

**249**

SNELL & WILMER LLP  
Alan L. Sullivan (3152)  
Todd M. Shaughnessy (6651)  
15 West South Temple  
Gateway Tower West  
Salt Lake City, Utah 84101-1004  
Telephone: (801) 257-1900  
Facsimile: (801) 257-1800

CRAVATH, SWAINE & MOORE LLP  
Evan R. Chesler (admitted pro hac vice)  
Thomas G. Rafferty (admitted pro hac vice)  
David R. Marriott (7572)  
Worldwide Plaza  
825 Eighth Avenue  
New York, NY 10019  
(212) 474-1000

*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 EDWARD J. RIDDLE

I, Edward J. Riddle, declare as follows:

1. I had responsibilities for Unix software and related materials from 1976 until 1994, first with Western Electric, then AT&T Technologies, Inc. ("AT&T Technologies"), then UNIX System Laboratories, Inc. ("USL") and finally with Novell, Inc. ("Novell").

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. Section I of this declaration describes my roles with respect to Unix software and related materials. Section II sets out my understanding of the rights conferred under the standard license agreements pursuant to which Unix software and related materials were licensed by AT&T Technologies, USL and Novell. Section III describes the confidentiality provisions of the license agreements. Section IV sets out my understanding of certain exceptions to the confidentiality provisions. Finally, Section V sets out my understanding of the most-favored customer provision in certain of the license agreements.

### **I. Roles and Responsibilities Regarding UNIX Software**

4. I began working for Western Electric, a wholly-owned subsidiary of American Telephone and Telegraph Company ("AT&T"), in 1968. From 1968 to 1970, I worked as an Accounting Associate in the Burlington, North Carolina office. In

1970, I was promoted to Section Chief (first level supervisor) within the Accounting Department. In 1971, I was relocated to the Merritt Drive plant of Western Electric in Greensboro, North Carolina, where I worked, as a first level supervisor, until September 1, 1976, primarily handling miscellaneous accounting and operating results. In September 1971, I moved to the Guilford Center office of Western Electric, also in Greensboro, to work as an internal auditor for Western Electric. In November 1976, I transferred to the Patent Licensing organization, also located at the Guilford Center.

5. Around 1983, Western Electric was dissolved and renamed AT&T Technologies, and as a result, the Unix Software Licensing was separated from Patent Licensing. As part of the reorganization, I accepted a position as Department Chief, Accounting and Administration, working with the group that was marketing and licensing Unix software and related materials, and supervising the collection of licensing fees.

6. In 1989, AT&T Technologies reorganized the organizations responsible for Unix software, and associated system software products and services, into a separate business unit called UNIX Software Operation (renamed "UNIX Systems Laboratories, Inc." ("USL") in 1990). As part of that reorganization, I accepted a position as Contract Administration Manager with USL, working with the group that was marketing and licensing Unix software and related materials. I was responsible for collecting license fees and coordinating audits under the terms of the sublicensing agreements. In 1993, when USL was acquired by Novell, I accepted a position with Novell, maintaining the same responsibilities, and again working with the group that was marketing and licensing Unix software and related materials.

7. While employed by Western Electric, AT&T Technologies, USL and Novell, my duties included tracking, collecting and reporting licensee fee payments, at first mostly for Unix software licenses, but eventually for both Unix software licenses and sublicenses (as Unix software became more popular with commercial users). I was also responsible for training auditors to understand, for the purposes of an audit, the terms and conditions relating to licensee obligations of reporting and fee payment under the sublicensing agreements.

8. I have personal knowledge of the terms and conditions of Unix software license agreements, which generally included a number of "standard" form agreements with each licensee. The standard software agreement granted the licensee the right to use and modify the source code for its own internal business purposes. In addition, many licensees were parties to sublicensing agreements, which granted the licensees the right to copy and furnish Unix software, and sublicensed products based on Unix software, to customers in object code format. A substitution agreement provided that the software agreement and, if applicable, the sublicensing agreement, replaced earlier agreements relating to Unix software.

9. Although I was not directly involved in their negotiation, I am familiar with the following agreements between International Business Machines Corporation ("IBM") and AT&T Technologies: the Software Agreement (Agreement Number SOFT-00015) dated February 1, 1985; the Sublicensing Agreement (Agreement Number SUB-00015A) dated February 1, 1985; the Substitution Agreement (Agreement Number XFER-00015B) dated February 1, 1985; and the letter agreement dated February

1, 1985. True and correct copies of these agreements are attached hereto as Exhibits 1 through 4. These agreements are referred to herein as the "IBM Related Agreements."

10. Similarly, I am familiar with the following agreements between Sequent Computer Systems, Inc. ("Sequent") and AT&T Technologies relating to Unix software: the Software Agreement (Agreement Number SOFT-000321) dated April 18, 1985; the Sublicensing Agreement (Agreement Number SUB-000321A) dated January 28, 1986; and the Substitution Agreement (Agreement Number XFER-000321B) dated January 28, 1986. True and correct copies of these agreements are attached hereto as Exhibits 5 through 7. These agreements are referred to herein as the "Sequent Related Agreements."

11. I have personal knowledge and experience regarding the Unix license agreements described in this declaration, including the IBM Related Agreements and the Sequent Related Agreements. During the period from 1984 through March 1994, I read, interpreted and worked with the Unix license agreements. I believe I know what the parties to these agreements understood them to mean and intended them to accomplish.

## **II. Grant of Rights to UNIX Software Licensees**

12. As I recall the period from 1984 to 1994, AT&T Technologies, USL and Novell licensed Unix software and related materials to hundreds of licensees. The code was licensed pursuant to software agreements. The standard software agreement granted the licensee the right to use and modify the source code for its own internal business purposes.

13. The software agreements also allowed licensees the right to modify a Unix software product and to prepare derivative works based upon the product. Licensees owned their modifications and derivative works and were permitted to use or disclose them as they might choose, provided that any modification or derivative work containing any part of a Unix software product was treated like a software product under the license agreements.

14. In early versions of the standard software agreement, including the IBM Software Agreement, Section 2.01 included 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 understand it, this language did not give AT&T Technologies, or any of its successors or assigns, the right to assert ownership or control over modifications or derivative works prepared by its licensees, except to the extent that Unix source code was included in such modifications or derivative works. We never intended to claim ownership or control of modifications or derivative works created by our licensees except where, and to the extent that, Unix source code was included in such modifications or derivative works.

15. Some of our licensees sought to make clear that they, not AT&T Technologies (or its successors or assigns), would own and control modifications and derivative works prepared by or for the licensee. We provided the requested clarification when asked because it was a clarification of our intent with respect to the standard

software agreement. For example, Paragraph A.2 of the IBM Side Letter, with which I am familiar, clarified the standard provisions as follows:

Regarding Section 2.01, we agree that modifications and derivative works prepared by or for [IBM] are owned by [IBM]. However, ownership of any portion or portions of SOFTWARE PRODUCTS included in any such modification or derivative work remains with [AT&T Technologies].

Clarifications of this kind did not represent a substantive change to the standard software agreement, since AT&T Technologies did not mean to assert ownership or control over modifications or derivative works prepared by licensees, except to the extent of the licensed Unix source code included in such modifications or derivative works. In fact, after some time, we updated the standard software agreement to clarify this point.

16. Our intent was the same irrespective of whether or not AT&T Technologies entered into a side letter to clarify the treatment of modifications or derivative works or altered the language of Section 2.01 of the standard software agreement. As far as I know, no one at AT&T Technologies, USL or Novell ever meant to claim ownership or control over any portion of a modification or derivative work that was not part of our licensed Unix source code base. Our licensees were free to use, copy, distribute or disclose such modifications or derivative works, so long as they did not copy, distribute or disclose any portion of the licensed Unix source code (except as permitted by the license agreements).

### **III. Confidentiality Restrictions in the License Agreements**

17. The software agreements employed during my tenure at AT&T Technologies, USL and Novell imposed confidentiality restrictions on licensees. While the exact language of the agreements might have differed, fundamentally the same



confidentiality restrictions applied to all licensees. In my view, a right to disclose held by one licensee benefited all other licensees.

18. Section 7.06(a) of the standard form software agreement included language forbidding the disclosure of the Unix source code licensed from AT&T Technologies. This provision was subject to caveats, including that a licensee's obligations under this section do not apply if "a SOFTWARE PRODUCT subject to this Agreement at any time becomes available without restriction to the general public by acts not attributable to LICENSEE or its employees". The goal of this language was to require licensees to keep confidential those parts of the licensed software that AT&T Technologies, USL or Novell wished to keep confidential, not to impose upon licensees a confidentiality obligation exceeding what AT&T Technologies could protect as a trade secret.

19. At least one of our licensees undertook to clarify or modify the confidentiality restrictions of Section 7.06(a). As clarified by its side letter, for example, IBM was not required to keep confidential any information subsumed in any of the software products provided to IBM, as long as IBM did not reveal the licensed source code (except as permitted by its license agreements). Paragraph A.9 of IBM's side letter relieves IBM from any confidentiality obligation with respect to Unix ideas, concepts, know-how, methods and techniques, because these were vague and indeterminate terms that were not material to the software Agreement.

20. To the best of my knowledge, AT&T Technologies, USL, and Novell never sought, by way of the confidentiality provisions in its license agreements, to claim ownership or control over any portion of a modification or a derivative work that

was not part of its Unix source code base. Except for any Unix System V source code included therein, such modifications and derivative works are not subject to the confidentiality restrictions of the license agreements because they are owned by the licensees. Licensees are free to use, copy, distribute or disclose such modifications and contributions to derivative works, provided that they do not copy, distribute or disclose any portions of Unix source code (except as permitted by the license agreements).

21. Particularly with respect to confidentiality, AT&T Technologies sought to impose essentially the same obligations on all of its licensees. To my mind, once we relieved one of our licensees of the obligation to keep a part of a software product confidential, all of our licensees were relieved of that obligation. Further, the fact that one licensee might have had a side letter while another did not, does not mean that we imposed materially different terms on different licensees. The side letters sought to clarify obligations that we meant to apply to all licensees.

22. I do not believe that anyone at AT&T Technologies intended our Unix license agreements to be construed to exercise control of unlicensed or non-original Unix source code. As I understand the agreements and believe they were intended, modifications and derivative works are not subject to the confidentiality and other restrictions contained in the license agreements (except for any licensed Unix System V source code actually included therein) because they are owned by the licensees.

#### **IV. Relief from Confidentiality Restrictions**

23. AT&T Technologies, USL and Novell sought to keep much of its Unix source code confidential. Yet, we understood it would become increasingly difficult to do so, as we intended to widely distribute the source code (and related

information). In fact, the software agreements provided that a licensee would not be required to keep a software product confidential if it became "available without restriction to the general public." A licensee may properly disclose, without any restriction whatsoever, information that becomes available without restriction to the general public by acts not attributable to that particular licensee or its employees.

24. I understand the term "available without restriction to the general public" to include circumstances, among others, in which a software product (or any part of a software product) is accessible without meaningful restriction, such as for download from the internet without enforceable confidentiality restrictions, is accessible outside the limits of a confidentiality agreement due to lack of care on the part of the licensor or owner (or an affiliate of the licensor or owner), or is made available to a third party, such as one of AT&T Technologies' licensees who has the right to disclose the software product (or any part of it).

25. By way of further example, a software product (or any part of a software product) is "available without restriction to the general public" if released, distributed or made available by its owner under the terms of an open-source license like the GNU General Public License ("GPL"), a copy of which is attached hereto as Exhibit 8. I understand that plaintiff (or its predecessors in interest) distributed Linux products, including source code subject to the GPL, for a number of years and that plaintiff's Linux distributions may have included Unix System V source code. It is also my understanding that the GPL did not exist at the time most, if not all, of the Unix license agreements involving AT&T Technologies and USL were negotiated and executed. At least I do not believe that I ever heard about the GPL, or read its terms, until after I left my

employment at USL. Nevertheless, based upon my understanding of what we intended the Unix license agreements to cover and not to cover, I believe that any Unix System V code released, distributed or made available by plaintiff under the GPL is “available without restriction to the general public”. That is true, in my judgment, even if the plaintiff did not know at the time it released or distributed the code or made it available that it was Unix System V code owned by the plaintiff.

**V. Most-Favored Customer Provision**

26. As I state above, while I was employed by AT&T Technologies, we meant, I believe, to deal with all of our licensees under essentially the same terms. We sought to subject all licensees to the same material terms.

29. A few of our licensees requested a “most-favored customer” provision to give them assurance that we would hold to our stated policy of treating all licensees the same. Paragraph A.12 of the IBM Side Letter provides:

We agree that all SOFTWARE PRODUCTS, including enhancements to or new versions of existing SOFTWARE PRODUCTS, generally available under the Software Agreement will be made available to you at the fees and under terms, warranties and benefits equivalent to those offered to other licensees.

This provision meant that if any other licensee were offered or obtained terms more favorable to the licensee than those contained in the IBM Related Agreements, then IBM would have the benefit of such more favorable terms as if they had been set forth in the IBM Related Agreements.

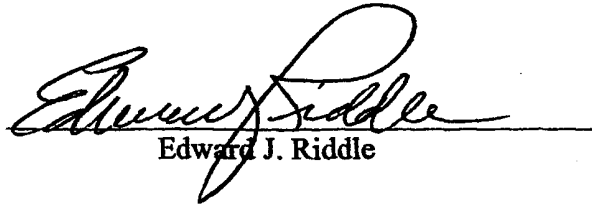
30. Not all of our licensees had side letters or most-favored customer provisions. Still I interpreted all of our agreements based upon the collective body of Unix license agreements. The existing collection of side letters was used generally to interpret our Unix license agreements. It is fair to say, I think, that we treated a licensee

that did not have a most-favored customer provision in a side letter (like Sequent) no different from a licensee (like IBM) that had a side letter with such a provision.

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

Executed: December 19, 2003.

Graham, North Carolina



Edward J. Riddle