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June 17, 2004

BY HAND DELIVERY

The Honorable Sue L. Robinson
United States District Court
844 North King Street
Wilmington, DE 19801

Re: *Red Hat, Inc. v. The SCO Group, Inc.*,
C.A. No. 03-772-SLR

Dear Chief Judge Robinson:

As Your Honor may recall, in September of last year, SCO asserted in support of its motion to dismiss Red Hat's complaint that the pending lawsuit between SCO and IBM in the District of Utah addresses "most, if not all, of the issues of copyright infringement and misappropriation" in the Red Hat case. (D.I. 9 at 15.) Given its September 2003 view that "most, if not all" such issues were in the IBM case, SCO expressed its view to the Court at that time that "The infringement and misappropriation issues Red Hat seeks to adjudicate in this case are currently before U.S. District Judge Dale A. Kimball in the SCO v. IBM Case pending in Utah Federal District Court." (*Id.* at 2.)

Since SCO's latest filing in this Court, SCO's adversaries in related, pending federal actions have misconstrued SCO's September 15, 2003 statements to this Court to argue that SCO is taking inconsistent positions to different courts. In particular, as previously described to this Court, IBM has now sought to add to the District of Utah action a counterclaim that would encompass all copyright issues relating to Linux – whether arising from IBM's own contributions to Linux or from contributions by others unrelated to IBM.[1] In support of its efforts to add that counterclaim, IBM filed a brief in the District of Utah on May 18 (since SCO's last submission to this Court) that quoted SCO's statements to this Court in an effort to suggest that SCO's complaint against IBM already included all of the issues relating to the propriety of Linux.

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[1] *See* SCO's Opposition to Red Hat's Motion for Reconsideration (D.I. 39 at 3-4). As further described in that brief to this Court, SCO is opposing the addition of that IBM counterclaim to the pending case in Utah. *Id.* at 4 n.2.

Such assertions – which unrealistically assume that time has simply stood still since September 2003 – are inaccurate. Accordingly, we feel compelled to expound on our September 15, 2003 statements in light of evidence that has more recently developed and to explain why characterizations like IBM's are unwarranted and inaccurate. SCO has already clarified these issues in summary form for the Nevada District Court in the AutoZone matter and – given that the parties in each of the related litigations are obviously monitoring all developments – we believe that Red Hat and IBM are inevitably aware of SCO's previous description of these issues. To ensure that SCO's position is clear to this Court, however, we respectfully submit this letter.

SCO continues to believe that IBM's violations of its license obligations and U.S. copyright law through its improper contributions of SCO's intellectual property to Linux – the issues that SCO's complaint in Utah presents – are of paramount importance and will continue to predominate, as a comparative matter, over other issues potentially affecting Linux. That *comparative* fact was true when SCO cited it in support of its motion to dismiss Red Hat's complaint and – given the extent and importance of the challenged IBM contributions to Linux – remains true today.

At the same time, since September 2003, SCO has obviously had the opportunity to conduct further investigation of improper contributions to Linux by parties other than IBM. Through that investigation, SCO has discovered significant instances of line-for-line and "substantially similar" copying of code from Unix System V into Linux. That non-IBM conduct is conduct that SCO's complaint in Utah – by its express terms – does not challenge or encompass.

Although SCO has thus made substantive progress on the issues relating to contributions to Linux by parties other than IBM, SCO's ongoing investigation in this regard has proven laborious. Computer programs can help to identify potentially similar lines of code, but because of various types of cosmetic changes that may be made to code (for example, to punctuation, abbreviations, and spelling), such programs cannot substitute for time-consuming visual review by software engineers. Unix System V contains 17,741 individual files and approximately 6.5 million lines of code, while Linux contains 11,717 individual files and over 5 million lines of code. Computer programs are even more dependent on human review for purposes of identifying "substantially similar" portions of computer code, which are often functionally similar (but not exact copies) due to shared code structures and/or sequences.

Of course, SCO's statements to this Court many months before much of this investigation could have occurred (and much longer before it could possibly be completed) cannot preclude SCO from protecting its rights, including by engaging in continuing investigation of contributions to Linux by parties other than IBM. Nor can the progress made in such investigations – relating to contributions to Linux by parties other than IBM – be a basis for claiming that SCO's statement to this Court last Fall somehow undermines later statements made to another court. This point is further underscored by the fact, noted above, that the issues

relating to IBM's improper contributions to Linux continue to predominate over other potential issues that affect Linux.

Finally, SCO has made clear since at least SCO's counsel's public comments on November 18, 2003 that its litigation plan was to identify (at the time, within ninety days) "*a* defendant" to "illustrate the nature of the problem" – *i.e.*, "a significant user that has not paid license fees and is in fact using proprietary and copyrighted material." Since that time, SCO has sued *one* end-user (AutoZone) – "*a* defendant" to "illustrate" the nature of the end-user problem. As SCO's actions have thus made clear, it continues to believe that the most rational route to an overall resolution of this problem is through negotiation, and not broad-based litigation.

Respectfully,

Jack B. Blumenfeld

JBB:pab

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