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*Attorneys for Defendant/Counterclaim-Plaintiff  
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**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 THOMAS L. CRONAN III

I, Thomas L. Cronan III, declare as follows:

1. I was employed as an attorney in International Business Machines Corporation's ("IBM") System Products Division from 1984 to 1992. During that time, I was involved in negotiating, on behalf of IBM, agreements with AT&T Technologies, Inc. ("AT&T Technologies") for the licensing of certain 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. In 1984, I joined IBM as a law clerk and later became an attorney in the System Products Division. Thereafter, I held various legal positions within IBM until I left the company in 1992.

4. During the period I was an attorney in IBM's System Products Division, beginning in or about 1984, IBM sought to license UNIX System V software and related materials from AT&T Technologies. IBM was then licensing certain other UNIX software and related materials from AT&T Technologies.

5. I was involved in negotiating the agreements pursuant to which IBM licensed from AT&T Technologies UNIX System V software and related materials. Our understanding with AT&T Technologies is memorialized in the following

agreements between IBM and AT&T Technologies, referred to in this declaration as the "AT&T Agreements":

- the Software Agreement (Agreement Number SOFT-00015) dated February 1, 1985 (the "AT&T Software Agreement");
- the Sublicensing Agreement (Agreement Number SUB-00015A) dated February 1, 1985 (the "AT&T Sublicensing Agreement");
- the Substitution Agreement (Agreement Number XFER-00015B) dated February 1, 1985 (the "AT&T Substitution Agreement"); and
- the letter agreement dated February 1, 1985 (the "AT&T Side Letter").

True and correct copies of these agreements are attached hereto as Exhibits 1 through 4.

6. Based upon my duties and responsibilities at IBM, including in particular my role in negotiating the AT&T Agreements, I have personal knowledge of the terms and conditions of the agreements and know what the parties understood them to mean and intended them to accomplish.

7. During our initial discussions with AT&T Technologies regarding the licensing of UNIX System V, the AT&T Technologies representatives with whom we negotiated insisted on licensing UNIX System V software and related materials pursuant to a standard set of license agreements. They said that this was because AT&T Technologies had already licensed and distributed UNIX software and related materials very broadly and that they intended to license and distribute UNIX System V software and related materials more broadly still. For the sake of efficiency and ease of administration, they wanted to avoid having to draft different agreements with each of their licensees. In addition, the AT&T Technologies representatives made clear that they wished to license UNIX System V software and related materials evenhandedly; they said they expected to treat all of their licensees as they treated IBM.

8. Thus, the AT&T Technologies representatives at first presented us with a standard Software Agreement under which they proposed to license UNIX System V software and related materials, which were called the "SOFTWARE PRODUCT" or "SOFTWARE PRODUCTS" in the agreement. The standard Software Agreement granted licensees the right to use such materials subject to various restrictions.

9. For example, the standard Software Agreement that AT&T Technologies proposed to us contained the following provisions:

- 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 representatives for AT&T Technologies explained them to us during our negotiations, and as I understood them, these provisions controlled what IBM could and could not do with the UNIX System V software products, primarily the UNIX System V source code, that we were licensing. I did not understand any of these provisions to allow AT&T Technologies to control IBM's use, export, disclosure or transfer of any software

products or source code that we developed ourselves that did not contain any UNIX System V code. Our negotiating team would never have agreed to such terms. To do so would have represented a dramatic departure from IBM's practices regarding the licensing of third-party code and would have required IBM to change the way it developed products to ensure that it not allow any IBM or third-party code to be introduced into the source code base containing the UNIX System V code (however briefly) unless IBM was prepared forever to yield control of that code to AT&T Technologies.

10. The standard Software Agreement also included a provision that would permit IBM to create modifications and derivative works of the UNIX System V software we were licensing. Specifically, the agreement stated in Section 2.01 that IBM's "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".

11. Based on my discussions with AT&T Technologies, I did not understand this language regarding the treatment of "resulting materials" to give AT&T Technologies the right to assert ownership or control over all of the source code of any modifications or derivative works based on UNIX System V that we prepared. To the contrary, I understood this language to mean—and I believe AT&T Technologies believed likewise—that IBM had to treat those parts of our modifications or derivative works that contained UNIX System V source code as we would treat the UNIX System V source code itself.

12. As I recall, the AT&T Technologies representatives with whom we negotiated assured us that under the standard software agreement, IBM owned, and was permitted to use however we wanted, the modifications or derivative works that we created (or that others created for us) based on the UNIX System V software, except for the UNIX System V source code that might be contained within our modifications or derivative works. AT&T Technologies made clear to us that we could do whatever we wanted with our own original non-UNIX System V source code.

13. During the negotiations of the AT&T Agreements, we in fact raised a number of concerns with the standard agreements, including with this Section 2.01 in particular, and indicated that we wanted to make sure both IBM and AT&T Technologies had the same understanding. We insisted that AT&T Technologies at least provide us with a side letter clarifying certain provisions of the agreements, and AT&T Technologies agreed to provide such a letter.

14. Among the clarifications that we specifically requested the side letter cover was the language in Section 2.01 concerning modifications and derivative works. We wanted to make sure there would be no question that IBM, not AT&T Technologies, would own and control the source code that was developed by IBM or developed for IBM by a third party.

15. AT&T Technologies agreed to provide this clarification. According to its representatives, AT&T Technologies understood IBM's desire to retain ownership and control of its own source code and did not wish to assert ownership or control over any modifications and derivative works prepared by or for IBM, or by any other of AT&T Technologies' licensees for that matter, except to the extent that those

portions of the modifications or derivative works contained licensed UNIX System V source code.

16. This clarification is contained in Paragraph A.2 of the AT&T Side Letter:

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].

The AT&T Technologies representatives insisted that this provision in the AT&T Side Letter was merely a clarification of what the standard AT&T Software Agreement was intended to mean all along.

17. We insisted that the side letter make clear that IBM would "own" its modifications and derivative works, because we believed the term signified the broadest possible scope of rights. In my mind, it ensured that we could do as we wished with modifications and derivative works of UNIX System V code so long as we treated UNIX System V code as required by the AT&T Agreements. It certainly did not give AT&T (or anyone else, for that matter) the right to control IBM's own code or code written by or for IBM, except insofar as that code might contain UNIX System V code.

18. As I understood the AT&T Agreements between IBM and AT&T Technologies, therefore, and as I believe the parties intended those agreements, the agreements impose no restrictions on IBM's use, export, disclosure or transfer of those portions of any modifications or derivative works of UNIX System V that were created by or for IBM and do not contain any UNIX System V source code.

19. So that there would be no confusion, we told the AT&T Technologies' representatives with whom we negotiated the AT&T Agreements that IBM

intended to include portions of AT&T's UNIX System V code in products with IBM code and to make changes to the AT&T code (such as by adding to it) and thus IBM had to ensure that the parties agreed that IBM had the right to do so, without forfeiting any rights (including the right to control) to such IBM products and code. AT&T Technologies' representatives advised us that they did not seek to preclude such activities. In fact, they assured us that the purpose of the restrictions imposed by the AT&T Agreements was to protect AT&T's original code and that IBM could do whatever it wanted with its own code so long as it did not use, export, disclose or transfer AT&T's original code (except as otherwise permitted by the AT&T Agreements).

20. It is my understanding that IBM's AIX product includes some licensed UNIX System V source code. However, I do not know whether AIX is so similar to UNIX System V that it may properly be viewed as a "modification" or a "derivative work" based on UNIX System V. In any event, as I understand the AT&T Agreements, IBM is free to use however it wants any AIX source code, except for the UNIX System V source code or other licensed software products provided by AT&T Technologies that may be contained therein (except as otherwise permitted by the AT&T Agreements).

21. I have been informed that the plaintiff in this litigation contends that IBM has breached the AT&T Agreements by improperly using, exporting, disclosing or transferring AIX source code, irrespective of whether IBM has improperly used, exported, disclosed or transferred any protected UNIX System V source code. Any such claim is, in my view, inconsistent with the provisions of the AT&T Agreements and with the parties' intentions.



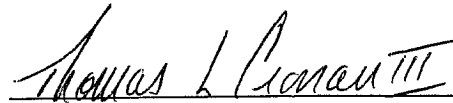
22. Based on my role in negotiating the attached AT&T Agreements, I do not believe there is any merit to the plaintiff's contentions. IBM would never have entered into any agreement that gave AT&T Technologies the right to control IBM's use of source code that it wrote itself or that it licensed from third parties. That is why we specifically discussed this issue of ownership of our modifications and derivative works with AT&T Technologies in detail before entering into the AT&T Agreements. AT&T Technologies assured us repeatedly, and I believed them, that the AT&T Agreements were not intended to limit IBM's freedom of action with respect to its original source code and were intended merely to protect AT&T Technologies' interest in its own UNIX System V source code.

23. No one involved in the negotiation of the AT&T agreements ever suggested that the agreements would give AT&T Technologies (or anyone else other than IBM) the right to control IBM original code. It seems quite clear to me, based on the statements of its representatives, that AT&T Technologies' concern was the protection of its original code only. I have no doubt that the AT&T Technologies' representatives with whom we negotiated the AT&T Agreements understood that IBM would not have entered into the AT&T Agreements if AT&T Technologies had sought and insisted on the right to control any product or code that might in the future be associated with UNIX System V code, except insofar as it might include UNIX System V code.

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

Executed: July 29, 2004.

San Jose, California

A handwritten signature in black ink that reads "Thomas L. Cronan III". The signature is written in a cursive style with a horizontal line underneath it.

Thomas L. Cronan III