

February 4, 2004

Via Telecopier

David R. Marriott  
Cravath Swaine & Moore LLP  
Worldwide Place  
285 Eight Avenue  
New York, NY 10019

Re: SCO v. IBM

Dear Dave:

This letter responds to the letter dated January 30, 2004 sent from Todd Shaughnessy at 8:15 p.m. As I previously mentioned, because of the late delivery on that Friday evening, I did not get his letter until Monday and was not able to begin collecting information to provide a detailed response until Monday afternoon. As a matter of convenience, I will follow the format of Mr. Shaughnessy's letter.

Mr. Shaughnessy first protests a quote that was attributed to Mike Darcy of IBM. According to a technology column in The Daily Herald dated January 24, 2004, Mike Darcy was quoted as follows:

SCO failed to comply with the court's order to fully answer IBM's interrogatories and requests for documents by Jan. 23. SCO has now agreed to provide additional responses, so the Court has agreed to postpone the hearing until February 6, to give SCO additional time to reply.

I don't understand Mr. Shaughnessy's dispute with this quote and in particular the fact that Mr. Darcy mentioned January 23. The significance of this statement is that, sometime before Mr. Darcy was quoted, IBM had determined that SCO had not complied with the Court's order. Because IBM was willing to share this view with the media, I simply inquired if IBM would share with SCO what it perceived was deficient about SCO's discovery responses. If IBM had determined by January 23 that SCO's discovery responses were deficient and was willing to

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publicly state as much, it only seemed appropriate that it also would relate those concerns to SCO.

Rather than simply disputing the quote and moving on, Mr. Shaughnessy further attempts to defend it by claiming that all documents had to be produced by the January 12 deadline and that "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.'" This is not the first time that Mr. Shaughnessy has misstated what occurred between counsel. As you will recall, I informed you *prior* to the January 12<sup>th</sup> deadline that there were difficulties in obtaining all of the documents during the holidays and that certain documents were not going to be completed by that deadline. On January 12<sup>th</sup>, I confirmed that additional time was needed to complete review and production of documents from certain individuals. I estimated it would be completed within a few days. In fact, SCO filed a Declaration with the Answers in this regard. When I thereafter learned that it would take more time, I immediately notified you of this fact on January 15, 2004, and estimated that, based on the volume of material to be reviewed, it would require approximately two weeks longer than I had previously informed you. Thus, Mr. Shaughnessy simply mischaracterizes the sequence of events. He has done this in correspondence in the past, including with the Court, and we would appreciate if you would restrain him from making incorrect statements in this case.

Turning to the substantive aspects of the letter, I will first address your critique of the interrogatory responses.

First, IBM claims that SCO has failed to identify any files or lines of code in its own UNIX System V product that IBM is alleged to have misappropriated or misused. This theme of a purported lack of identification of System V code is repeated throughout IBM's letter in an attempt to disparage the quality of SCO's supplemental answers to interrogatories. The problem is that this idea ignores some basic facts. For example, AIX contains over 1000 files that have attribution to AT&T. Indeed, it is because AIX is replete with AT&T code that IBM requires that any company that wanted to view AIX must obtain permission from AT&T (and eventually SCO). If AIX was not filled with this AT&T code, there would be no reason for IBM to require such permission. As a result of these facts, it is clear that AIX and Dynix are modifications of or derivative works based on System V. IBM, accordingly, was obligated treat AIX and Dynix as it agreed to do in the respective license agreements. IBM did not and that is what is detailed in the revised supplemental answers.

Without re-pleading the Amended Complaint in this letter, SCO has in fact identified IBM's misuse of the Protected Materials under the IBM Related Agreements and Sequent Agreements. The revised supplemental answers go into excruciating detail as to such misuse. IBM keeps insisting on something that is not part of SCO's claims, so it should come as no surprise that files or lines of code in System V have not been identified. Moreover, this latest concern is belied by the language in IBM's proposed order on the Motion to Compel when IBM

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itself wanted SCO to provide "the exact location in Unix System V *or elsewhere* were such information is found or expressed. . ." SCO, in fact, has done so.

Second, IBM claims certain of SCO's answers are deficient because they do not provide the detail of particular lines of code for selected technologies (A/I/O, SMP, etc.). IBM also protests that the Dynix/ptx/RCU files identified in Table A do not specify the line for line matches. As set forth in our Supplemental Answers to Interrogatories, the code comparisons for the items that appear in Table A appear throughout the entire file, so we have not matched the lines in Dynix that IBM provided to Linux and that now appear in Linux. Similarly, your criticisms about the failure to identify lines of code in A/I/O, scatter/gather input/output and SMP ignore what SCO stated in its answers to interrogatories and the Declaration of Ryan Tibbitts. As detailed therein, SCO specifically noted that it needs the full production of source code from IBM. *See Revised Supplemental Answers*, pp. 13-17, 26-30. Without the underlying source code from AIX and Dynix, SCO quite obviously cannot identify the lines of AIX and Dynix that match to IBM's contributions of those lines of code in Linux. Until IBM provides this complete information, which it had only begun to do before discovery was stayed, SCO is not in a position to further answer with respect to the aforementioned technologies.

Third, IBM claims SCO has failed to answer Interrogatory No. 2 that asked for the nature and source of SCO's rights in the alleged trade secret or confidential or proprietary information identified in response to Interrogatory No. 1. Again, IBM is ignoring what has been clearly stated throughout this case, both in the Amended Complaint as well as the Answers to Interrogatories. SCO's rights arise from the IBM Related Agreements and the Sequent Agreements. In these documents, there are very clear restrictions and prohibitions on IBM's use of AIX and Dynix, all of which are detailed in the answers.

Fourth, IBM claims that SCO did not respond to Interrogatory No. 2 regarding the identity of all persons who have or had rights to the alleged trade secret or confidential or proprietary information. Again, IBM is attempting to change the scope of the claims asserted under the license agreements. SCO has answered the question as asked and as appropriate in light of the claims asserted against IBM. Moreover, to the extent IBM now wants to know all of the persons or entities that had a license to System V, and the terms and conditions of those agreements, that information is set forth in the license agreements that have been produced in this litigation. At this point, the Interrogatory asked SCO to identify all persons who have or have had rights to the alleged trade secret or confidential or proprietary information identified in response to Interrogatory No. 1. SCO has in fact identified those people in response to Interrogatory No. 2.

Fifth, IBM criticizes SCO's response to Interrogatory No. 3 claiming SCO failed to identify persons or entities (other than IBM or Sequent) to whom it (presumably meaning SCO) has disclosed any of the UNIX System V or Linux code at issue in this case. IBM then makes reference to the fact that SCO has shown code to investors, analysts and others under an NDA. Again, IBM's criticism does not track the language of Interrogatory No. 3. In that question, IBM

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actually asked to identify all persons to whom the alleged trade secret or confidential or proprietary information is known or has been disclosed and describe, in detail, the circumstances under which it became known or was disclosed. We have answered that question. Regarding your comment of SCO's public statements that it has shown code that was improperly contributed to Linux, we have in fact provided that information. First, as has been stated on repeated occasions and which was reiterated in SCO's Answers to Interrogatories, the direct line-for-line copying of System V code that SCO has found was not contributed by IBM, but instead was contributed by Silicon Graphics. That code was provided to IBM in response to the Answers to Interrogatories and can be found at tab Exhibit A-2 and Exhibit A-4. However, reference to that code is not responsive to this question because this question is limited to IBM's improper actions, not those of others.

Sixth, IBM has attempted to reframe Interrogatory No. 3(d), which asks for all places or locations where the alleged trade secret or confidential or proprietary information may be found or accessed. SCO has done so. In response to that question, SCO noted that the tables and extensive tabbed exhibits specifically mark where the information is located in Linux. Indeed, in IBM's proposed order, IBM previously wanted to know where in Linux or other software such information may be found, including the version and release of the software, the file and the line of code therein. The tables and tabbed exhibits provide this detailed information.

Moreover, regarding IBM's specific comment that SCO must identify where on its website and in which SCO products the Protected Materials may be found or accessed, that has been done. As indicated in response to Interrogatory Nos. 3 and 13, the Protected Materials would be found in any product that contains Linux 2.4 kernel or above and SCO distributed the Linux 2.4 kernel and above for a brief period of time in SCO Linux server 4.0. Moreover, we provided you with the invoices that laid out the terms under which these materials were made available.

The commentary that IBM believes there are other products that SCO distributed or made available containing such code is incorrect. Specifically, IBM's claim that the Linux 2.2.12 kernel contains infringing code and therefore SCO must produce all products in which it distributed the Linux 2.2.12 kernel simply is incorrect. Using the instance of IBM's improper contribution of JFS to Linux, IBM certainly is aware that it appeared as a *patch* in Linux 2.2.12. However, JFS was not accepted into the "official" Linux source tree until Linux 2.4.20. Therefore, although IBM publicly displayed JFS in violation of the IBM Related Agreements as early as Linux 2.2.12, JFS did not become a standard part of Linux until 2.4.20. In other words, prior to Linux 2.4.20, the only Linux distributions that included JFS were ones that had downloaded JFS from IBM's website and added it to that distribution. SCO did not do so; therefore, contrary to Mr. Shaughnessy's statement, Caldera Open Linux 3.1 did not include IBM's improper public display of JFS.

Seventh, contrary to the accusation, SCO has responded to Interrogatory No. 5(b) and identified all copyrights relating to the alleged trade secret or confidential or proprietary

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information identified in response to Interrogatory No. 1. To SCO's knowledge, there are not third party copyrights in those materials. If IBM is aware of such copyrights, please identify them for SCO and the answer will be supplemented.

Eighth, IBM is concerned about SCO's response to Interrogatory No. 12 in which IBM asked SCO to identify all source code and other material in Linux to which Plaintiff has rights. In particular, IBM is concerned that SCO failed to identify *by line* XFS code improperly contributed to Linux in violation of SGI's license agreements. As set forth in SCO's revised and Supplemental Answers, XFS is a journaling file system developed by SGI and used in SGI's IRIX operating system, which was subject to SGI's license agreement with SCO and its predecessors. SCO identified each of the XFS files that were contributed. The reason SCO has not identified specific lines in the files set forth in our Revised Supplemental answers is, as was set forth on page 66 of the answers, SCO has not had access to versions of IRIX to compare and identify the IRIX/XFS files and lines of code to then identify those same lines as they appear in Linux. With respect to the ABI files, I am not sure what the concern is about SCO's alleged failure to identify by line the improper contributions. In Exhibit B to the Revised Supplemental answers, the tabbed exhibits clearly identify the lines that were improperly contributed.

Mr. Shaughnessy concludes this section by commenting that "SCO additionally fails to describe whether, when, to whom and under what circumstances and terms, it ever distributed the ABI files and the XFS of those codes." Interrogatory 13 and IBM's proposed order were directed to distribution of IBM's infringements, not the improper contributions of others. Accordingly, SCO provided the answer as set forth in Interrogatory 13.

Regarding IBM's concerns over SCO's document production, we will likewise address those matters seriatim. Under the heading "First", Mr. Shaughnessy identified thirteen categories of documents. Each of those is specifically addressed below.

- (1) *"The Linux intellectual property licenses SCO has publicly claimed it has sold to at least ten companies."* At this juncture, I am only aware of a license with Computer Associates, Questar and Leggett & Platt. The Computer Associates document was collected and approved for production, but the third party vendor being used for this document production did not burn the image on a CD. We, of course, will produce this document. The remaining documents were received by the client well after the collection of documents took place and therefore was not included in the production. We will produce this document as well.
- (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."* Regarding the letters sent in May and December 2003, there is only the form letter, which obviously you have downloaded from SCO's website, and the distribution list. There are not copies of all 1500 letters that were sent out. The form letter was previously produced at Bates 1269622-1269623. In addition, to the

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extent you want the distribution list used for the mail merge, we can provide this as well.

The December letter was created after the documents were collected from SCO, so it would not have been in the production. Again, although you already have a copy of the form letter, we will provide it to you if you want it.

Regarding the responses to each of these letters, SCO will check to see if it received any responses to the May letter. To the extent it has received responses to the December letter, those responses obviously were received after documents were collected from the client. To the extent you want these responses, we can collect those documents and provide them to you as they are kept in the ordinary course of business.

- (3) *"The letters SCO sent to members of Congress regarding Linux or any responses it received to such letters."* As you know, this letter was sent January 8, 2004, so it was well after there was any collection of documents from the client. The client apparently does have copies of each of these individual letters, so if you would like to have those documents, we will produce them to you.
- (4) *"SCO's customer contracts with which IBM is alleged to have interfered (including at least its contracts with Auto Zone, Sherwin Williams and Target)."* The Sherwin Williams contract has been produced and can be found at Bates Nos. 1299855-1299865. We are further investigating if other portions were produced elsewhere in the production. As to Auto Zone and Target, they should have been produced. If they were not produced, I will make arrangements to have them produced immediately.
- (5) *"The code comparisons shown by SCO to financial analysts and others pursuant to a non-disclosure agreement."* This document was located in Chris Sontag's files. Apparently, the document had notations on it that caused it to be designated as privileged. This designation of privilege was in error and the document will be produced.
- (6) *"The code comparisons performed by consultants retained by SCO, the results of which were publicly discussed by SCO."* These documents were created by consulting experts who have not been designated to testify in this case. As a result, such documents are protected from disclosure under Rule 26(b)(4).
- (7) *"Documents concerning the creation and development of its Unix products."* These documents can be found throughout e-mail and correspondence in the materials provided. In addition, design documents can be found extensively throughout CD 144.

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- (8) *"The pleadings, deposition transcripts and deposition exhibits from UNIX Systems Laboratories, Inc. ("USL") suit against BSD."* SCO does not have such documents in its custody, control or possession.
- (9) *"The documents concerning SCO's suit against Microsoft, Inc., including at least a copy of all discovery requests and responses in the case."* As we previously mentioned, SCO was not a party to this litigation and does not have possession of such documents. Moreover, as we related to your colleague Peter Ligh in May 2003, the documents in the Canopy Group's possession were destroyed pursuant to Court Order issued in that unrelated litigation. Our understanding, however, is that Microsoft or its lawyers may still have the documents you are seeking, so you may wish to contact them.
- (10) *"The exhibits to the August 1, 2000 agreement between Caldera Systems, Inc. and Santa Cruz Operation."* To the extent that such documents are in the possession of SCO, IBM is certainly entitled to such documents. We will undertake an additional search to attempt to locate them and thereafter produce them.
- (11) *"Documents concerning the acquisition of USL by Novell, Inc."* Any such documents in SCO's possession have been produced. Nonetheless, SCO will undertake further investigation to attempt to locate such documents. A preliminary investigation reveals that this document may be one of the problem documents in CD 196, which is discussed in further detail below. In any event, we will provide this document.
- (12) *"SCO's educational materials concerning Linux, the GPL, and its open source development activities."* There are several issues with this item. First, as with many of the forgoing items IBM has listed, Fed.R.Civ.P. 34(b) requires that parties produce documents either as they are kept in the ordinary course of business or label them to correspond to specific requests. In large scale litigation like this, parties typically produce the documents as they are kept in the ordinary course of business. Thus, to the extent any such materials have been produced, they are found in many different files. One such person with documents responsive to this request would be Andy Nagle. Educational documents in Mr. Nagle's possession are further found at Bates Nos. 1307625-1307643; 1307686-1307714; 1307644-1307665; 1307680-1307685. I am providing you with this information despite the fact nowhere in IBM's First or Second Request for Production did it ask for educational materials.
- (13) *"Documents concerning the GPL."* As with item 12, to the extent there are e-mails, correspondence or other documents located in various files regarding the GPL, they have been produced and can be found as they are kept in the ordinary course of

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business. There are, however, specific responsive documents that may be found at Bates Nos. 1297464-1297486; 1182904-1182908.

Under your heading for "Second," IBM identified four individuals from whom you have not received documents--Gregory Blepp, Philip Langer, John Maciaszek and Porter Olsen. As to Gregory Blepp, his documentation was not produced because IBM had sought to limit production in this case to persons in the United States. SCO agreed to this limitation if it was reciprocal and provided that no work on AIX, Dynix or Linux occurred outside the United States. No work on AIX, Dynix or Linux occurred while Mr. Blepp was at SCO and furthermore he is located outside the United States. As a result, his files were not collected. If you would like to revisit the limitation originally raised by IBM, we will collect any non-privileged responsive documents from Mr. Blepp. As to Philip Langer, there are no documents. As to Porter Olsen, he was a junior employee who left SCO in November. SCO previously attempted to obtain his documents but did not recover any. I will have them try again to recover any responsive documents. As to John Maciaszek, his documents had been collected and we believed had been produced. However, upon seeing your observations that his documents had not been produced, we discovered that the third party vendor had not included his and about 20 other persons' information in the queue to be produced. As a result of IBM's prioritizing certain individuals, such as Darl McBride and Chris Sontag, and thereafter identifying directors and officers of the company from whom IBM immediately wanted documents, this batch of collected documents was set aside and apparently never incorporated into the CDs to be produced. We are making arrangements to have these documents produced on an expedited basis.

As to your concern about documents from those individuals who were produced and, in particular, the fact that attachments do not appear for each of the e-mails, the system only produces the attachment to the e-mail one time. Thus, if an identical attachment appears multiple times at different e-mails, it will only be produced one time. As to your concern about Darl McBride not having produced "sent" e-mails, he infrequently sends e-mails. Nonetheless, based upon IBM's comments and the expectation that there would be at least some sent e-mails, we further investigated why sent e-mails for others had not been produced. Apparently, only some of the "sent" e-mails were on the servers at SCO. The sent e-mails for some executives apparently are not on the server and instead are only located on their individual machines. SCO has already begun the collection process to obtain the "sent" e-mails as expeditiously as possible and, to the extent such e-mails are available, they will be produced.

Under the heading "Third", Mr. Shaughnessy identifies various releases of software it claims have not been produced and then concludes that SCO was previously able to produce the missing source code for a number of these programs in paper form. As an initial matter, any source code that was produced in paper form came from a CD and therefore has been produced. I think the confusion may have arisen from a typographical error. The source log shows UnixWare 7.0.3 being delivered in the first delivery. It should have said UnixWare 2.0.3, which has been redelivered.



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More specifically addressing the items listed, I have set forth a chart below detailing a response to each of your concerns. As you can see, we have already produced all such source code in our possession and we have identified for you in which CDs you may find such source code. There are four items that were not previously produced and have now been located will be produced. First, Volution Manager, which was an obsolete optional product, has been located and will be produced. Because this was the first time you had asked for such source code by name, no effort was previously made to attempt to locate this obsolete product. Second, for the Unix System V Release 4.0MP Intel i386 version, Unix System V Release 4.1 3 B2 version and Unix System V Release 4.2cs/MP Intel i386 version, SCO did not have these in its source code library, which is why they were not discovered earlier. However, further investigation revealed they were located in a separate server and we have made arrangements to produce those documents.

Missing per 1-30 letter	Notes	Production CDs
Open Linux 1.0	Not available	NA
Open Linux 2.4	AKA eDesktop 2.4	81s, 82b
SCO Open Desktop Release 3	Delivered	54s
UNIX Version 1	SCO does not have this source code	NA
UNIX Version 2	SCO does not have this source code	NA
UNIX Version 3	SCO does not have this source code	NA
UNIX Version 4	SCO does not have this source code	NA
UNIX Version 5	SCO does not have this source code	NA
UNIX Version 8	SCO does not have this source code	NA
UNIX Version 9	SCO does not have this source code	NA
UNIX Version 10	SCO does not have this source code	NA
UNIX System IV	SCO does not have this source code	NA
UNIX System V Release 2.1	AKA System V2.1 3B2	95s
UNIX System V Release 3.1	AKA System V Release 3.1	96s
UNIX System V/386 Release 3.2	AKA System V Release 3.2 i386	96s
UNIX System V Release 4.1 MP	Not a valid release number	NA
UNIX System V Release 4.2, Intel 386 implementation	AKA UnixWare 1.1	148s, 111s, 151b
UNIX System Release 4.2 MP, Intel 386 implementation	AKA UnixWare 2.0.3	147s, 156s, 152b
Unix System V 4.2 ES/MP	virtually the same as UW 2.0.3	
UnixWare 7.0.3.	Mislabeled on first delivery, should have been UnixWare 2.0.3, was re-delivered in source	139s, 98s

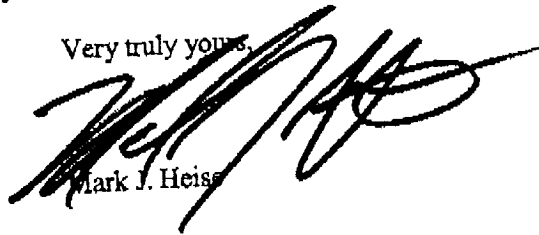
On the item listed as "Fourth," I have been corresponding and speaking with Christopher Kao of your office regarding CDs 196, 211 and 212. With respect to CDs 211 and 212, there was simply a technical error with the vendor and those CDs have been re-burned and I will send those corrected CDs. As to CD 196, it appears that certain documents were marked privileged

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that should not have been marked privileged and, conversely, privileged documents were not marked as privileged. We are fully investigating this CD and will issue a replacement CD once we are able to electronically correct this error.

Please feel free to call if you have any questions.

Very truly yours,

A handwritten signature in black ink, appearing to be "Mark J. Heiss", written over a printed name.

Mark J. Heiss

MJH/vb

cc: Brent O. Hatch, Esq. (via telecopier)  
Todd Shaughnessy, Esq. (via telecopier)