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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 OTIS L. WILSON

I, Otis L. Wilson, declare as follows:

1. I was responsible for licensing operating systems under the UNIX brand from 1980 until 1991, first with American Telephone and Telegraph Company ("AT&T") and then with its subsidiary, UNIX System Laboratories, Inc. ("USL"). Initially, I was on the staff responsible for negotiating license agreements with our customers. From 1983 until I retired in 1991, I was the head of the group responsible for licensing the UNIX System V operating system worldwide.

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 and review of the documents referenced herein.

I. Roles and Responsibilities Regarding UNIX.

3. I joined AT&T in 1963. In 1980, after completing a company-sponsored management training program, I left the Princeton office of AT&T to join the Patent and Licensing Group in Greensboro, North Carolina. I was responsible for licensing operating systems under the UNIX brand beginning in 1980. Initially, I was on the staff responsible for negotiating license agreements with our customers. Beginning in 1983 until I retired in 1991, I was the head of the group responsible for licensing the UNIX System V operating system worldwide.

4. In 1989, AT&T separated the organizations responsible for UNIX, and associated system software products and services, into a business unit called UNIX

Software Operation. In 1991, the rights to UNIX operating systems and related products, technology and intellectual property were transferred to USL. I remained the head of the licensing group throughout these changes.

5.   During the period from 1980 to 1991, AT&T and USL licensed UNIX source code, including UNIX System V source code, to hundreds of licensees. Nearly every UNIX license agreement executed by AT&T during this period was signed by me or on my behalf by people that reported to me.

6.   The UNIX System V source code license agreements 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 licensee the right to furnish sublicensed products based on UNIX System V 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 System V software.

7.   I am familiar with the following license agreements between AT&T Technologies, Inc. and International Business Machines Corporation ("IBM"), which were negotiated under my supervision while I was head of the licensing group:

- 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").

David W. Frasure, who reported to me, signed these agreements for me on behalf of AT&T. True and correct copies of these agreements are attached hereto as Exhibits 1 through 4. I refer to these agreements as the "IBM Agreements."

8.   I am also familiar with the following agreements between AT&T Technologies, Inc. and Sequent Computer Systems, Inc. ("Sequent") and which were also negotiated under my supervision:

- 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").

I signed these agreements on behalf of AT&T. True and correct copies of these agreements are attached hereto as Exhibits 5 through 7. I refer to these agreements as the "Sequent Agreements." I understand that Sequent has been acquired by, and merged into, IBM.

9.   As a result of my role as head of the group responsible for negotiating the IBM Agreements and the Sequent Agreements, and hundreds of other UNIX System V license agreements, I have a thorough understanding of these agreements and what the parties intended them to accomplish.

II.   Rights and Obligations of UNIX System V Licensees.

10.   From 1983 until 1991, while I was responsible for licensing UNIX System V for AT&T and USL, my group licensed UNIX System V source code and related materials to a large number of licensees around the world.

11.   The standard software agreement that we used to license UNIX System V source code and related materials sets forth the various rights given to licensees and the restrictions imposed on the licensees with respect to such materials, which were called the "SOFTWARE PRODUCT" or "SOFTWARE PRODUCTS" in the agreement.

12.   Among the standard provisions in our early software agreement (including in the IBM Software Agreement and the Sequent Software Agreement) were the following:

- Section 2.01: "AT&T grants to LICENSEE 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: "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 4.03: "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): "LICENSEE agrees that it shall hold all parts of the SOFTWARE PRODUCTS subject to this Agreement in confidence for AT&T."

- Section 7.10: "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."

These provisions set forth our licensees' rights, as they relate to the UNIX System V source code and related materials—the "SOFTWARE PRODUCT" or "SOFTWARE PRODUCTS"—that AT&T provided to them. At least as I understood these sections and discussed them with our licensees, they do not, and were not intended to, restrict our licensees' rights to use, export, disclose or transfer their own products and source code, as long they did not use, export, disclose or transfer AT&T's UNIX System V source code along with it. I never understood AT&T's software agreements to place any restrictions on our customers' use of their own original work.

13. AT&T's standard software agreements also granted licensees the right to modify UNIX System V source code and to prepare derivative works based upon the code. Section 2.01 of our early software agreement, including the IBM Software Agreement and the Sequent Software Agreement, included 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 the resulting materials are treated hereunder as part of the original SOFTWARE PRODUCT.

14. As my staff and I communicated to our licensees, this provision was only intended to ensure that if a licensee were to create a modification or derivative work based on UNIX System V, any material portion of the original UNIX System V source code provided by AT&T or USL that was included in the modification or derivative work would remain subject to the confidentiality and other restrictions of the software agreement. As we understood Section 2.01, any source code developed by or for a licensee and included in a modification or a derivative work would not constitute "resulting materials" to be treated as part of the original software product, except for any

material proprietary UNIX System V source code provided by AT&T or USL and included therein.

15.   AT&T and USL did not intend to assert ownership or control over modifications and derivative works prepared by licensees, except to the extent of the original UNIX System V source code included in such modifications and derivative works. Although the UNIX System V source contained in a modification or derivative work continued to be owned by AT&T or USL, the code developed by or for the licensee remained the property of the licensee, and could therefore be used, exported, disclosed or transferred freely by the licensee.

16.   I do not believe that our licensees would have been willing to enter into the software agreement if they understood Section 2.01 to grant AT&T or USL the right to own or control source code developed by the licensee or provided to the licensee by a third party. I understood that many of our licensees invested substantial amounts of time, effort and creativity in developing products based on UNIX System V. The derivative works provision of the software agreement was not meant to appropriate for AT&T or USL the technology developed by our licensees.

17.   In fact, some licensees sought to clarify that, under the agreements, the licensee, not AT&T or USL, would own and control modifications and derivative works prepared by or for the licensee (except for any original UNIX System V source code provided by AT&T or USL and included therein). We provided such clarification when asked because that is what we understood the language in the standard software agreement to mean in any event. In some cases we provided this clarification orally and in some cases we provided it in writing.

18.   In fact, although I am not a lawyer, it was my view at the time that we could not claim any rights to non-UNIX System V code source (as the plaintiff here appears to be doing) without raising serious antitrust issues. In light of the divestiture of AT&T around that time, we as a company were very concerned with the potential anticompetitive effects of our actions. As a result, one of the reasons we made clear to our licensees that our UNIX System V software agreements did not impose any restrictions on the use or disclosure of their own original code, except insofar as it included UNIX System V code, was to avoid any appearance of any impropriety.

19.   We provided IBM with just such a clarification in Paragraph A.2 of the IBM 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].

I understood this language to mean that IBM, not AT&T or USL, would have the right to control modifications and derivative works prepared by or for IBM. IBM (like all licensees under the agreements) fully owns any modifications of and derivative works based on UNIX System V prepared by or for IBM, and can freely use, copy, distribute or

disclose such modifications and derivative works, provided that IBM does not copy, distribute or disclose any material portions of the original UNIX System V source code provided by AT&T or USL (except as otherwise permitted by the IBM Agreements).

20.   Clarifications of the kind reflected in Paragraph A.2 of the IBM Side Letter did not represent a substantive change to the standard software agreement, since AT&T and USL never intended to assert ownership or control over modifications and derivative works prepared by licensees, except to the extent of any material portions of the original UNIX System V source code provided by AT&T or USL and included in such modifications and derivative works.

21.   Because of numerous inquiries we received from licensees, my licensing group further clarified the meaning of Section 2.01 of our software license agreements at seminars we organized for licensees and in our "$ echo" publication. $ echo was a newsletter that we published for all UNIX System V licensees to keep them informed of AT&T's policies with respect to UNIX System V. We intended for our guidance in the newsletter to apply to all of our UNIX System V licensees.

22.   The April 1985 edition of $ echo, a true and correct copy of which is attached hereto as Exhibit 8, describes presentations made by a member of my licensing group, Mr. Frasure, outlining changes that AT&T intended to make to the licensing and sublicensing agreements as a result of discussions that I and others in the group had with our licensees. I personally reviewed and approved the changes that Mr. Frasure discussed with our licensees at the UNIX seminars.

23.   As discussed in the newsletter, among the changes we decided to implement, and which were announced at the seminars by Mr. Frasure, were "[l]anguage

changes . . . to clarify ownership of modifications or derivative works prepared by a licensee."

24.   The August 1985 edition of *$ echo*, a true and correct copy of which is attached hereto as Exhibit 9, describes these changes in detail. 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.

This change was not intended to alter the meaning of the software agreements, but was meant only to clarify the original intent of Section 2.01. We intended only to make clear to our licensees that AT&T, and later USL, did not claim any right to the licensees' original work contained in modifications or derivatives of UNIX System V.

25.   The new language is reflected, for example, 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).

As we communicated at our seminars and in our newsletters to UNIX System V licensees, this new language was intended only to clarify the language in the original Section 2.01, not change its meaning. My licensing group interpreted the language of the original Section 2.01 and this revised Section 2.01 in exactly the same way.

26. Although we made "specimen copies" of the revised software agreement available to our licensees, we did not require that our licensees enter into new agreements. We intended for all of our UNIX System V licensees to receive the benefit of the changes and clarifications we outlined at our seminars and in the newsletter.

27. Whether or not we entered into a side letter or other agreements with our licensees to clarify the treatment of modifications and derivative works, or altered the language of Section 2.01, AT&T's and USL's intent was always the same. We never intended to assert ownership or control over any portion of a modification or derivative work that was not part of the original UNIX System V source code provided by AT&T or USL. The licensee was free to use, copy, distribute or disclose its modifications and derivative works, provided that it did not use, copy, distribute or disclose any portions of the original UNIX System V source code provided by AT&T or USL except as permitted by the license agreements.

28. My understanding is that IBM's AIX and Sequent's Dynix/PTX operating system products include some UNIX System V source code. I do not know whether AIX and Dynix/PTX are sufficiently similar to UNIX System V that they would constitute modifications of, or derivative works based on, UNIX System V. However, even if AIX or Dynix/PTX were modifications of, or derivative works based on, UNIX System V, IBM and Sequent are free to use, export, disclose or transfer AIX and Dynix/PTX source code, provided that they do not use, export, disclose or transfer any UNIX System V source code provided by AT&T or USL (except as otherwise permitted by the agreements). Therefore, IBM and Sequent are free, under the IBM Agreements and the Sequent Agreements, to open source all of AIX and Dynix/PTX other than those

portions of the original UNIX System V source code included therein. Even portions of the original UNIX System V source code included in AIX and Dynix/PTX may be open sourced to the extent permitted by the IBM Agreements or the Sequent Agreements.

29. I understand that plaintiff claims that IBM and Sequent have breached the IBM Agreements and the Sequent Agreements by improperly using, exporting, disclosing or transferring AIX and Dynix/PTX source code, irrespective of whether IBM or Sequent have disclosed any specific protected source code copied from the UNIX System V source code provided by AT&T or USL. In my view, these claims are inconsistent with the provisions of the IBM Agreements and the Sequent Agreements. I do not believe that anyone at AT&T or USL intended these agreements to be construed in this way. In all cases, modifications and derivative works are not subject to the confidentiality and other restrictions contained in the license agreements (except for any protected UNIX System V source code provided by AT&T or USL actually included therein) because they are owned by the licensees.
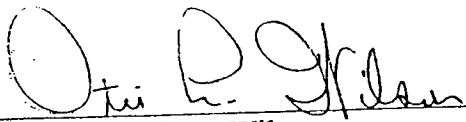
30. In my view, any claim that the IBM Software Agreement and the Sequent Software Agreement prohibit the use, export, disclosure or transfer of any code other than UNIX System V code is clearly wrong. Not only did we at AT&T not intend the agreements to be read that way, but we also went out of our way to assure our licensees that that is not what the agreements meant.

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

correct.

Executed: April 26, 2004.

Greensboro, North Carolina

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Otis L. Wilson