

**Snell & Wilmer**  
L.L.P.  
LAW OFFICES

15 West South Temple, Suite 1200  
Gateway Tower West  
Salt Lake City, Utah 84101  
(801) 257-1900  
Fax: (801) 257-1800  
www.swlaw.com

Todd M. Shaughnessy (801) 257-1937  
tshaughnessy@swlaw.com

January 30, 2004

SALT LAKE CITY, UTAH

PHOENIX, ARIZONA

TUCSON, ARIZONA

IRVINE, CALIFORNIA

DENVER, COLORADO

LAS VEGAS, NEVADA

***VIA FACSIMILE AND U.S. MAIL***

Brent O. Hatch  
HATCH, JAMES & DODGE, P.C.  
10 West Broadway, Suite 400  
Salt Lake City, Utah 84101

*Re: SCO v. IBM*

Dear Brent:

I am writing in response to Mark Heise's letter to David Marriott dated January 26, 2004, which his office sent on January 27, 2004.

I am confused by Mr. Heise's statement that IBM has publicly claimed that "SCO failed to comply with the court's order to fully answer IBM's interrogatories and request for documents by Jan. 23".

Mr. Heise appears to be referring to a statement that appeared in an article in *The Salt Lake Tribune* last week. In the article, a Mike Darcy of IBM is purportedly quoted as saying: "SCO failed to comply with the court's order to fully answer IBM's interrogatories and requirements by [the deadline]." There is no reference, however, to "Jan. 23" anywhere in the article, and read in context, it is plain that Mr. Darcy is referring to the January 12, 2004 deadline set by the Court for SCO to comply with its Order.

In our judgment, SCO did not fully comply with the Court's Order by January 12. The Court ordered SCO "to produce all requested documents" in IBM's First and Second Set of Interrogatories by that date. Instead, on January 12, SCO informed IBM that it had been unable to complete its production on time, but would do so "within the next few days". As a result of SCO's later representation to IBM that its production would not be completed until January 23, the hearing scheduled for January 23 was postponed until February 6. In fact, SCO has continued to produce documents to IBM after January 23, including documents we received on January 28.

In any event, we believe that SCO has still not complied with the Court's order in at least the respects set forth below. We raise these issues with you now, so that we may resolve them prior to the February 6, 2004 hearing before Magistrate Judge Wells.

SCO's Interrogatory Responses.

SCO's supplemental interrogatory responses are deficient in numerous respects.

First, SCO still fails to identify any files or lines of code in its own UNIX System V product that IBM is alleged to have misappropriated or misused.

Second, although the Court ordered SCO to identify code by file and by line, SCO has not identified the particular files or lines of code at issue in either UNIX System V, Dynix/ptx, AIX or Linux with respect to SCO's allegations regarding "asynchronous input/output", "scatter/gather input/output" and "SMP". In addition, SCO fails to identify any lines of code with respect to the Dynix/ptx and Linux files listed in Table A of SCO's supplemental responses.

Third, SCO completely fails to identify the nature and source of its rights in the Dynix/ptx, AIX and Linux code identified in its supplemental responses. As SCO's primary contention appears to be that IBM improperly contributed code to Linux that was directly copied, or derived, from its UNIX System V code, SCO must identify the UNIX System V code that IBM is alleged to have misused with respect to all of the Dynix/ptx, AIX and Linux code identified in SCO's responses.

Fourth, SCO fails to identify all of the persons and entities other than IBM and Sequent to whom it has granted rights to any of the specific UNIX System V code at issue in this case. As SCO admits it has granted rights to UNIX System V to thousands of individuals and entities, SCO must be in a position to identify all of these persons and entities and the nature and source of their rights.

Fifth, SCO fails to identify all of the persons and entities other than IBM and Sequent to whom it has disclosed any of the specific UNIX System V or Linux code at issue in this case. Since, among other things, SCO has publicly stated it has shown code that is alleged to have been improperly contributed to Linux to investors, financial analysts and others pursuant to non-disclosure agreements, we expect SCO to at least identify to whom, and under what circumstances and terms, such code was disclosed.

Sixth, SCO also fails to identify all places or locations where the code at issue in this case may be found or accessed (such as on SCO websites), and all the specific SCO products—UNIX, Unixware, Linux, or otherwise—in which the code at issue in this case

Brent O. Hatch  
January 30, 2004  
Page 3

was included, and when, to whom and under what terms such products were distributed or made available.

Although SCO does identify two of its Linux products that contain the Linux 2.4 kernel code at issue, we believe that there are other products that SCO distributed or made available that also contain such code (such as Caldera Open Linux 3.1). Further, as SCO also appears to claim that the Linux 2.2.12 kernel contains code that was misappropriated or misused by IBM, SCO must also identify all SCO products in which it distributed the Linux 2.2.12 kernel, and when, to whom, and under what terms such products were distributed or made available.

Seventh, SCO fails to identify all of the copyrights that exist in any of the UNIX System V code at issue in the case. Although SCO identified its own copyrights in such materials, it fails to identify any third-party copyrights that may exist in the code, including, for example, copyrights of Berkeley Systems Design, Inc. ("BSD").

Eighth, SCO fails to identify by line the XFS code that Silicon Graphics, Inc. ("SGI") allegedly improperly contributed to Linux, or the UNIX System V files and lines of code from which the XFS code, and also the application binary interface ("ABI") files referenced by SCO in its responses, was copied or derived.

SCO additionally fails to describe whether, when, to whom and under what circumstances and terms, it ever distributed the ABI files and the XFS code.

#### SCO's Document Production.

Based on our preliminary review, it appears that SCO's document production remains substantially incomplete.

First, SCO has yet to produce numerous categories of responsive documents, including but not limited to:

- (1) the Linux intellectual property licenses SCO has publicly claimed it has sold to at least ten companies;
- (2) the letters SCO sent to UNIX licensees, Linux end-users and Fortune 1500 companies regarding Linux and/or AIX, or any responses it received to such letters;
- (3) the letters SCO sent to members of Congress regarding Linux, or any responses it received to such letters;
- (4) SCO's customer contracts with which IBM is alleged have interfered (including at least its contracts with AutoZone, Sherwin Williams and Target);

- (5) the code comparisons shown by SCO to financial analysts and others pursuant to a non-disclosure agreement;
- (6) the code comparisons performed by consultants retained by SCO, the results of which were publicly discussed by SCO;
- (7) documents concerning the creation and development of its UNIX products;
- (8) the pleadings, deposition transcripts and deposition exhibits from UNIX Systems Laboratories, Inc.'s ("USL") suit against BSD;
- (9) documents concerning SCO's suit against Microsoft, Inc., including at least a copy of all discovery requests and responses in the case;
- (10) the exhibits to the August 1, 2000 agreement between Caldera Systems, Inc. and the Santa Cruz Operation; and
- (11) documents concerning the acquisition of USL by Novell, Inc.;
- (12) SCO's educational materials concerning Linux, the GPL, and its open-source development activities; and
- (13) documents concerning the GPL.

Second, SCO has thus far only produced files from 17 individuals. Presumably others of SCO's employees have documents responsive to IBM's First and Second Document Requests, including Gregory Blepp, Philip Langer, John Maciaszek and Porter Olson, among others.

In any case, the productions from these 17 individuals appear to be incomplete. Although SCO has provided numerous e-mails from these individuals, SCO has not produced any of the corresponding attachments to those e-mails. In addition, for certain individuals (including Darl McBride), SCO has produced received e-mails, but not any sent e-mails.

Third, SCO still has not produced the source code for numerous of its software programs, including at least: OpenLinux 1.0, Open Linux 2.4, SCO Manager, SCO Open Desktop Release 3, SCO Volution, UNIX Version 1, UNIX Version 2, UNIX Version 3, UNIX Version 4, UNIX Version 5, UNIX Version 8, UNIX Version 9, UNIX Version 10, UNIX System IV, UNIX System V Release 2.1, UNIX System V Release 3.1, UNIX System V/386 Release 3.2, UNIX System V Release 4.0MP, Intel386

Brent O. Hatch  
January 30, 2004  
Page 5

implementation, UNIX System V Release 4.1, UNIX System V Release 4.1 MP, UNIX System V Release 4.2, Intel386 implementation, UNIX System V Release 4.2 MP, Intel386 implementation, UNIX System V 4.2 ES/MP, and UnixWare 7.0.3.

Since SCO was previously able to produce the source code for a number of these programs in paper form, there should be no difficulty in producing such code in electronic form.

Fourth, there are serious defects in a number of the CDs SCO has provided to IBM. CDs 196, 211 and 212 are missing thousands of pages of documents SCO claims in its production log to have already produced. In all, more than 10,000 pages have not been produced.

Please address our concerns as to these issues by the close of business on Tuesday, February 3, 2004, so that we can determine whether to raise these issues with the Court at next Friday's hearing. With respect to IBM's interrogatories, we ask that SCO either provide the missing information or state unequivocally that after a diligent search it has no additional information to provide. With respect to the document requests, we ask that SCO either produce the missing documents or state unequivocally that after a diligent search it has no additional documents to produce. This way we can advise the Court by letter on Wednesday which, if any, of the above issues should be addressed at Friday's hearing.

Very truly yours,



Todd Shaughnessy

cc: David Marriott  
Alan Sullivan  
Amy Sorenson  
Mark Heise