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*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

EXHIBIT
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DECLARATION OF DAVID W. FRASURE

I, David W. Frasure, declare as follows:

1. From 1984 through 1987, I was the national sales and licensing manager at AT&T Technologies, Inc. ("AT&T Technologies") and was responsible for the licensing of 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.

I. Responsibilities at AT&T Technologies.

3. In 1968, I accepted an engineering position with Western Electric, which was then a subsidiary of the American Telephone and Telegraph Company ("AT&T"). In approximately April 1980, I became a department chief in the computer systems and software division of Western Electric, and later I became a department chief in the corporate computer standards division.

4. Sometime around June 1984, I became the national sales and licensing manager at AT&T Technologies, another subsidiary of AT&T, with responsibility for licensing UNIX software and related materials. In that position, I supervised the work of approximately eleven account representatives. I held this position until 1987, when I left AT&T Technologies to accept a position at Kidde Aerospace.

5. As national sales and licensing manager, I was responsible for all of the agreements under which AT&T Technologies licensed and sublicensed UNIX

software and related materials. I personally negotiated many of the agreements with licensees, and I was consulted about, and approved, many others.

6. I personally negotiated the following license agreements between AT&T Technologies and International Business Machines Corporation ("IBM") relating to UNIX System V:

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

I signed each of these agreements on behalf of my manager, Otis L. Wilson. True and correct copies of these agreements, referred to in this declaration as the "IBM Agreements", are attached hereto as Exhibits 1 through 4.

7. I also participated in the negotiation of the following license agreements between AT&T Technologies and Sequent Computer Systems, Inc. ("Sequent") relating to UNIX System V:

- the Software Agreement (Agreement Number SOFT-000321) dated April 18, 1985 (the "Sequent Software Agreement");
- the Sublicensing Agreement (Agreement Number SUB-000321A) dated January 28, 1986 (the "Sequent Sublicensing Agreement"); and
- the Substitution Agreement (Agreement Number XFER-000321B) dated January 28, 1986 (the "Sequent Substitution Agreement").

True and correct copies of these agreements, referred to in this declaration as the "Sequent Agreements", are attached hereto as Exhibits 5 through 7.

8. Based upon my duties and responsibilities at AT&T Technologies, I have firsthand knowledge of the UNIX System V licenses described in this declaration, including in particular, the IBM Agreements and Sequent Agreements. During the period of my employment at AT&T Technologies, I participated in the formulation and negotiation of many licenses of this kind.

9. Although I did not personally negotiate all of the UNIX licenses executed by AT&T Technologies during the period from 1984 through 1987, I believe that I am familiar with their terms and conditions and know what the parties understood them to mean and intended them to accomplish. While the language in side letters to the licenses may have varied from one licensee to the next, and while some licensees did not have side letters, our intent was to hold all licensees to the same basic standard.

II. Rights and Obligations of UNIX System V Licensees.

10. During the period from 1984 through 1987, AT&T Technologies licensed UNIX System V (and other UNIX) source code and related materials to a large number of licensees.

11. The standard software agreement pursuant to which AT&T Technologies licensed UNIX System V source code and related materials—referred to as the “SOFTWARE PRODUCT” or “SOFTWARE PRODUCTS” in the agreement—granted licensees the right to use the code subject to various restrictions.

12. For example, in early versions of the standard software agreement, including the IBM Software Agreement and the Sequent Software Agreement:

- 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."

Each of these provisions was intended to define the scope of the licensee's rights only with respect to the "SOFTWARE PRODUCT" or "SOFTWARE PRODUCTS", in other words, the UNIX System V source code and related materials. We did not intend these provisions to restrict our licensees' use, export, disclosure or transfer of anything besides the licensed UNIX System V source code and related materials. It would be inconsistent with the language of the software agreements, and the intentions of AT&T Technologies in licensing UNIX System V, to say that the provisions apply, for instance, to our licensees' own code (that, for example, they developed).

13. The standard software agreements also granted licensees the right to modify UNIX System V source code and to prepare derivative works based upon the code. As AT&T Technologies intended the agreements, and as we communicated to our licensees, although the licensees owned their modifications and derivative works (since they created them), and were thus permitted to use or disclose them as they might choose, those portions of the modifications or derivative work consisting of any UNIX System V

source code were subject to the same restrictions as the licensed UNIX System V source code.

14. In early versions of the standard software agreement, again including the IBM Software Agreement and the Sequent Software Agreement, Section 2.01 contained 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 we assured our licensees, this language does not, and was never intended to, give AT&T Technologies the right to assert ownership or control over modifications or derivative works prepared by its licensees, except to the extent of the licensed UNIX System V source code that was included in such modifications or derivative works. The term "resulting materials" in the context of the software agreements was intended only to mean those portions of a licensees' modifications or derivative works that included the licensed UNIX System V source code.

15. Obviously, any materials created by the licensees that could not even be considered modifications or derivative works of UNIX System V were not subject to the software agreements at all. Licensees were free to use and disclose any such materials.

16. As I understood it, and as I believe AT&T Technologies intended it at the time, Section 2.01 did not in any way expand the scope of the software agreement to restrict our licensees' use, export, disclosure or transfer of their own original code, even if such code was contained in a modification or derivative work of UNIX System V. The purpose of the software agreement was to protect AT&T

Technologies' UNIX System V source code, and was never meant to encumber our licensees' own work.

17. Some of our licensees sought further clarification that they, not AT&T Technologies, owned and controlled the modifications and derivative works prepared by or for them. We invariably provided this requested clarification (both orally and in writing) when asked, because it was in keeping with our original intent with respect to all of our licensees under the standard software agreement.

18. For example, Paragraph A.2 of the IBM Side Letter, with which I am familiar because I negotiated it, 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].

This clarification (and those like it that we provided to other licensees) did not represent a change to the standard software agreement. It merely spelled out what AT&T Technologies had always intended—that AT&T Technologies did not assert any right to control the use and disclosure of modifications and derivative works prepared by its licensees, except to the extent of the licensed UNIX System V source code included in such modifications and derivative works.

19. Indeed, since a number of licensees had contacted my Software Sales and Licensing group regarding the meaning of Section 2.01, we announced in early 1985 at seminars hosted by AT&T Technologies and in a newsletter called "*\$ echo*" that we would be modifying the language of our standard software agreements to clarify even further that licensees owned their modifications and derivative works, except to the extent of the licensed UNIX System V source code included in such modifications and

derivative works. The *\$ echo* newsletter was published by the Software Sales and Licensing group for all licensees of UNIX System V, and was intended, as we put it in the newsletter, to keep the licensees "abreast of any product announcements, policy changes, company business and pricing structures." The guidance we published in *\$ echo* applied to all of AT&T Technologies' UNIX System V licensees, including IBM and Sequent.

20. The April 1985 edition of *\$ echo*, a true and correct copy of which is attached hereto as Exhibit 8, summarizes presentations I made at seminars hosted by AT&T Technologies in New York and Santa Clara outlining the changes and clarifications that we intended to make to the standard software and sublicensing agreements in order "to make the contracts more responsive to the needs of the licensees". With respect to Section 2.01 of the software agreement, the newsletter states that "[l]anguage changes will be made to clarify ownership of modifications or derivative works prepared by a licensee." At the seminars, and again in this newsletter, we emphasized that the changes we would be making to Section 2.01 did not alter the meaning of the standard software agreements that our UNIX System V licensees had already entered into, but instead were intended to provide clarification as to the original intent of the section.

21. The August 1985 edition of *\$ echo*, a true and correct copy of which is attached hereto as Exhibit 9, describes in detail the changes we made to the standard software and sublicensing agreements. With respect to Section 2.01, the newsletter states:

Section 2.01 - The last sentence was added to assure licensees that AT&T will claim no ownership in the software that they developed -- only the portion of the software developed by AT&T.

Again, as we made clear in the newsletter, the revised language was added only to assure licensees that AT&T Technologies did not claim any right to its licensees' original work contained in modifications or derivatives of UNIX System V. The language did not represent in any way a departure from the original intent of Section 2.01.

22. An example of the revised language referred to in the *\$ echo* newsletter appears in Section 2.01 of a software agreement between AT&T Information Systems Inc. and The Santa Cruz Operation, Inc. entered into in May 1987, a true and correct copy of which is attached hereto as Exhibit 10. That agreement includes the following language:

Such right to use includes the right to modify such SOFTWARE PRODUCT and to prepare derivative works based on such SOFTWARE PRODUCT, provided that any such modification or derivative work *that contains any part of a SOFTWARE PRODUCT subject to this Agreement is treated hereunder the same as such SOFTWARE PRODUCT. AT&T-IS claims no ownership interest in any portion of such a modification or derivative work that is not part of a SOFTWARE PRODUCT.* (emphasis added).

This new version of Section of 2.01 is present in the standard UNIX System V licenses executed after August 1985. As stated above, however, the revised language was intended only to clarify the original meaning of Section 2.01 in the standard software agreement, not to change it. AT&T Technologies interpreted Section 2.01 of all of its software agreements the exact same way.

23. Although we noted in *\$ echo* that all UNIX System V licensees could request "specimen copies" of the revised software agreement from the Software Sales and Licensing group, we did not require our licensees to enter into new agreements.

We intended the revised language of Section 2.01 (and other sections) to apply to all of our UNIX System V licensees, including IBM and Sequent, regardless of which version of the standard software and sublicensing agreements they had specifically entered into.

24. Thus, whether or not AT&T Technologies had provided 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 for specific UNIX System V licensees, our intent with respect to each licensee was the same. To my knowledge, no one at AT&T Technologies ever intended to assert ownership or control over any portion of a modification or derivative work that did not contain our licensed UNIX System V code. Our licensees, including IBM and Sequent, were free to use and disclose the modifications or derivative works they created, provided that they did not use and disclose any portion of the licensed UNIX System V source code except as permitted by the license agreements.

25. In fact, some of AT&T Technologies' licensees later developed technology that AT&T Technologies wished to integrate into the UNIX System V software. We entered into cooperative development agreements with a number of these licensees, because we did not otherwise have rights to their modifications or derivative works, or their other standalone works. Indeed, under the license agreements, we did not even have copies of the modifications and derivative works developed by our licensees in either source or object code form.

26. It is my understanding that IBM's AIX products and Sequent's Dynix products may include some licensed UNIX System V source code, but I do not know whether AIX and Dynix are so similar to UNIX System V that they can be viewed

as modifications of, or derivative works based on, UNIX System V. In any event, as I understand the IBM Agreements and the Sequent Agreements, IBM and Sequent were and are free to use, export, disclose or transfer any AIX and Dynix source code, except for those portions of AIX and Dynix code that contain licensed UNIX System V source code (unless otherwise permitted by the IBM Agreements or the Sequent Agreements).

27. I understand that plaintiff claims that IBM and/or Sequent have breached their license agreements with AT&T Technologies by improperly using, exporting, disclosing or transferring AIX and Dynix source code, irrespective of whether IBM and/or Sequent have disclosed any specific protected source code from UNIX System V. Any such claim is, in my view, inconsistent with the provisions of the license agreements generally, and the IBM Agreements and the Sequent Agreements in particular.

28. I do not believe that anyone at AT&T Technologies intended our UNIX System V license agreements to be construed to exercise control over original works of our licensees. In all cases, as I understand the agreements and believe they were intended, modifications and derivative works are not subject to restrictions contained in the license agreements on use, export, disclosure or transfer (except for any licensed UNIX System V source code actually included therein) because they are owned by the licensees.

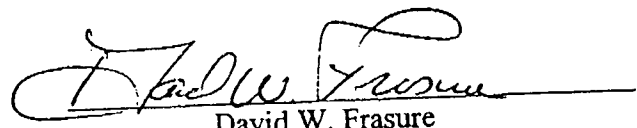
29. The plaintiff's interpretation of the IBM Software Agreement and the Sequent Software Agreement is impossible to reconcile with what I, and I believe others at AT&T Technologies, understood our software agreements to mean. I never suggested, or would have thought to suggest, to our customers that the agreements

precluded them from using or disclosing their own products as they might wish, so long as they did not disclose any UNIX System V code. Moreover, I do not believe that our customers (particularly large ones like IBM) would have entered into agreements that placed such restrictions on their use of code that they developed. In fact, some, including IBM, specifically said so.

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

Executed: March 28 2004.

Wilson, North Carolina


David W. Frasure