

8 MR. MARRIOTT: Would it affect the motion? Your  
9 Honor --

10 THE COURT: In other words, would you still want me  
11 to grant that motion?

12 MR. MARRIOTT: Your Honor, the motion with respect  
13 to the Ninth Counterclaim is intended simply to reflect IBM's  
14 intent to filing a motion.

15 THE COURT: All right. So I'll call it a motion to  
16 clarify.

17 MR. MARRIOTT: Call it a motion to clarify. The  
18 motion frankly is of little consequence. It doesn't make much  
19 difference. SCO doesn't really care, Your Honor, about that  
20 motion except for purposes of being able to argue in this  
21 connection that somehow the claim is waived.

22 THE COURT: But my question to you is, if I let  
23 them amend, do you care about your motion?

24 MR. MARRIOTT: I don't care about the motion, Your  
25 Honor.

1 THE COURT: Okay. Thank you.

2 MR. MARRIOTT: Thank you.

3 THE COURT: Reply, Mr. Normand?

4 I assume you'll be brief and efficient.

5 MR. NORMAND: Thank you, Your Honor. I'll make an  
6 effort to be brief and efficient. Mr. Marriott has raised  
7 some new issues, some new documents and some arguments that  
8 I'm hearing for the first time.

9 Just to clear the field, to begin with, Your Honor,  
10 the question of when documents were produced, I think we're  
11 going to have a factual dispute with IBM about that. I do not  
12 purport to have personal knowledge about when documents were  
13 produced, but it is my understanding that the documents had  
14 been produced after the amendment deadline. If we're  
15 incorrect, we're incorrect. It stands that several of the  
16 documents at least, as Mr. Marriott concedes, were produced  
17 after the deadline. And this goes to the point of plaintiff's  
18 entitlement to collect a core critical mass of highly  
19 privilege documents. There is no question that some of the  
20 very important documents were produced after the deadline.  
21 And we have not purported to present to the Court with all of  
22 the documents.

23 As an overarching matter, Your Honor, there is no  
24 argument of undue prejudice from IBM. And under the Supreme  
25 Court precedent and under a lot of other precedents, that's

1 the primary overriding factor. There is no undue prejudice.

2 IBM makes a series of arguments about Rule 16. We  
3 think those arguments misconstrue the case law and are  
4 overstated. Let me note from the onset, Your Honor, that, as  
5 I noted in my opening argument, there is no place for Rule 16  
6 here. There may not be a place for Rule 16 because there may  
7 be a new amendment deadline.

8 Even if there is not a new amendment deadline, the  
9 question, then, is Rule 16, because there is no question that  
10 many of the documents, at least, even pending this dispute  
11 with IBM over the timing of production of documents, there's  
12 no question that some of the documents were produced after the  
13 deadline. If there's been no undue delay and Rule 15 is prior  
14 to the deadline, Rule 16 has been placed. In any event, the  
15 questions under Rule 16 as we cite in the briefs is whether  
16 the plaintiff uncovered previously unknown facts during the  
17 discovery that would support an additional cause of action.  
18 The question is whether the supporting facts did not surface  
19 when the last amendment deadline had passed.

20 Now, with regard to another matter, IBM spends a  
21 lot of time going through the documents, the documents that we  
22 had not seen before, internal documents from Santa Cruz. We  
23 think that misses the point entirely. There is evidence that  
24 people at Santa Cruz might have known that as part of the  
25 Project Monterey the parties intended to allow copying to

1 happen. IBM, first of all, argues that there was an  
2 authorization, but they don't point to the Court or to us any  
3 basis for that supposed authorization.

4 Santa Cruz understood that the product was to be  
5 developed. Santa Cruz understood that there would be sharing  
6 of the code as part of the project, but there is no allegation  
7 and no proof that anyone at Santa Cruz or SCO actually knew  
8 they had a claim. More importantly, IBM's arguments ignore  
9 the key evidence that we've uncovered. It is highly relevant  
10 that IBM itself thought and its product release did not  
11 authorize itself to use the code. And I'd like to walk the  
12 Court through that in a little bit more detail.

13 SCO must prove that IBM's copying was unauthorized.  
14 Part of that proof is the question of the operation of the  
15 JDA. Very relevant evidence as to the operation of the JDA is  
16 how IBM thought the JDA operated. Accordingly, very relevant  
17 evidence to our claim is IBM's view that it was not authorized  
18 under the JDA to undertake the copying it did. There is just  
19 no question that that evidence is relevant. IBM's argument  
20 produces the claim that the evidence is irrelevant, that it  
21 added nothing, that we could have brought a copyright claim  
22 without knowing that IBM thought that the release was  
23 pretextual. I don't think that's true to the extent that an  
24 argument is an accrual argument. And I'll address that in a  
25 moment, Your Honor.

1 IBM tends to confront the three reasons that we've  
2 offered for why we think it is appropriate. Some of the  
3 reasons are ones that IBM has frankly mischaracterized. They  
4 first discussed the documents and say that we dismissed the  
5 documents. As I said, that misses the point that as many of  
6 the documents that are released, they did not either attempt  
7 or give any basis for thinking they have copyright claims.  
8 And none of the documents suggest that anyone at Santa Cruz  
9 knew that IBM itself regards itself as having lack of  
10 authorization of the copying of the code. That is a critical  
11 aspect of the claim we propose to bring. It is an aspect that  
12 we could not have discovered possibly until we reviewed the  
13 documents in this litigation.

14 Argument -- IBM then argues the issue of whether we  
15 should be imputed to have what little knowledge Santa Cruz  
16 might have had about the subject matter of the claim. We  
17 think IBM misses the point there, as well, Your Honor. IBM  
18 cites no case for its proposition and for purposes of Rule 15  
19 that plaintiff should have knowledge of its predecessor  
20 imputed to it. These are the cases that IBM cites, cases in  
21 which the defense of laches had already barred the  
22 predecessor's claims when the predecessor purported to assign  
23 the claims to the successor. Those cases make sense. If  
24 laches were to preclude the predecessor's lawsuit, he should  
25 not be permitted to escape his untimeliness by selling or

1 giving his patent or other intellectual property rights to a  
2 successor to then try to file a timely lawsuit.

3 SCO does not seek to gain any rights that Santa  
4 Cruz did not have. The only issue here is whether SCO can  
5 bring a new claim as an amendment in this proceeding. IBM  
6 cites no cases to support its oral argument that knowledge of  
7 Santa Cruz, however limited, should be imputed to us.

8 IBM illustrates what I think is its failure to  
9 confront our main argument where it says the most basic of  
10 public and internal investigations would have revealed the  
11 basis for our proposed claim. That is not true. It's not  
12 remotely true. We would not have known even with the most  
13 intense investigation that IBM itself viewed itself as  
14 unauthorized to publish and to copy code as it did. That's  
15 critical evidence, Your Honor.

16 IBM argues that we acknowledged in our opening  
17 brief the JDA applied. That's not true, Your Honor. Here's  
18 the statement we made in our opening brief.

19 SCO recognizes that the parties' JDA for  
20 Project Monterey contains a forum selection  
21 clause for New York courts.

22 We acknowledge that the JDA contained a forum  
23 selection clause. We weren't obligated to raise every  
24 argument, Your Honor, in which 22.3 would not apply.

25 We're also at the height of formality here, Your



1 Honor. IBM filed an ex-parte motion for leave to file a  
2 surreply after they concluded that when we raised the issue of  
3 waiver in the applicability provision in our reply brief, they  
4 argue that we raised that for the first time. They got  
5 permission to file a surreply. They filed a 16-page surreply,  
6 and we're here arguing the points before Your Honor. I think  
7 it's an incorrect argument, and in any event, a technical one  
8 that shouldn't preclude the consideration of merits.

9 As to the interpretation, Your Honor, of  
10 Section 22.3 of the JDA, IBM ignores again our main argument,  
11 which is by their own lights, the provision doesn't make any  
12 sense. They leave the accrual portion of the provision out  
13 because it would give the provision an unreasonable reading.  
14 They cite several cases that they say support their arguments,  
15 that in light of analogous provisions a forum selection clause  
16 should apply.

17 We think those cases make our point. In contrast  
18 to those cases, Section 22.3 does not encompass all claims  
19 relating to or arising under the agreement or concerting the  
20 parties' rights and duties under the agreement. That is not  
21 the scope of this provision. That's the scope of 20.1. It's  
22 a reason not to give the reading of 22.3 that IBM does.

23 IBM argues that there's been no waiver of the  
24 provision. We think that's wrong, Your Honor, for one basic  
25 reason, which is the scope of the Ninth Counterclaim. I

1 quoted the Ninth Counterclaim before, and it is extremely  
2 broad. It asks for a declaration of non-infringement. It  
3 does so in plain language. It was a counterclaim that  
4 exceeded the scope, as Mr. Marriott concedes, as praise as  
5 written that he exceeds the scope of our claims. That makes  
6 it not a compulsory counterclaim, as Mr. Marriott again  
7 explicitly concedes, but a permissible counterclaim. Parties  
8 pursue litigation from one forum constitutes the waiver of  
9 that party's ability to enforce the forum selection clause to  
10 another forum.

11 The Ninth Counterclaim is permissive. None of  
12 SCO's claims required any fact finder to determine whether  
13 IBM's development of AIX violated any SCO copyrights. We  
14 think the precedent makes clear that the defendant waives any  
15 venue objections when it objects to new issues in the case.  
16 10th Circuit held long ago in Thompson, 1962, that the filing  
17 of a counterclaim can constitute the waiver of a forum  
18 selection clause.

19 IBM cites a more recent 10th Circuit case,  
20 Campbell, I believe it's Campbell, in which the Court  
21 concludes that if the counterclaim was compulsory, it would  
22 not be a waiver. But the rule as it stands and as we can  
23 prove from a variety of precedents is that the defendant  
24 voluntarily submits himself to the forum through filing a  
25 permissible counterclaim. We think the plain language of the