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*Attorneys for Defendant/Counterclaim-Plaintiff
International Business Machines Corporation*

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

THE SCO GROUP, INC.,

Plaintiff/Counterclaim-Defendant,

-against-

INTERNATIONAL BUSINESS MACHINES
CORPORATION,

Defendant/Counterclaim-Plaintiff.

Civil No. 2:03CV-0294 DAK

Honorable Dale A. Kimball

Magistrate Judge Brooke C. Wells

DECLARATION OF IRA KISTENBERG

I, Ira Kistenberg, declare as follows:

1. From April 1984 through June 1988, I was an account executive at AT&T Technologies, Inc. ("AT&T Technologies"), responsible for the licensing of UNIX software and related materials.

2. This declaration is submitted in connection with the lawsuit entitled The SCO Group, Inc. v. International Business Machines Corporation, Civil Action No. 2:03CV-0294 DAK (D. Utah 2003). Except as stated otherwise, this declaration is based upon personal knowledge.

3. I was responsible for managing AT&T Technologies' relationships with the particular licensees assigned to me. During the time I was employed by AT&T Technologies, I reported to David Frasure, and later to Steve Edson, after Mr. Frasure left AT&T Technologies. I was responsible for the Sequent Computer Systems, Inc. ("Sequent") account, among others.

4. As the AT&T Technologies account executive responsible for the Sequent account, I participated in the negotiation of the following license agreements between AT&T Technologies and Sequent relating to UNIX System V:

- the Software Agreement (Agreement Number SOFT-000321) dated April 18, 1985 (the "Sequent Software Agreement");
- the Sublicensing Agreement (Agreement Number SUB-000321A) dated January 28, 1986 (the "Sequent Sublicensing Agreement"); and
- the Substitution Agreement (Agreement Number XFER-000321B) dated January 28, 1986 (the "Sequent Substitution Agreement").

True and correct copies of these agreements, referred to in this declaration as the "Sequent Agreements", are attached hereto as Exhibits 1 through 3.

5. Based upon my duties and responsibilities at AT&T Technologies, I have firsthand knowledge of the terms and conditions of the UNIX System V licenses we entered into with licensees, including, in particular, the Sequent Agreements. While I was employed at AT&T Technologies, I participated in negotiations and discussions regarding many such UNIX System V licenses. It was normally my responsibility to conduct negotiations with a licensee, and then prepare final agreements for signature by the licensee and by Mr. Wilson or Mr. Frasure for AT&T Technologies (or Mr. Edson, after Mr. Frasure's departure).

6. As a general rule, we at AT&T Technologies intended to treat of all our licensees in the same way. We never intended to give any one of our licensees an edge over another licensee. To the extent we provided certain clarifications to one licensee or another, we would provide the same clarifications to all of our licensees.

7. AT&T Technologies used standard form agreements to license UNIX System V, including a standard "software agreement" and a standard "sublicensing agreement".

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

9. For example, in early versions of the standard software agreement, including the Sequent Software Agreement:

- Section 2.01 granted licensees a "personal, nontransferable and nonexclusive right to use in the United States each SOFTWARE PRODUCT identified in the one or more Supplements hereto, solely for LICENSEE's own internal business purposes."

- Section 2.05 provided: "No right is granted by this Agreement for the use of SOFTWARE PRODUCTS directly for others, or for any use of SOFTWARE PRODUCTS by others."
- Section 4.01 provided: "LICENSEE agrees that it will not, without the prior written consent of AT&T, export, directly or indirectly, SOFTWARE PRODUCTS covered by this Agreement to any country outside of the United States."
- Section 7.06(a) provided: "LICENSEE agrees that it shall hold all parts of the SOFTWARE PRODUCTS subject to this Agreement in confidence for AT&T."
- Section 7.10 provided: "Except as provided in Section 7.06(b), nothing in this Agreement grants to LICENSEE the right to sell, lease or otherwise transfer or dispose of a SOFTWARE PRODUCT in whole or in part."

As I communicated to the licensees that I was responsible for, these provisions were intended to define the scope of the licensee's rights only with respect to the "SOFTWARE PRODUCT" or "SOFTWARE PRODUCTS", in other words, the UNIX System V source code and related materials. We did not intend these provisions to restrict our licensees' use, export, disclosure or transfer of any source code that our licensees developed on their own.

10. The standard software agreements also granted licensees the right to modify UNIX System V source code and to prepare derivative works based upon the code. As AT&T Technologies intended the agreements, and as we told our licensees, the licensees owned the modifications and derivative works they prepared based on UNIX System V, and could do whatever they wanted with those modifications and derivative works, as long as they treated those portions of the modifications or derivative work consisting of any UNIX System V source code the same way they treated the UNIX System V source code that we provided to them.

11. In early versions of the standard software agreement, including the Sequent Software Agreement, Section 2.01 contained the following language regarding modifications and derivative works:

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

As I, and others at AT&T Technologies, assured our licensees, this language does not, and was never intended to, give AT&T Technologies the right to assert any control over the modifications or derivative works prepared by our licensees, except to the extent of the licensed UNIX System V source code that was included in such modifications or derivative works. The term "resulting materials" in the context of the software agreements was intended only to mean those portions of a licensees' modifications or derivative works that included the licensed UNIX System V source code.

12. In my understanding, Section 2.01 did not in any way expand the scope of the software agreement to restrict our licensees' use, export, disclosure or transfer of their own original code, even if such code was contained in a modification or derivative work of UNIX System V. The purpose of the software agreement was to protect AT&T Technologies' UNIX System V source code, and was not meant to claim for AT&T Technologies our licensees' own work. It would not make sense to me to read this Section 2.01 to place restrictions on code that our licensees created themselves—that code was theirs.

13. A number of licensees requested clarification that they, not AT&T Technologies, owned, and could do what they wanted with, the modifications and derivative works prepared by or for them. We always provided this requested

clarification—both orally and in writing—when asked, because it was consistent with the original intent of Section 2.01 of the standard software agreement.

14. Indeed, since so many licensees requested clarification of that provision of the standard software agreement, we announced in early 1985 at seminars hosted by AT&T Technologies and in a newsletter called "*\$ echo*" that we would be modifying the language of our standard software agreements to clarify even further that licensees owned their modifications and derivative works, except for the licensed UNIX System V source code included in such modifications and derivative works.

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

16. The April 1985 edition of *\$ echo*, a true and correct copy of which is attached hereto as Exhibit 4, summarizes presentations made by Mr. Frasure at seminars hosted by AT&T Technologies in New York and Santa Clara outlining various revisions we intended to make to the standard software and sublicensing agreements.

17. With respect to Section 2.01 of the software agreement, the newsletter states that "[l]anguage changes will be made to clarify ownership of modifications or derivative works prepared by a licensee." As is emphasized in the newsletter, the changes we intended to make to Section 2.01 did not alter the meaning of the standard software agreements that our UNIX System V licensees had already entered into, but instead were intended to provide clarification as to the original intent of the section.

18. The August 1985 edition of *\$ echo*, a true and correct copy of which is attached hereto as Exhibit 5, describes in detail the changes we made to the standard software and sublicensing agreements. With respect to Section 2.01, the newsletter states:

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

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

19. An example of the revised language referred to in the *\$ echo* newsletter appears in Section 2.01 of a software agreement between AT&T Information Systems Inc. and The Santa Cruz Operation, Inc. ("Santa Cruz") entered into in May 1987, a true and correct copy of which is attached hereto as Exhibit 6. I was the account executive responsible for Santa Cruz and I participated personally in the negotiation of this agreement with Santa Cruz.

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

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

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

21. Although the *\$ echo* newsletter notes that all UNIX System V licensees could request "specimen copies" of the revised software agreement from the Software Sales and Licensing group, we did not require our licensees to enter into new agreements. We intended the revised language of Section 2.01 (and other sections) to apply to all of our UNIX System V licensees, including Sequent, regardless of which version of the standard software and sublicensing agreements they had specifically entered into.

22. As it was our general policy not to treat our licensees differently, whether or not our licensees had a side letter clarifying the treatment of modifications or derivative works or had entered into agreements containing the revised Section 2.01 of the standard software agreement, our intent with respect to each or of licensees was the same. To my knowledge, no one at AT&T Technologies ever intended to assert ownership or control over any portion of a modification or derivative work that did not contain our licensed UNIX System V code. Our licensees, including Sequent, were free to use and disclose the modifications or derivative works they created, provided that they did not use and disclose any portion of the licensed UNIX System V source code.

23. It is my understanding that Sequent's Dynix products may include some licensed UNIX System V source code, but I do not know whether Dynix is so similar to UNIX System V that it can be viewed as a modification of, or derivative work based on, UNIX System V. In any event, as I understand the Sequent Agreements,

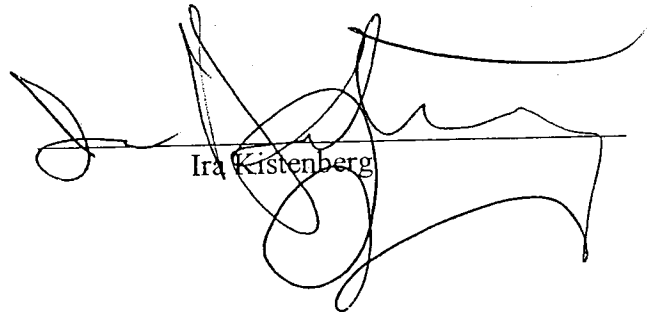
Sequent was free to use, export, disclose or transfer any Dynix source code, except for those portions of Dynix that consisted of licensed UNIX System V source code.

24. I understand that plaintiff claims that Sequent has breached its license agreement with AT&T Technologies by improperly using, exporting, disclosing or transferring Dynix source code, irrespective of whether Sequent has disclosed any specific protected source code from UNIX System V. At least as I understand the Sequent Agreements, that is simply not consistent with what the parties intended by the agreements.

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

Executed: June 24, 2004.

Boynton Beach, Florida



Ira Kistenberg