

# **EXHIBIT F**

**In The Matter Of:**

***THE SCO GROUP, INC. v.  
INTERNATIONAL BUSINESS MACHINES CORPORATION***

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**BURTON LEVINE**

*January 19, 2005*

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**LEVINE, BURTON - Vol.**



1 BURTON LEVINE  
 10:17:30 2 resulting material is a combination of software  
 10:17:37 3 product and whatever a licensee adds to the  
 10:17:40 4 software product?  
 10:17:41 5 MR. NORMAND: Objection to form.  
 10:17:43 6 A. No.  
 10:17:43 7 Q. What is your definition of  
 10:17:45 8 resulting material within the meaning of Section  
 10:17:48 9 2.01?  
 10:17:48 10 A. The resulting material, as I can  
 10:17:52 11 broadly state it, any part of a software product  
 10:17:58 12 -- if any part of a software product is used by  
 10:18:02 13 the licensee to create another product, that  
 10:18:13 14 product is a resulting material even if Unix  
 10:18:22 15 System V code that was contained in the original  
 10:18:25 16 product is not present in the product that the  
 10:18:30 17 licensee makes.  
 10:18:32 18 Q. And what's the basis of that  
 10:18:34 19 understanding, Mr. Levine?  
 10:18:35 20 MR. NORMAND: Objection, asked and  
 10:18:46 21 answered.  
 10:18:46 22 A. You mean in the language of the  
 10:18:48 23 agreement?  
 10:18:49 24 Q. I mean anywhere. What's the basis  
 10:18:51 25 of your understanding that that's the meaning of

1 BURTON LEVINE  
 10:20:22 2 MR. NORMAND: Objection to form.  
 10:20:38 3 A. I don't know if I can answer your  
 10:20:40 4 question without just going back to the  
 10:20:43 5 structure of the license and what it was  
 10:20:46 6 intended to do.  
 10:20:54 7 The Unix license itself was  
 10:21:03 8 intended to protect the code, the intellectual  
 10:21:08 9 property, and all of the, quote/unquote, methods  
 10:21:17 10 and concepts, and that wording is used in the  
 10:21:21 11 agreement, that's contained or embodied in the  
 10:21:26 12 product.  
 10:21:31 13 So the metes and bounds of what a  
 10:21:33 14 software product is, as we have always  
 10:21:36 15 interpreted so long as I've been in connection  
 10:21:39 16 with the business, has been a continuum of  
 10:21:45 17 intellectual property that includes but is not  
 10:21:50 18 limited to the code itself. There are  
 10:21:54 19 structures, there are various algorithms,  
 10:22:00 20 everything else that is contained in the Unix  
 10:22:02 21 code, so long as it remains unpublished, so long  
 10:22:07 22 as it remains the proprietary property of the  
 10:22:11 23 licensor, is all inclusive in the software  
 10:22:15 24 product.  
 10:22:15 25 If a licensee, by virtue of being

1 BURTON LEVINE  
 10:18:53 2 the term resulting material?  
 10:19:00 3 A. This has always been my  
 10:19:03 4 understanding of what the agreement meant, was  
 10:19:06 5 intended to mean, and does mean.  
 10:19:11 6 Q. And my question is: What's the  
 10:19:14 7 basis of that understanding?  
 10:19:22 8 MR. NORMAND: Objection to the  
 10:19:23 9 form, asked and answered.  
 10:19:31 10 A. Because the software product that  
 10:19:36 11 is being licensed is in no way defined as Unix  
 10:19:43 12 System V code itself.  
 10:19:52 13 Q. Are you done?  
 10:19:56 14 A. Yeah. I can answer it directly  
 10:19:59 15 like that or I can bring, you know, just  
 10:20:02 16 examples of --  
 10:20:06 17 Q. I didn't mean to cut you off. What  
 10:20:08 18 I'm interested in knowing, you provided your  
 10:20:09 19 definition of the term resulting material.  
 10:20:11 20 My question is: What's the basis  
 10:20:12 21 of that understanding? You began to say that  
 10:20:15 22 it's -- I don't want to put words in your mouth.  
 10:20:18 23 Let me ask again: What is the  
 10:20:20 24 basis of your understanding of your definition  
 10:20:21 25 of term resulting material?

1 BURTON LEVINE  
 10:22:22 2 exposed or having access to this code, learns  
 10:22:25 3 about a particular structure, a particular  
 10:22:29 4 portion of the licensed item, uses that  
 10:22:35 5 structure to develop a product that is going to  
 10:22:45 6 be similar to but not containing any of the Unix  
 10:22:49 7 code, that is the derivative work, that is  
 10:22:52 8 treated as a software product, and treated as a  
 10:22:56 9 software product means being subject to the same  
 10:22:58 10 protections that the code itself would be  
 10:23:02 11 subject, whether or not we're talking about  
 10:23:08 12 literal code or not. That's why I disagree with  
 10:23:10 13 him.  
 10:23:11 14 Q. Let me ask you this question,  
 10:23:13 15 Mr. Levine. Would you agree with the following  
 10:23:16 16 statement -- I'll refer you to Mr. DeFazio's  
 10:23:19 17 declaration where it begins, A modification or  
 10:23:22 18 derivative work. Would you agree with the  
 10:23:24 19 following alteration of that statement: A  
 10:23:28 20 modification or a derivative work would  
 10:23:30 21 constitute, quote, resulting materials, close  
 10:23:32 22 quote, to be treated as part of the original  
 10:23:35 23 Unix System V software product only so long as  
 10:23:38 24 it contained any protected Unix System V source  
 10:23:42 25 code or Unix System V methods and concepts

1 BURTON LEVINE  
 10:33:35 2 itself is.  
 10:33:37 3 In the licensing organization to  
 10:33:45 4 talk about even a binary, a licensing may ask,  
 10:33:50 5 for example, how much code do I have to have in  
 10:33:56 6 a binary product in order for it to be a  
 10:33:59 7 sublicense product subject to royalties, and the  
 10:34:02 8 answer that we gave and we -- we gave, that we  
 10:34:08 9 were supposed to give on that, was that even one  
 10:34:11 10 line of code would make that a software product,  
 10:34:18 11 and by extension on the software side, the  
 10:34:22 12 source code side, the use of any part of a  
 10:34:26 13 software product, whether it was the code or  
 10:34:31 14 not, that results in a product makes that  
 10:34:34 15 product resulting materials within the meaning  
 10:34:40 16 of this clause.  
 10:34:46 17 Q. As you define the term software  
 10:34:50 18 product, does it include resulting materials?  
 10:34:55 19 MR. NORMAND: Objection to the  
 10:34:57 20 form.  
 10:34:57 21 A. Well, the way we put it over here  
 10:35:00 22 is it's going to be treated as a software  
 10:35:02 23 product. Whether you want to say that the  
 10:35:04 24 resulting materials are a software product per  
 10:35:08 25 se I think is probably immaterial because of the

1 BURTON LEVINE  
 10:36:16 2 A. I would agree with it to this  
 10:36:18 3 extent. If that source code that was developed  
 10:36:21 4 by the licensee was independently developed and  
 10:36:24 5 tacked on to whatever they did to derive  
 10:36:31 6 something from the actual software product under  
 10:36:33 7 license and it was a mixture, if you will, that  
 10:36:39 8 I wouldn't say that that independent part that  
 10:36:43 9 was sold in connection with the resulting  
 10:36:44 10 material would be part of the resulting  
 10:36:47 11 material.  
 10:36:55 12 Q. The next sentence in this  
 10:36:56 13 declaration Mr. DeFazio says, "The purpose of  
 10:36:59 14 treating portions of Unix System V source code  
 10:37:02 15 included in modifications and derivative works  
 10:37:04 16 as part of the original software produce was to  
 10:37:06 17 ensure that the Unix System V source code  
 10:37:10 18 provided by AT&T, USL or Novell and contained in  
 10:37:13 19 the licensee's derivative works would continue  
 10:37:15 20 to be protected as if it were a stand-alone Unix  
 10:37:20 21 System V source code."  
 10:37:21 22 Do you agree with that?  
 10:37:22 23 MR. NORMAND: Objection to form.  
 10:37:23 24 A. It's a correct statement but it's  
 10:37:25 25 not sufficient.

1 BURTON LEVINE  
 10:35:13 2 language here. It has to be treated that way.  
 10:35:16 3 It has to be protected that way.  
 10:35:20 4 Colloquially, I guess you could say  
 10:35:24 5 if it walks like a duck and it quacks like a  
 10:35:27 6 duck, it's a duck. So, yeah, it's a software  
 10:35:29 7 product in substance.  
 10:35:30 8 Q. Did I understand you to say that if  
 10:35:33 9 a product included only one line of Unix code  
 10:35:38 10 and potentially, you know, millions of lines of  
 10:35:41 11 other code, that product would, nevertheless, in  
 10:35:44 12 your view, be a software product?  
 10:35:47 13 MR. NORMAND: Objection to form.  
 10:35:48 14 A. Yes, it would be a software  
 10:35:50 15 product.  
 10:35:55 16 Q. Let me refer you to the second  
 10:35:57 17 sentence in the portion of Mr. DeFazio's  
 10:35:59 18 declaration I've been asking you about. He says  
 10:36:01 19 there, source code developed by or for a  
 10:36:04 20 licensee, even if it were included in such a  
 10:36:08 21 modification or derivative work, would not by  
 10:36:10 22 itself constitute resulting materials.  
 10:36:12 23 Do you agree with that statement?  
 10:36:14 24 A. I would.  
 10:36:15 25 MR. NORMAND: Objection to form.

1 BURTON LEVINE  
 10:37:25 2 Q. Why isn't it sufficient?  
 10:37:26 3 A. It's not only the Unix System V  
 10:37:30 4 code that's contained in there that would do it.  
 10:37:33 5 It's the fact that it was derived using any part  
 10:37:36 6 of the software product.  
 10:37:38 7 So what he says here is true, if  
 10:37:40 8 the product actually only contained Unix source  
 10:37:44 9 code, so that part is true, but -- again, it's  
 10:37:53 10 not a complete statement, as far as I can see.  
 10:38:02 11 Q. Direct your attention to Paragraph  
 10:38:04 12 17. There Mr. DeFazio states, "The agreements  
 10:38:12 13 did not and do not give AT&T, USL, Novell or any  
 10:38:17 14 of their successors or assigns the right to  
 10:38:20 15 assert ownership or control over modifications  
 10:38:22 16 and derivative works prepared by its licensees,  
 10:38:25 17 except to the extent of the original Unix System  
 10:38:28 18 V source code included in such modifications and  
 10:38:30 19 derivative works."  
 10:38:31 20 Do you agree with that statement?  
 10:38:33 21 A. No, I don't.  
 10:38:34 22 MR. NORMAND: Objection to form.  
 10:38:35 23 Q. Why do you not agree with that  
 10:38:37 24 statement?  
 10:38:37 25 A. I'm not necessarily addressing the

1 BURTON LEVINE  
 17:11:46 2 answered.  
 17:11:46 3 A. Yes, that's correct.  
 17:11:48 4 MR. MARRIOTT: With a different  
 17:11:49 5 answer.  
 17:11:50 6 MR. NORMAND: From when?  
 17:11:52 7 MR. MARRIOTT: That's the problem.  
 17:12:02 8 BY MR. MARRIOTT:  
 17:12:02 9 Q. Would you agree, Mr. Levine, that a  
 17:12:03 10 licensee can do with it wishes -- withdrawn.  
 17:12:08 11 Would you agree that a licensee can  
 17:12:11 12 do what it wishes with respect to any product so  
 17:12:17 13 long as that product is not either the software  
 17:12:19 14 product, as the term is defined in the AT&T Unix  
 17:12:23 15 licensing agreement, or resulting materials, as  
 17:12:25 16 the term is defined in the AT&T Unix licensing  
 17:12:29 17 agreements?  
 17:12:30 18 A. Yeah, I think that's a fair  
 17:12:32 19 statement.  
 17:12:32 20 Q. The term software product is a  
 17:12:34 21 defined term in the licensing agreements,  
 17:12:37 22 correct?  
 17:12:40 23 A. There is a definition of software  
 17:12:42 24 product, yeah.  
 17:12:43 25 Q. Is resulting materials a defined

1 BURTON LEVINE  
 17:14:15 2 Q. -- a place in the licensing  
 17:14:17 3 agreement, for example, from which you derive  
 17:14:20 4 that definition?  
 17:14:27 5 A. I don't know if I can or I can't.  
 17:14:31 6 Q. The IBM/AT&T Technologies software  
 17:14:35 7 agreement is at Exhibit 279, if you'd like to  
 17:14:38 8 take a look at that. You should have it in  
 17:14:40 9 front of you there.  
 17:15:22 10 MR. NORMAND: What's the pending  
 17:15:23 11 question?  
 17:15:45 12 (Record read.)  
 17:15:45 13 A. In my view, it's Section 2.01,  
 17:15:53 14 three lines from the bottom. The resulting  
 17:16:05 15 materials are the end result of preparing  
 17:16:12 16 derivative works and modifications, and  
 17:16:19 17 derivative works, in my view, are works that are  
 17:16:23 18 created by the licensee after having access to  
 17:16:29 19 the software product.  
 17:16:35 20 Q. Do you distinguish in meaning for  
 17:16:38 21 purposes of your understanding of Section 2.01  
 17:16:41 22 between the term derivative work -- or works --  
 17:16:44 23 and the term modification?  
 17:16:54 24 A. I don't know that I would make a  
 17:17:02 25 big distinctions other than the scope of the

1 BURTON LEVINE  
 17:12:45 2 term within the meaning of the software  
 17:12:47 3 agreements?  
 17:12:47 4 A. I think in the context of the  
 17:12:50 5 paragraph it's in, it's evident in what it  
 17:12:53 6 means.  
 17:12:54 7 Q. Would you define for me then what  
 17:12:56 8 exactly constitutes resulting materials? I want  
 17:12:59 9 to understand what the essential elements of  
 17:13:02 10 resulting materials are, those things without  
 17:13:04 11 which you would not have resulting materials.  
 17:13:06 12 MR. NORMAND: Objection, asked and  
 17:13:10 13 answered.  
 17:13:10 14 A. Resulting materials are products  
 17:13:24 15 that are created by the licensee after having  
 17:13:35 16 access to a software product.  
 17:13:47 17 Q. Is that it?  
 17:13:49 18 A. Yep, in short.  
 17:13:51 19 MR. NORMAND: Objection to form.  
 17:13:59 20 Q. Are you sure about that definition?  
 17:14:01 21 MR. NORMAND: Objection to form.  
 17:14:07 22 A. Pretty much.  
 17:14:09 23 Q. What is the basis of that  
 17:14:11 24 definition, Mr. Levine? Can you point me to --  
 17:14:15 25 MR. NORMAND: Objection to form.

1 BURTON LEVINE  
 17:17:05 2 rights here. Modifications are a smaller one.  
 17:17:14 3 Scope, it would seem to me then, in preparing  
 17:17:18 4 derivative works that could be a whole operating  
 17:17:20 5 system.  
 17:17:20 6 Q. Would you agree that the term  
 17:17:22 7 derivative works is not defined in this  
 17:17:26 8 agreement?  
 17:17:28 9 A. It is not defined in this  
 17:17:30 10 agreement, that's correct.  
 17:17:32 11 Q. And in what sense do you use the  
 17:17:35 12 term derivative works, in the sense of the  
 17:17:38 13 copyright law or in some other sense?  
 17:17:40 14 MR. NORMAND: Objection to form.  
 17:17:40 15 A. No, not necessarily in the sense of  
 17:17:43 16 the copyright law.  
 17:17:44 17 Q. Are you aware of any deposition of  
 17:17:46 18 the term derivative work outside the context of  
 17:17:50 19 copyright law?  
 17:17:52 20 MR. NORMAND: Objection to form.  
 17:17:57 21 A. You mean besides what appears here?  
 17:18:00 22 Q. Is there any accepted definition of  
 17:18:03 23 the term derivative works of which you're aware  
 17:18:05 24 outside the copyright law context?  
 17:18:08 25 MR. NORMAND: Objection to form.