Appendix A

Response to IBM's Statement of Facts [30]

A.   Development of the UNIX Operating System.

1.   In the 1960s, MIT, AT&T's Bell Labs, and General Electric collaborated on a project, known as Multics, to create a computer operating system that would allow for the simultaneous access by multiple users to a single computer. (Ex. 487 at 26-27; Ex. 384; Ex. 230 ¶ 5.)

Undisputed.

2.   Multics resulted in an operating system that could accommodate simultaneous users, but the operating system could not support many multiple users and was expensive to operate, and Bell Labs withdrew from the project. (Ex. 384; Ex. 385; Ex. 386; Ex. 230 ¶ 6.)

Undisputed.

3.   After Bell Labs withdrew from Multics, one of its developers, Ken Thompson, undertook to design an alternative operating system, drawing on the work done in Multics. (Ex. 386.) With others at Bell Labs, including Dennis Ritchie, Mr. Thompson developed an operating system they called Unics. (Ex. 487 at 9; Ex. 387.) At the suggestion of another Bell Labs developer, Brian Kernighan, the name of the operating system was eventually changed to "UNIX". (Ex. 388.)

Undisputed.

4.   In the years that followed, AT&T developed numerous versions of UNIX and made it widely available to universities and businesses, as well as to the United States government. (Ex. 389.) AT&T permitted licensees, including the University of California at Berkeley ("UC Berkeley"), to develop and add their own features to UNIX and to distribute those features. (Ex. 488 at *1-2, 18; Ex. 275 ¶ 13; Ex. 230 ¶ 8; Ex. 389.)

Disputed to the extent the statement suggests that AT&T had waived any copyright or

other legal rights in UNIX by distributing any version of UNIX during that time. (¶ 79.) "The

mere fact of publishing a copyrighted work does not give others the right to use, copy, modify, or

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[30] In citing its basis for disputing an IBM statement of fact, SCO cites herein either the paragraphs in SCO's Statement of Facts above or directly to exhibits, or both.

distribute that work." (IBM Statement of Undisputed Facts in Support of IBM's Motion for Summary Judgment on Its Claim for Copyright Infringement (IBM's Eighth Counterclaim) ¶ 8.)

5.   By the end of the 1970s, UNIX had grown in popularity. Universities throughout the world, including UC Berkeley, began offering educational courses and sponsoring research projects involving UNIX. (Ex. 487 at 119-33; Ex. 389; Ex. 230 ¶ 10.)

Disputed to the extent the statement suggests that AT&T had waived any copyright or other legal rights in UNIX by virtue of any such courses or projects. (¶ 79.)

6.   Numerous manuals, articles and papers were written about UNIX, including no less than seven editions of the "UNIX PROGRAMMER'S MANUAL", which was distributed by Bell Labs with its UNIX operating systems, and the Lions' Commentary on UNIX 6th Edition, written by John Lions. (Ex. 487 at 43, 130; Ex. 385; Ex. 491; Ex. 230 ¶ 11.)

Disputed to the extent the statement suggests that any such manual, article, paper or commentary constituted any waiver by AT&T of any copyright or other legal rights in UNIX. (Ex. 288 at 49-50; Ex. 139 ¶¶ 23-26.) "The mere fact of publishing a copyrighted work does not give others the right to use, copy, modify, or distribute that work." (IBM Statement of Undisputed Facts in Support of IBM's Motion for Summary Judgment on Its Claim for Copyright Infringement (IBM's Eighth Counterclaim) ¶ 8.)

B.   Commercialization of the UNIX Operating System.

7.   In 1982, AT&T entered into a consent decree with the U.S Federal Trade Commission, which provided for the spin-off of the regional Bell operating companies and freed AT&T to enter the computer industry, from which it had previously been barred. (Ex. 487 at 190; Ex. 230 ¶ 19.)

Disputed to the extent the statement draws a legal conclusion, disputed in that the cited material does not properly support the statement.

8.   As a result, AT&T developed and sold a commercial version of the UNIX operating system known as UNIX System III. This release met with limited success, however. Many universities and companies had utilized their rights under the AT&T licenses to create their own versions of UNIX, creating confusion and competition in the marketplace. Moreover,

companies like Western Electric, a subsidiary of AT&T, continued to sell older UNIX versions. (Ex. 391.)

Disputed to the extent the statement suggests that AT&T developed and sold a

commercial version of UNIX solely as a result of the 1982 consent decree, which statement the

inadmissible cited material does not properly support.

9.   In an attempt to end confusion concerning the differing versions of the UNIX operating system, AT&T in 1983 combined various versions of UNIX developed at universities and other companies into UNIX System V, Release 1. (Ex. 391.) Later, AT&T released other versions, including System V Release 2.0, System V Release 3.0, and System V Release 4.0. (See Ex. 297 at 32:2-13.)

Disputed to the extent the statement suggests that AT&T developed UNIX System V,

Release 1 solely "in an attempt to end confusion concerning the differing versions of the UNIX

operating system," which statement the inadmissible cited material does not properly support.

10.   Over the years, through various business units and subsidiaries, including AT&T Technologies, Inc. and UNIX System Laboratories, Inc. ("USL"), AT&T licensed various versions of its UNIX operating system, both in source code and object code form. (See Ex. 3 ¶¶ 23-24; Ex. 5 ¶ 9; Ex. 64 ¶ 2.)

Undisputed.

11.   AT&T generally licensed its UNIX operating system pursuant to standard form agreements. A software agreement granted the licensee the right to use and modify the source code of the operating system. A sublicensing agreement granted the licensee the right to furnish sublicensed products based on UNIX System V to customers in object code format. And, a substitution agreement provided that the software agreement and, if applicable, the sublicensing agreement replaced earlier agreements relating to UNIX System V software. (Ex. 282 ¶ 6.)

Undisputed.

12.   The head of the AT&T division responsible for licensing AT&T UNIX software during this time was Otis Wilson. Mr. Wilson led the UNIX licensing negotiations for AT&T and either personally signed, or authorized the signing of, almost all, if not all, of AT&T's UNIX licensing agreements. (See Ex. 281 ¶ 5; Ex. 282 ¶ 3; Ex. 301 at 41:4-14, 42:7-43:6.)

Depending on the meaning of the terms "responsible for licensing" and "this time," disputed in that Mr. Wilson reported to William Guffey, who was then the head of AT&T's Software Services Division responsible for the UNIX software, through 1985. (Ex. 138 ¶ 3.) Disputed to the extent the statement suggests that Mr. Wilson had the authority to modify or negotiate away the terms of AT&T's standard license agreements. (¶ 90.)

13.   Mr. Wilson reported to Michael DeFazio, who was then the head of the overall AT&T organization responsible for the UNIX software, including product management, marketing and licensing. (See Ex. 182 ¶ 1.) As head of the organization, Mr. DeFazio had ultimate responsibility for the terms and conditions of AT&T's UNIX licensing agreements. (See id. ¶¶ 6-7.)

Disputed in that as of 1985, Mr. Wilson reported to William Guffey, who was then the head of AT&T's Software Services Division responsible for the UNIX software, through 1985. (¶ 105.) Disputed in that Mr. DeFazio did not have the authority to modify or negotiate away the terms of AT&T's standard form UNIX license agreements, and was only one of several individual responsible for interpreting and enforcing the agreements. (¶ 90.)

14.   Reporting to Mr. Wilson was, among others, David Frasure, who was AT&T's national sales and licensing manager for its UNIX products. (See Ex. 190 ¶ 5; Ex. 302 at 8:1-22.) Mr. Frasure participated in negotiating many of AT&T's UNIX System V licenses, and on occasion signed the agreements on Mr. Wilson's behalf. (See Ex. 302 at 8:13-9:6.)

Undisputed.

15.   Under the direction of Messrs. DeFazio, Wilson and Frasure, AT&T and its subsidiaries licensed UNIX source code, including UNIX System V source code, to hundreds of licensees. AT&T also licensed many companies to distribute their own UNIX operating systems, such as Hewlett-Packard Co.'s "HP-UX" operating system. (See Ex. 3 ¶¶ 24-27; Ex. 64 ¶ 3.)

Disputed to the extent the statement suggests that Messrs. DeFazio, Wilson and Frasure had the authority to modify the terms of AT&T's standard UNIX license agreements, to the extent the statement suggests that Messrs. DeFazio, Wilson and Frasure were the only

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individuals under whose direction AT&T licensed its UNIX source code, and to the extent the

statement suggests that AT&T licensed any company to distribute their own UNIX operating

system in source code format. (¶¶ 76-96.)

     C.   <u>Basic Rights and Obligations of UNIX System V Licensees.</u>

     16.   The standard software agreements that AT&T used to license UNIX System V source code and related materials set forth the various rights given to licensees and the restrictions imposed on the licensees with respect to such materials. (Ex. 282 ¶ 6.)

Disputed to the extent the statement suggests that AT&T did not license the UNIX

System V methods and concepts pursuant to the standard license agreements. (¶ 80.)

     17.   Among the provisions in AT&T's 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 4.01: "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."

(Ex. 282 ¶ 12; Ex. 119; Ex. 492.)

Depending on the meaning of the term "early," (disputed to the extent the statement

suggests that AT&T or its successors – in – interest ever abandoned the foregoing protections in

the standard UNIX license agreements. (¶¶ 76-96.)

18. These provisions concern the UNIX System V source code and related materials –
the "SOFTWARE PRODUCT" or "SOFTWARE PRODUCTS" – that AT&T provided to its
licensees. The Agreements define "SOFTWARE PRODUCT" as "materials such as
COMPUTER PROGRAMS, information used or interpreted by COMPUTER PROGRAMS and
documentation relating to the use of COMPUTER PROGRAMS"; "COMPUTER PROGRAM"
is defined as "any instruction or instructions, in source-code or object-code format, for
controlling the operation of a CPU". (Ex. 119; Ex. 492.) The provisions do not, by their terms,
place restrictions on what licensees can do with their own original works. (Ex. 282 ¶ 12; Ex.
119; Ex. 492.)

Disputed to the extent the statement suggests that AT&T did not license the UNIX

System methods and concepts pursuant to the standard software agreements, and, depending on

the meaning of the term "their own original works," to the extent that the statement suggests that

the terms of AT&T's standard UNIX license agreement do not place restrictions on what

licensees can do with their own original works. (¶¶ 13-21.)

19. As Messrs. Wilson, DeFazio, and Frasure understood and discussed the
provisions with licensees, they do not, and were not intended to, restrict a licensee's right to use,
export, disclose or transfer its own products and source code, so long the licensee did not use,
export, disclose or transfer AT&T's UNIX System V source code along with it. AT&T's
software agreements were not intended to place any restrictions on licensees' use of their own
original work. (Ex. 282 ¶ 12; Ex. 182 ¶ 17; Ex. 189 ¶¶ 14-16.)

Disputed in that substantial evidence shows (and easily permits the inference) that

Messrs. Wilson, DeFazio, and Frasure had no such understanding or discussions. (¶¶ 63-163.)

Depending on the meaning of the phrases "their own original works" and "its own products and

source code," disputed in that AT&T's software agreements were intended to place restrictions

on the licensee's modifications and derivative works based on the licensed UNIX software

product. (¶¶ 82-86.)

20.   AT&T's standard software agreements granted licensees the right to modify UNIX System V source code and to prepare derivative works based upon the code. Section 2.01 of AT&T's early 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.

(Ex. 281 ¶ 13; Ex. 182 ¶ 16; Ex. 189 ¶ 15; Ex. 190 ¶ 14.)

Disputed to the extent the statement suggests that the term "SOFTWARE PRODUCT" in the standard UNIX license agreement excludes the methods and concepts embodied therein. (¶ 80.)

21.   As Messrs. Wilson, DeFazio, Frasure and other AT&T representatives communicated to AT&T's 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. 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. (Ex. 282 ¶ 14; Ex. 182 ¶ 16; Ex. 190 ¶ 14.)

Disputed in that substantial evidence shows (and easily permits the inference) that Messrs. Wilson, DeFazio, Frasure and other AT&T representatives had no such understanding and engaged in no such communications. (¶¶ 63-163.) Disputed in that AT&T's license agreements were intended to require licensees to hold in confidence all parts of their modifications and derivative works based on the licensed UNIX System V software product. (¶¶ 82-86.)

22.   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 code contained in a modification or derivative work continued to be owned by AT&T or

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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. (Ex. 282 ¶ 15; Ex. 182 ¶ 17; Ex. 190 ¶ 16.)

Disputed in that AT&T and USL intended to require their UNIX System V licensees to

hold in confidence all parts of the modifications and derivative works they developed based on

the licensed UNIX System V software product, even those parts of such modifications and

derivative works as to which AT&T and USL claimed no ownership. (¶¶ 82-86.)

23. Messrs. Wilson, DeFazio, Frasure and other AT&T representatives did not believe that licensees would have been willing to enter into the software agreement if they had 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. They understood that many of AT&T's licensees invested substantial amounts of time, effort and creativity in developing products based on UNIX System V, and they did not intend Section 2.01 to appropriate for AT&T the technology developed by AT&T's licensees. (Ex. 282 ¶ 16; Ex. 182 ¶ 17; Ex. 190 ¶ 29.)

Disputed in that substantial evidence shows (and easily permits the inference) that

Messrs. Wilson, DeFazio, Frasure and other AT&T representatives held no such belief or

understanding. (¶¶ 63-163.)

24. 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). Messrs, Wilson, DeFazio, Frasure, and other AT&T representatives provided such clarification when asked because that is what they understood the language in the standard software agreement to mean. In some cases, they provided this clarification orally. In other cases, they provided it in writing, such as in a side letter. (Ex. 282 ¶ 17; Ex. 182 ¶ 18; Ex. 189 ¶ 14; Ex. 190 ¶¶ 17-18.)

Disputed in that substantial evidence shows (and easily permits the inference) that

Messrs. Wilson, DeFazio, Frasure and other AT&T representatives held no such understanding

and made no such statements. (¶¶ 63-163.) Disputed in that no side letter permitted any AT&T

or USL UNIX System V licensee to distribute any part of its modifications or derivative works

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based on the licensed UNIX System V software product. (¶¶ 82-88.) Disputed to the extent that

the statement suggests that, upon entering into their written agreement, the parties did not intend

to exclude any previous oral discussion from the agreement the parties had reached. (¶¶ 18, 91-

92.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set

forth the terms under which UNIX System V could be used and disclosed by them and under

which they could distribute software programs "based on" UNIX System V." (IBM Statement of

Undisputed Facts ¶ 50.) Disputed to the extent the statement suggests that any writing referred

to the licensee's "control," which statement the cited material does not support.

26. It was Mr. Wilson's view at the time that AT&T could not claim any rights to
non-UNIX System V code source (as SCO does here) without raising serious antitrust issues. In
light of the divestiture of AT&T in the early 1980s, AT&T as a company was concerned with the
potential anticompetitive effects of its actions. As a result, one of the reasons Mr. Wilson made
clear to AT&T's licensees that its 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. (Ex. 282 ¶ 18.)

Disputed in that substantial evidence shows (and easily permits the inference) that Mr.

Wilson held no such view and made no such representations. (¶¶ 63-163.) Disputed to the

extent that the statement suggests that, upon entering into their written agreement, the parties did

not intend to exclude any previous oral discussion from the agreement the parties had reached.

(¶¶ 18, 91-92.) "The IBM Agreements and the Sequent Agreements (collectively "the

Agreements") set forth the terms under which UNIX System V could be used and disclosed by

them and under which they could distribute software programs "based on" UNIX System V."

(IBM Statement of Undisputed Facts ¶ 50.)

26. Because AT&T and USL intended to distribute the UNIX System V source code
and related information widely, AT&T understood that it would be difficult to require that the
code and related information be kept confidential. Since AT&T believed that its licensees held
the same view, its standard UNIX software agreements provided that a licensee would not be

required to keep a software product confidential if it became available without restriction to the general public. (Ex. 282 ¶ 29.)

Disputed in that there was nothing inherent in AT&T's or USL's UNIX licensing program that would result in the disclosure of any confidential UNIX material, modifications, or derivative works. (¶¶ 78-79.)

27.   The exception is set forth in Section 7.06(a) of the standard software agreement:

> If information relating to a SOFTWARE PRODUCT subject to this Agreement at any time becomes available without restriction to the general public by acts not attributable to LICENSEE or its employees, LICENSEE'S obligations under this section shall not apply to such information after such time.

(Ex. 119 § 7.06(a).) The licensee was free to disclose, without any restriction whatsoever, any information that became available without restriction to the general public by acts not attributable to that particular licensee. (Ex. 281 ¶ 30.)

Disputed to the extent the statement suggests that Section 7.06(a) of the standard software agreement embodies the exception as and for the reasons described in Paragraph 26.

28.   This exception was intended to ensure that the confidentiality restriction applied only to information that needed to be protected – specifically, any trade secrets embodied in UNIX System V source code provided by AT&T or USL. If part or all of the source code were not entitled to be protected as a trade secret, then such software product (or portion of a software product) would be "available without restriction to the general public" within the meaning of the agreements, and no longer protected by any confidentiality restriction. AT&T did not intend to impose a confidentiality obligation beyond what it could enforce under trade secret law. (Ex. 281 ¶ 31.)

Disputed. AT&T intended to require its licensees to hold in confidence all parts of their modifications and derivative works based on the licensed UNIX software product. (¶¶ 82-86.) AT&T sought to obtain more protection under the standard license agreement than AT&T might have under the existing intellectual property law. (¶ 81.) Disputed to the extent the statement

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suggests that Section 7.06(a) of the standard software agreement embodies the exception as and

for the reasons described in Paragraph 26.

29.   AT&T never attempted to list all the ways in which source code could become "available without restriction to the general public" within the meaning of the software and related agreements. But AT&T, including Mr. Wilson and other representatives, believed that the UNIX System V source code (or any part thereof) would be available without restriction to the general public if, for example, it were (1) published by a party other than the licensee in question; (2) accessible outside the limits of a confidentiality agreement, such as for download from the internet; (3) available because its owner failed, even if by inadvertence or simple negligence, to take sufficient precautions to ensure that it would remain confidential; (4) distributed so widely that contractual confidentiality restrictions would be insufficient to maintain confidentiality; (5) made available to a third party who had the right to disclose the software product (or any part thereof); or (6) distributed under an open-source license like the GNU General Public License (the "GPL"). (Ex. 281 ¶ 32.)

Disputed to the extent the statement suggests that a distribution of the source code or

methods or concepts embodied therein, accompanied by a copyright notice, would constitute

making such technology "available without restriction to the general public." "The mere fact of

publishing a copyrighted work does not give others the right to use, copy, modify, or distribute

that work." (IBM Statement of Undisputed Facts in Support of IBM's Motion for Summary

Judgment on Its Claim for Copyright Infringement (IBM's Eighth Counterclaim) ¶ 8.) Disputed

in that there was nothing inherent in AT&T's or USL's UNIX licensing program that would

result in the disclosure of any confidential UNIX material, modifications, or derivative works.

(¶¶ 78-79.) Disputed to the extent the statement suggests that the GPL existed when the standard

UNIX license agreement was created, which statement the cited material does not support.

30.   Some licensees requested side letters clarifying or amending AT&T's standard terms or including most-favored customer provisions. AT&T agreed to issue side letters in some circumstances as an accommodation to the licensee, but it nevertheless intended to hold all licensees to the same basic standard. (Ex. 281 ¶¶ 22-26, 43.)

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Disputed in that substantial evidence shows (and easily permits the inference) that AT&T did not intend to hold all licensees to the same basic standard without regard to the provisions of any side letters with its licensees. (¶ 89.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.)

31.   Although not all of AT&T's licensees had a side letter or most-favored customer provision, AT&T interpreted its license agreements in light of the collective body of UNIX license agreements. For example, the UNIX licensing group used the entire body of side letters to provide its guidance to AT&T's UNIX licensees. AT&T's policy was to deal with a licensee that did not have a most-favored customer provision in a side letter (like Sequent) in the same manner as a licensee that had a side letter with such a provision (like IBM). (Ex. 281 ¶ 43.)

Disputed in that substantial evidence shows (and easily permits the inference) that AT&T did not intend and it was not its policy to hold all licensees to the same basic standard regardless of the provisions of any side letters with its licensees. (¶ 89.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.)

D.   IBM/Sequent Negotiations of New UNIX Licenses.

32.   IBM and Sequent (like many other companies) entered into negotiations with AT&T in the mid-1980s, to replace their existing UNIX licenses with new ones for UNIX System V. Those negotiations led ultimately to execution of the Agreements, which SCO now contends IBM has breached. (See Ex. 178 ¶¶ 4-5; Ex. 190 ¶¶ 6-7; Ex. 217 ¶ 4; Ex. 228 ¶¶ 4-9; Ex. 233 ¶ 4; Ex. 252 ¶ 2; Ex. 266 ¶ 13; Ex. 275 ¶¶ 7-8; Ex. 282 ¶¶ 7-8.)

Undisputed.

33.   While Messrs. Wilson, DeFazio, and Frasure had primary responsibility for the negotiation and execution of the new IBM and Sequent UNIX licensing agreements, Mr. Steve Vuksanovich and Mr. Ira Kistenberg also participated in the negotiations. (See Ex. 275 ¶ 7; Ex.

217 ¶ 4.) Mr. Vuksanovich was the AT&T account representative assigned to the IBM account. (See Ex. 275 ¶ 8.) Mr. Kistenberg was the AT&T account representative specifically assigned to the Sequent account. (See Ex. 217 ¶¶ 3-5.)

Disputed to the extent the statement suggests that the standard UNIX license agreement

at that time had not been previously drafted by AT&T. (¶¶ 106-18.)

34.   IBM was represented in the negotiation of its UNIX licensing agreements by, among others, Messrs. Richard McDonough, Thomas Cronan, and Jeffrey Mobley. Mr. McDonough was the Division Counsel for IBM's System Products Division. (Ex. 228 ¶ 4.) Mr. Cronan was an attorney in IBM's System Products Division. (See Ex. 178 ¶¶ 4-5.) Mr. Mobley was a member of IBM's corporate Commercial & Industry Relations staff. (See Ex. 233 ¶¶ 1, 3-4.)

Undisputed.

35.   Sequent was represented in the negotiation of its UNIX licensing agreements by, among others, Messrs. David Rodgers and Roger Swanson. Mr. Rodgers was Sequent's Vice President of Engineering. (See Ex. 252 ¶ 2.) Mr. Swanson was Sequent's Director of Software Engineering. (See Ex. 266 ¶¶ 2-3.)

Undisputed.

36.   The AT&T representatives insisted on licensing its UNIX System V software and related materials pursuant to a standard set of license agreements. They stated that AT&T intended to license and distribute UNIX System V software and related materials broadly and, for the sake of efficiency and ease of administration, wanted to avoid having to draft different agreements with each of its licensees. In addition, they made clear that AT&T wished to license UNIX System V software and related materials evenhandedly; they said they expected to treat all of their licensees the same. (Ex. 178 ¶ 7; Ex. 217 ¶¶ 6-7; Ex. 228 ¶¶ 5-6; Ex. 252 ¶ 6; Ex. 266 ¶ 6; Ex. 275 ¶ 10.)

Disputed in that substantial evidence shows (and easily permits the inference) that AT&T

did not intend and it was not its policy to hold all licensees to the same basic standard regardless

of the provisions of any side letters with its licensees. (¶ 89.) "The IBM Agreements and the

Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX

System V could be used and disclosed by them and under which they could distribute software

programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.)

37.   Mr. Wilson and his staff explained that the proposed agreements controlled what licensees could and could not do with the UNIX System V software products. They stated that the proposed agreements did not allow AT&T to control licensees' use, export, disclosure, or transfer of any software products or source code that licensees developed themselves that did not contain any UNIX System V code. (Ex. 178 ¶ 9; Ex. 228 ¶ 12; Ex. 233 ¶¶ 8-9; Ex. 252 ¶ 7; Ex. 266 ¶ 10.)

Disputed to the extent the statement suggests that Mr. Wilson and his staff held the view

and told IBM or Sequent that the proposed agreements did not allow AT&T to control licensees'

use, export, disclosure, or transfer of the licensees modifications and derivative works based on

the licensed System V software product, in that substantial evidence shows (and easily permits

the inference) that Messrs. Wilson and his staff other AT&T representatives held no such

understanding and made no such statements. (¶¶ 63-163.) Disputed to the extent that the

statement suggests that, upon entering into their written agreement, the parties did not intend to

exclude any previous oral discussion from the agreement the parties had reached. (¶¶ 18, 91-92.)

"The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the

terms under which UNIX System V could be used and disclosed by them and under which they

could distribute software programs "based on" UNIX System V." (IBM Statement of

Undisputed Facts ¶ 50.)

38.   Both IBM and Sequent made clear during their respective negotiations that they could not and would not enter into any agreement that did not give them ownership and control of their own original works. The IBM and Sequent negotiators insisted that they had to own and control their own original works, even if they were included in a modification and derivative work of UNIX System V. (Ex. 178 ¶¶ 13-14; Ex. 228 ¶ 13; Ex. 233 ¶¶ 6, 8; Ex. 252 ¶ 7; Ex. 266 ¶¶ 10-11.)

Disputed in that AT&T's license agreements were intended to require licensees to hold in

confidence all parts of their modifications and derivative works based on the licensed UNIX

System V software product, AT&T would not have entered into a license agreement with any

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licensee who had stated a contrary view as a condition of entering into the contract, and the plain

language of AT&T's standard UNIX System V license agreement made clear that AT&T had

entered into no such understanding. (¶¶ 13-163.) Disputed in that the evidence shows (and

easily permits the inference) that neither IBM nor sequent would have imposed any such

conditions on their willingness to enter into their agreements. (¶¶ 13-21.) Disputed to the extent

that the statement suggests that, upon entering into their written agreement, the parties did not

intend to exclude any previous oral discussion from the agreement the parties had reached. (¶¶

18, 91-92.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements")

set forth the terms under which UNIX System V could be used and disclosed by them and under

which they could distribute software programs "based on" UNIX System V." (IBM Statement of

Undisputed Facts ¶ 50.)

39.   The AT&T negotiators separately advised both the IBM and Sequent negotiators
that AT&T did not seek to preclude ownership and control of their original or homegrown
works. In fact, the AT&T negotiators assured IBM and Sequent that the purpose of the
restrictions imposed by the AT&T Agreements was to protect AT&T's original code and that
IBM and Sequent could do whatever they wanted with their own code so long as they did not
use, export, disclose, or transfer AT&T's original code (unless otherwise permitted by the AT&T
Agreements). (Ex. 178 ¶ 19; Ex. 228 ¶ 15; Ex. 233 ¶ 16; Ex. 252 ¶ 8; Ex. 266 ¶ 12.)

Disputed in that substantial evidence shows (and easily permits the inference) that the

AT&T negotiators gave no such advice or assurances, because they held no such understanding.

(¶¶ 63-163.) Disputed to the extent that the statement suggests that the AT&T negotiators had

the authority to modify or amend the standard terms of AT&T's standard System V license

agreement. (¶¶ 90-91.) Disputed to the extent that the statement suggests that, upon entering

into their written agreement, the parties did not intend to exclude any previous oral discussion

from the agreement the parties had reached. (¶¶ 18, 91-92.) "The IBM Agreements and the

Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX

System V could be used and disclosed by them and under which they could distribute software

programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.)

40.   The IBM negotiating team would never have agreed to give AT&T the right to own or control IBM's original works. 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. (Ex. 178 ¶ 9; Ex. 228 ¶ 18; Ex. 233 ¶ 17.)

Depending on the meaning of the phrase "IBM's original works" and "control," disputed

to the extent the statement suggests that the IBM negotiating team did not enter into a written

agreement requiring IBM to hold in confidence all parts of its modifications and derivative

works based on the licensed UNIX System V software product. (¶¶ 13-29, 82-86.) Disputed to

the extent that the statement suggests that, upon entering into their written agreement, the parties

did not intend to exclude any previous oral discussion from the agreement the parties had

reached. (¶¶ 18, 91-92.) "The IBM Agreements and the Sequent Agreements (collectively "the

Agreements") set forth the terms under which UNIX System V could be used and disclosed by

them and under which they could distribute software programs "based on" UNIX System V."

(IBM Statement of Undisputed Facts ¶ 50.) Disputed to the extent the statement suggests that

IBM had compelling business reasons to insist on the "control" as described by IBM herein. (¶¶

30-62.)

41.   So that there would be no confusion, the IBM negotiators told the AT&T representatives with whom they negotiated 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. (Ex. 178 ¶ 19.)

Disputed in that substantial evidence shows (and easily permits the inference) that the IBM negotiators made no such statements and asked for no such assurances. (¶¶ 63-163.) Disputed to the extent that the statement suggests that, upon entering into their written agreement, the parties did not intend to exclude any previous oral discussion from the agreement the parties had reached. (¶¶ 18, 91-92.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.)

42. Similarly, the Sequent negotiators would never have agreed to give AT&T the right to own or control their original works. (Ex. 252 ¶ 7; Ex. 266 ¶¶ 10-11.) As a small company at the time, it would not have made any sense for Sequent to have entered into an agreement that gave AT&T control over the source code that Sequent developed for its own software products. (Ex. 266 ¶ 11.) Sequent's original or homegrown source code was one of the key assets of the company, and to compromise Sequent's ownership of or control over the code would have required the approval of Sequent's board of directors. (Ex. 295 at 47:9-49:19.)

Depending on the meaning of the phrase "IBM's original works" and "control," disputed to the extent the statement suggests that the Sequent negotiating team did not enter into a written agreement requiring Sequent to hold in confidence all parts of its modifications and derivative works based on the licensed UNIX System V software product. (¶¶ 13-21, 82-86.) Disputed to the extent that the statement suggests that, upon entering into their written agreement, the parties did not intend to exclude any previous oral discussion from the agreement the parties had reached. (¶¶ 18, 91-92.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.) Disputed to the extent the statement suggests that

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Sequent had compelling business reasons to insist on the "control" as described by IBM herein. (¶¶ 30-62.)

43.   Messrs Wilson, Frasure and DeFazio understood that neither IBM nor Sequent would have entered into the proposed UNIX licensing agreements if AT&T 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. (Ex. 182 ¶ 17; Ex. 190 ¶ 29; Ex. 282 ¶ 16.) No one involved in the negotiation of the Agreements ever suggested that they would give AT&T (or anyone else other than IBM or Sequent) the right to control IBM or Sequent original code. (Ex. 178 ¶¶ 11-12; Ex. 228 ¶ 19; Ex. 233 ¶ 9; Ex. 252 ¶ 7; Ex. 266 ¶ 10.)

Disputed in that substantial evidence shows (and easily permits the inference) that

Messrs. Wilson, DeFazio, Frasure and other AT&T representatives held no such understanding

and made no such statements. (¶¶ 63-163.) Depending on the meaning of the phrase "IBM or

Sequent original code," disputed to the extent the statement suggests that the Sequent negotiating

team did not enter into a written agreement requiring IBM and Sequent to hold in confidence all

parts of its modifications and derivative works based on the licensed UNIX System V software

product. (¶¶ 13-29, 82-86.) Disputed to the extent that the statement suggests that, upon

entering into their written agreement, the parties did not intend to exclude any previous oral

discussion from the agreement the parties had reached. (¶¶ 18, 91-92.) "The IBM Agreements

and the Sequent Agreements (collectively "the Agreements") set forth the terms under which

UNIX System V could be used and disclosed by them and under which they could distribute

software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.)

Disputed to the extent the statement suggests that IBM or Sequent had compelling business

reasons to insist on the "control" as described by IBM herein. (¶¶ 30-62.)

44.   Based at least in part on AT&T's assurances, IBM and Sequent made the decision to execute licensing agreements that AT&T represented to reflect its standard terms. Sequent agreed to sign the agreements as is, whereas IBM agreed to sign them subject to clarifications

and amendments set out in a contemporaneous side letter. IBM wanted to make sure there would be no question that, among other things, AT&T's licensees, not AT&T, would own and control the source code that was developed by the licensee or developed for the licensee by a third party. (Ex. 178 ¶¶ 13-17; Ex. 228 ¶¶ 13-14, 18; Ex. 233 ¶¶ 10-13; Ex. 252 ¶ 7; Ex. 266 ¶ 12.)

Disputed in that substantial evidence shows (and easily permits the inference) that

Messrs. Wilson, DeFazio, Frasure and other AT&T representatives gave no such assurances. (¶¶

63-163.) Disputed to the extent the statement suggests that IBM and Sequent did not enter into

agreements requiring IBM and Sequent to hold in confidence all parts of its modifications and

derivative works based on the licensed UNIX System V software product. (¶¶ 13-29, 82-86.)

Disputed to the extent that the statement suggests that, upon entering into their written

agreement, the parties did not intend to exclude any previous oral discussion from the agreement

the parties had reached. (¶¶ 18, 91-92.) "The IBM Agreements and the Sequent Agreements

(collectively "the Agreements") set forth the terms under which UNIX System V could be used

and disclosed by them and under which they could distribute software programs "based on"

UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.) Disputed to the extent the

statement suggests that IBM or Sequent had compelling business reasons to insist on the

"control" as described by IBM herein. (¶¶ 30-62.)

45.   The AT&T negotiators agreed to provide IBM with a side letter, including, among other things, a most-favored customer provision, but stated that a side letter was not necessary because, among other reasons, AT&T 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's licensees for that matter, except to the extent that those portions of the modifications or derivative works contained licensed UNIX System V source code. (Ex. 178 ¶ 16; Ex. 228 ¶¶ 13-14; Ex. 233 ¶¶ 12-13; Ex. 182 ¶¶ 18, 20; Ex. 189 ¶¶ 14-16; Ex. 281 ¶ 17.)

Depending on the meaning of the term "most-favored nation customer provision,"

disputed in that the term concerns terms other than pricing. (Ex. 333 ¶ 27.) Disputed in that

substantial evidence shows (and easily permits the inference) that Messrs. Wilson, DeFazio, Frasure and other AT&T representatives possessed no such wishes. (¶¶ 63-163.)

46. AT&T made clear that – side letter or not – AT&T intended to treat all of its licensees the same. Messrs. Wilson, DeFazio Frasure, Kistenberg, and Vuksanovich intended to hold all licensees to the same basic standard. AT&T's stated policy was to treat all of its licensees essentially the same. (Ex. 182 ¶¶ 18, 20; Ex. 189 ¶¶ 14-16; Ex. 217 ¶¶ 21-22; Ex. 275 ¶¶ 26-27; Ex. 281 ¶ 17.) All were free to do as they wished with their original or homegrown works, so long as they protected AT&T's UNIX software. (See Ex. 182 ¶ 18; Ex. 190 ¶ 26; Ex. 217 ¶ 12; Ex. 275 ¶ 29; Ex. 282 ¶ 28.)

Disputed in that substantial evidence shows (and easily permits the inference) that AT&T did not intend to hold all licensees to the same basic standard without regard to the provisions of any side letters with its licensees. (¶ 89.) Disputed in that substantial evidence shows (and easily permits the inference) that Messrs. Wilson, DeFazio, Frasure and other AT&T representatives gave no such assurances. (¶¶ 63-163.) Depending on the definition of the phrase "original or homegrown works," disputed to the extent the statement suggests that IBM and Sequent did not enter into a written agreement requiring IBM and Sequent to hold in confidence all parts of its modifications and derivative works based on the licensed UNIX System V software product. (¶¶ 13-21, 82-86.) Disputed to the extent that the statement suggests that, upon entering into their written agreement, the parties did not intend to exclude any previous oral discussion from the agreement the parties had reached. (¶¶ 18, 91-92.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.)

E.   IBM's and Sequent's License Agreements.

47.   IBM and Sequent completed negotiations relating to their UNIX System V licensing agreements beginning in early 1985. (Ex. 119; Ex. 120; Ex. 122; Ex. 492.)

Undisputed.

48.   IBM executed its agreements with AT&T, including its side letter, on February 1, 1985 (collectively, the "IBM Agreements"). The IBM Agreements were executed by Mr. Frasure on behalf of Mr. Wilson for AT&T and by Mr. McDonough for IBM. (Ex. 120; Ex. 122; Ex. 492.)

Undisputed.

49.   Sequent executed its agreements with AT&T on April 18, 1985 and January 28, 1986 (collectively the "Sequent Agreements"). The Sequent Agreements were executed by Mr. Wilson for AT&T and Mr. Rodgers for Sequent. (Ex. 119; Ex. 121.)

Undisputed.

50.   The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V. (Ex. 119; Ex. 492; Ex. 282 ¶ 6; Ex. 182 ¶ 15.)

Undisputed.

51.   The Agreements included the following provisions from AT&T's standard Software Agreements, each of which SCO accuses IBM of breaching:

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 and solely on or in conjunction with DESIGNATED CPUs for such SOFTWARE PRODUCT. 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.

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 4.01

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 6.03

If LICENSEE fails to fulfill one or more of its obligations under this Agreement, AT&T may, upon its election and in addition to any other remedies that it may have, at any time terminate all the rights granted by it hereunder by not less than two (2) months' written notice to LICENSEE specifying any such breach, unless within the period of such notice all breaches specified therein shall have been remedied; upon such termination LICENSEE shall immediately discontinue use of and return or destroy all copies of SOFTWARE PRODUCTS subject to this Agreement.

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. LICENSEE further agrees that it shall not make any disclosure of any or all of such SOFTWARE PRODUCTS (including methods or concepts utilized therein) to anyone, except to employees of LICENSEE to whom such disclosure is necessary to the use for which rights are granted hereunder. . . . If information relating to a SOFTWARE PRODUCT subject to this Agreement at any time becomes available without restriction to the general public by acts not attributable to LICENSEE or its employees, LICENSEE'S obligations under this section shall not apply to such information after such time.

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.

(Ex. 492; Ex. 119.)

Undisputed.

52.   On their face, the allegedly breached provisions (Sections 2.01, 2.05, 4.01, 6.03, 7.06(a) and 7.10) pertain to AT&T's "SOFTWARE PRODUCT", which is defined by the Agreements as:

[M]aterials such as COMPUTER PROGRAMS, information used or interpreted by COMPUTER PROGRAMS and documentation relating to the use of

COMPUTER PROGRAMS. Materials available from AT&T for a specific SOFTWARE PRODUCT are listed in the Schedule for such SOFTWARE PRODUCT.

(Ex. 492 ¶ 1.04; Ex. 119 ¶ 1.04.)

Disputed to the extent the statement suggests that the foregoing provisions relate only to the "software product" in that, on their face, Sections 2.01, 7.06(a) and 7.10 of the Agreements also pertain to any modifications and derivative works that IBM and Sequent develop based on the licensed UNIX System V software product.

53.   The various schedules attached to the IBM and Sequent Software Agreements identify the specific "SOFTWARE PRODUCT" or "SOFTWARE PRODUCTS", and related materials, that AT&T provided under the terms of the agreements. (Id.) The particular "SOFTWARE PRODUCT" at issue in this case is "UNIX System V". (See, e.g., Ex. 125; Ex. 126.)

Disputed to the extent the statement suggests that the agreements do not refer to specific versions of UNIX System V, which statement the cited material does not support.

54.   The IBM Side Letter clarified Section 2.01 as follows:

Regarding Section 2.01, we agree that 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].

(Ex. 122 at 2; Ex. 282 ¶¶ 19-20; Ex. 189 ¶ 14; Ex. 182 ¶ 18; Ex. 275 ¶¶ 15-16; Ex. 228 ¶¶ 13-14; Ex. 178 ¶¶ 13-16; Ex. 233 ¶¶ 10-13.) This language clarified that IBM (like all AT&T licensees) owned and controlled its original or homegrown works. (Ex. 282 ¶¶ 19-20; Ex. 189 ¶ 14; Ex. 182 ¶ 18; Ex. 275 ¶¶ 15-16; Ex. 228 ¶¶ 13-14; Ex. 178 ¶¶ 13-16; Ex. 233 ¶¶ 10-13.)

Depending on the meaning of the word "controlled" and the phrase "original or homegrown works," disputed in that the language in Paragraph 2 of the IBM Side Letter did not clarify that IBM (or any other AT&T UNIX System V licensee) was free to publicly disclose

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even those portions of a modification or derivative work that IBM (or AT&T's other UNIX System V licensees) owned. (¶¶ 87-89.)

55.	In addition, the Side Letter, as well as subsequent Amendment No. X, amended Section 7.06(a) of the IBM Software Agreement to provide as follows:

> LICENSEE agrees that it shall hold SOFTWARE PRODUCTS subject to this Agreement in confidence for AT&T. LICENSEE further agrees that it shall not make any disclosure of such SOFTWARE PRODUCTS to anyone, except to employees of LICENSEE to whom such disclosure is necessary to the use for which rights are granted hereunder. . . . Nothing in this Agreement shall prevent LICENSEE from developing or marketing products or services employing ideas, concepts, know-how or techniques relating to data processing embodied in SOFTWARE PRODUCTS subject to this Agreement, provided that LICENSEE shall not copy any code from such SOFTWARE PRODUCTS into any such product or in connection with any such service. . . If information relating to a SOFTWARE PRODUCT subject to this Agreement at any time becomes available without restriction to the general public by acts not attributable to LICENSEE or its employees, LICENSEE'S obligations under this section shall not apply to such information after such time.

(Ex. 122 ¶ A.9; Ex. 124 ¶ 6.) This language clarified, among other things, that IBM (like all AT&T licensees) had no obligation of confidentiality regarding UNIX software that becomes available without restriction to the general public by acts not attributable to IBM.

Disputed in that the foregoing statement omits the third sentence of Paragraph A.9 of the IBM Side Letter: "LICENSEE shall appropriately notify each employee to whom any such disclosure is made that such disclosure is made in confidence and shall be kept in confidence by such employee."

56.	Consistent with AT&T's policy to treat all licensees the same, Paragraph A.12 of the IBM Side Letter provides:

> We agree that all SOFTWARE PRODUCTS, including enhancements to or new versions of existing SOFTWARE PRODUCTS, generally available under the Software Agreement will be made available to you at the fees and under terms, warranties and benefits equivalent to those offered to other licensees.

(Ex. 122 ¶ A.12.) This language meant that if any other licensee was offered or obtained terms more favorable to the licensee than those contained in the IBM Agreements, then IBM would have the advantage of such more favorable terms as if they had been set forth in the IBM Agreements. (Ex. 281 ¶ 43

Disputed to the extent the statement suggests that paragraph A.12 concerned any term other than pricing. (Ex. 333 ¶ 27.) Disputed to the extent that IBM ever licensed any subsequent version of UNIX System V other than the version licensed under its 1985 Agreement and Side Letter. (Ex. 333 ¶ 27.)

F.   Parties' Intent as to Homegrown Material

57.   All of the individuals who executed and negotiated the Agreements, as well as Mr. DeFazio, who had ultimate responsibility for them (collectively, the "Involved Persons"), agree that the Agreements were not intended to, and do not, restrict in any manner the use or disclosure of any original code written by, or for, IBM and Sequent. (See Ex. 178 ¶ 18; Ex. 182 ¶¶ 17-18; Ex. 189 ¶¶ 13-16, 24-29; Ex. 217 ¶ 9; Ex. 228 ¶¶ 11-19; Ex. 233 ¶ 9; Ex. 252 ¶¶ 7-9; Ex. 266 ¶ 8; Ex. 275 ¶ 12; Ex. 282 ¶¶ 14-15, 27-30.)

Disputed to the extent the statement suggests that the "Involved Persons" had the authority to modify the terms of AT&T's standard UNIX license agreements and to the extent the statement suggests that the "Involved Persons" were the only individuals under whose direction AT&T licensed its UNIX source code. (¶¶ 76-96.) Disputed in that substantial evidence shows (and easily permits the inference) that the "Involved Persons" did not share any such view during their tenure at AT&T. (¶¶ 63-163.) Depending on the definition of the phrase "original code written by, or for, IBM and Sequent," disputed to the extent the statement suggests that IBM and Sequent did not enter into a written agreement requiring IBM and Sequent to hold in confidence all parts of its modifications and derivative works based on the licensed UNIX System V software product. (¶¶ 13-29, 82-86.) Disputed to the extent that the statement suggests that, upon entering into their written agreement, the parties did not intend to exclude

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any previous oral discussion from the agreement the parties had reached. (¶¶ 18, 91-92.) "The

IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the

terms under which UNIX System V could be used and disclosed by them and under which they

could distribute software programs "based on" UNIX System V." (IBM Statement of

Undisputed Facts ¶ 50.)

58.   None of the Involved Persons understood the Agreements to give AT&T or its
successors the right to assert ownership or control over the source code of any modifications or
derivative works based on UNIX System V. To the contrary, they understood that IBM and
Sequent owned, and were permitted to use however they wanted, any modifications or derivative
works that they created (or that others created for them) based on UNIX System V software,
except for the UNIX System V material that might be contained within their modifications or
derivative works. (See Ex. 178 ¶ 17; Ex. 182 ¶ 20; Ex. 190 ¶¶ 14-15; Ex. 217 ¶¶ 10-11; Ex. 228
¶¶ 13, 15; Ex. 233 ¶¶ 8-9; Ex. 252 ¶ 7; Ex. 266 ¶¶ 10-12; Ex. 275 ¶ 13; Ex. 282 ¶ 15.)

Disputed to the extent the statement suggests that the "Involved Persons" had the

authority to modify the terms of AT&T's standard UNIX license agreements and to the extent

the statement suggests that the "Involved Persons" were the only individuals under whose

direction AT&T licensed its UNIX source code. (¶¶ 76-96.) Disputed in that substantial

evidence shows (and easily permits the inference) that the "Involved Persons" did not share any

such view during their tenure at AT&T. (¶¶ 63-163.) Depending on the definition of the phrase

"original code written by, or for, IBM and Sequent," disputed to the extent the statement

suggests that IBM and Sequent did not enter into a written agreement requiring IBM and Sequent

to hold in confidence all parts of its modifications and derivative works based on the licensed

UNIX System V software product. (¶¶ 13-29, 82-86.) Disputed to the extent that the statement

suggests that, upon entering into their written agreement, the parties did not intend to exclude

any previous oral discussion from the agreement the parties had reached. (¶¶ 18, 91-92.) "The

IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the

terms under which UNIX System V could be used and disclosed by them and under which they

could distribute software programs "based on" UNIX System V." (IBM Statement of

Undisputed Facts ¶ 50.)

59. As the Involved Persons understood the Agreements, they impose no restrictions
on IBM's or Sequent'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 or Sequent and do not
contain any UNIX System V source code. (See Ex. 178 ¶ 18; Ex. 182 ¶ 18; Ex. 190 ¶ 24; Ex.
217 ¶ 12; Ex. 228 ¶ 16; Ex. 233 ¶ 6; Ex. 252 ¶ 18; Ex. 266 ¶ 12; Ex. 275 ¶ 12; Ex. 282 ¶ 27.)
Under the Agreements, IBM and Sequent are free to use however they want any AIX or Dynix
source code, except for the UNIX System V source code or other licensed software products
provided by AT&T that may be contained therein (except as otherwise permitted by the AT&T
Agreements). (See Ex. 178 ¶ 19; Ex. 182 ¶ 18; Ex. 190 ¶ 26; Ex. 217 ¶ 12; Ex. 228 ¶ 15; Ex.
233 ¶ 14; Ex. 252 ¶ 13; Ex. 266 ¶ 13; Ex. 275 ¶ 29; Ex. 282 ¶ 28.)

Disputed to the extent the statement suggests that the "Involved Persons" had the

authority to modify the terms of AT&T's standard UNIX license agreements and to the extent

the statement suggests that the "Involved Persons" were the only individuals under whose

direction AT&T licensed its UNIX source code. (¶¶ 76-96.) Disputed in that substantial

evidence shows (and easily permits the inference) that the "Involved Persons" did not share any

such view during their tenure at AT&T. (¶¶ 63-163.) Disputed to the extent the statement

suggests that IBM and Sequent did not enter into a written agreement requiring IBM and Sequent

to hold in confidence all parts of its modifications and derivative works based on the licensed

UNIX System V software product. (¶¶ 13-29, 82-86.) Disputed to the extent that the statement

suggests that, upon entering into their written agreement, the parties did not intend to exclude

any previous oral discussion from the agreement the parties had reached. (¶¶ 18, 91-92.) "The

IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the

terms under which UNIX System V could be used and disclosed by them and under which they

could distribute software programs "based on" UNIX System V." (IBM Statement of
Undisputed Facts ¶ 50.)

60.   According to the Involved Persons, SCO's theory of the case – that IBM has
breached the Agreements by improperly using, exporting, disclosing or transferring AIX and
Dynix source code, irrespective or whether IBM has improperly used, exported, disclosed or
transferred any protected UNIX System V source code – is inconsistent with the provisions of'
the Agreements and with the parties' intentions. (See Ex. 178 ¶ 21; Ex. 182 ¶ 31; Ex. 190 ¶ 27;
Ex. 217 ¶ 24; Ex. 228 ¶ 17; Ex. 233 ¶ 16; Ex. 275 ¶ 30; Ex. 282 ¶ 29; Ex. 310 at 116:18-118:4.)
The Agreements were not intended to limit IBM's or Sequent's freedom of action with respect to
their original source code, methods, or concepts and were intended merely to protect AT&T's
interest in its own UNIX System V source material. (See Ex. 178 ¶ 22; Ex. 182 ¶ 22; Ex. 190 ¶
12; Ex. 228 ¶ 18; Ex. 233 ¶ 17; Ex. 276 ¶ 3; Ex. 282 ¶ 12; Ex. 310 at 80:15-19, 117:14-118:4;
124:12-21.)

Disputed to the extent the statement suggests that the "Involved Persons" had the

authority to modify the terms of AT&T's standard UNIX license agreements and to the extent

the statement suggests that the "Involved Persons" were the only individuals under whose

direction AT&T licensed its UNIX source code. (¶¶ 76-96.) Disputed in that substantial

evidence shows (and easily permits the inference) that the "Involved Persons" did not share any

such view during their tenure at AT&T. (¶¶ 63-163.) Depending on the definition of the phrases

"freedom of action" and "original source code, methods, or concepts," disputed to the extent the

statement suggests that IBM and Sequent did not enter into a written agreement requiring IBM

and Sequent to hold in confidence all parts of its modifications and derivative works based on the

licensed UNIX System V software product. (¶¶ 13-29, 82-86.) Disputed to the extent that the

statement suggests that, upon entering into their written agreement, the parties did not intend to

exclude any previous oral discussion from the agreement the parties had reached. (¶¶ 18, 91-92.)

"The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the

terms under which UNIX System V could be used and disclosed by them and under which they

could distribute software programs "based on" UNIX System V." (IBM Statement of

Undisputed Facts ¶ 50.)

61.   Section 2.01 of the Software Agreements, as understood by the Involved Persons, 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. (See Ex. 178 ¶ 1; Ex. 182 ¶ 16; Ex. 190 ¶ 14; Ex. 228 ¶ 12; Ex. 233 ¶ 8; Ex. 282 ¶ 14; Ex. 584 at 176:2-18; Ex. 310 at 30:17-31:5.) 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. (See Ex. 178 ¶ 11 ; Ex. 182 ¶ 16; Ex. 190 ¶ 14; Ex. 217 ¶ 11; Ex. 228 ¶ 12; Ex. 233 ¶ 8; Ex. 252 ¶ 7; Ex. 282 ¶ 14; Ex. 584 at 173:3-174.)

Disputed to the extent the statement suggests that the "Involved Persons" had the

authority to modify the terms of AT&T's standard UNIX license agreements and to the extent

the statement suggests that the "Involved Persons" were the only individuals under whose

direction AT&T licensed its UNIX source code. (¶¶ 76-96.) Disputed in that substantial

evidence shows (and easily permits the inference) that the "Involved Persons" did not share any

such view during their tenure at AT&T. (¶¶ 63-163.) Disputed to the extent the statement

suggests that IBM and Sequent did not enter into a written agreement requiring IBM and Sequent

to hold in confidence all parts of its modifications and derivative works based on the licensed

UNIX System V software product. (¶¶ 13-29, 82-86.) Disputed to the extent that the statement

suggests that, upon entering into their written agreement, the parties did not intend to exclude

any previous oral discussion from the agreement the parties had reached. (¶¶ 18, 91-92.) "The

IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the

terms under which UNIX System V could be used and disclosed by them and under which they

could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.)

62.   None of the Involved Persons intended the Agreement to permit AT&T and USL 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. (See Ex. 178 ¶ 15; Ex. 182 ¶ 20; Ex. 190 ¶¶ 14-15; Ex. 21 ¶ 22; Ex. 228 ¶ 13; Ex. 233 ¶ 8; Ex. 252 ¶ 7; Ex. 266 ¶ 10; Ex. 275 ¶ 27; Ex. 282 ¶ 15.) They intended that the code developed by or for the licensee would remain the property of the licensee, and could therefore be used, exported, disclosed or transferred freely by the licensee. (See Ex. 178 ¶ 18; Ex. 182 ¶ 20; Ex. 190 ¶¶ 14-15; Ex. 217 ¶ 23; Ex. 228 ¶ 15; Ex. 233 ¶ 9; Ex. 252 ¶¶ 8, 9; Ex. 266 ¶¶ 10, 12; Ex. 275 ¶ 27; Ex. 282 ¶ 15.)

Disputed to the extent the statement suggests that the "Involved Persons" had the

authority to modify the terms of AT&T's standard UNIX license agreements and to the extent

the statement suggests that the "Involved Persons" were the only individuals under whose

direction AT&T licensed its UNIX source code. (¶¶ 76-96.) Disputed in that substantial

evidence shows (and easily permits the inference) that the "Involved Persons" did not share any

such view during their tenure at AT&T. (¶¶ 63-163.) Disputed to the extent the statement

suggests that IBM and Sequent did not enter into a written agreement requiring IBM and Sequent

to hold in confidence all parts of its modifications and derivative works based on the licensed

UNIX System V software product. (¶¶ 13-29, 82-86.) Disputed to the extent that the statement

suggests that, upon entering into their written agreement, the parties did not intend to exclude

any previous oral discussion from the agreement the parties had reached. (¶¶ 18, 91-92.) "The

IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the

terms under which UNIX System V could be used and disclosed by them and under which they

could distribute software programs "based on" UNIX System V." (IBM Statement of

Undisputed Facts ¶ 50.)

63.   Whether or not AT&T entered into a side letter or other agreements with its 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. It 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. (See Ex. 182 ¶ 20; Ex. 190 ¶ 24; Ex. 217 ¶ 22; Ex. 275 ¶ 27; Ex. 282 ¶ 27.)

Disputed in that substantial evidence shows (and easily permits the inference) that AT&T did not intend to hold all licensees to the same basic standard without regard to the provisions of any side letters with its licensees. (¶ 89.) Disputed to the extent the statement suggests that the "Involved Persons" had the authority to modify the terms of AT&T's standard UNIX license agreements and to the extent the statement suggests that the "Involved Persons" were the only individuals under whose direction AT&T licensed its UNIX source code. (¶¶ 76-96.) Disputed in that substantial evidence shows (and easily permits the inference) that the "Involved Persons" did not share any such view during their tenure at AT&T. (¶¶ 63-163.) Disputed to the extent the statement suggests that IBM and Sequent did not enter into a written agreement requiring IBM and Sequent to hold in confidence all parts of its modifications and derivative works based on the licensed UNIX System V software product. (¶¶ 13-29, 82-86.) Disputed to the extent that the statement suggests that, upon entering into their written agreement, the parties did not intend to exclude any previous oral discussion from the agreement the parties had reached. (¶¶ 18-91-92.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.)

64.   At about the same time that IBM and Sequent executed the Agreements, other licensees and prospective licensees sought clarification that 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 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. (See Ex. 217 ¶ 13; Ex. 275 ¶ 17.)

Disputed to the extent the referenced materials are cited for the truth of the proposition

that other licensees and prospective licensees sought such clarification, and disputed to the extent

the statement suggests that AT&T held the view that the agreements did not preclude the

licensees' use, export, disclosure, or transfer of the licensees modifications and derivative works

based on the licensed System V software product, in that substantial evidence shows (and easily

permits the inference) that AT&T held no such view. (¶¶ 63-163.)

65.   Because of the numerous inquiries it received from licensees, AT&T further clarified the meaning of Section 2.01 of its software license agreements at seminars organized for licensees and in its "$ echo" publication. $ echo was a newsletter that AT&T published for all UNIX System V licensees to keep them informed of AT&T's policies with respect to UNIX System V. AT&T intended the guidance provided in the newsletter to apply to all of its UNIX System V licensees. (See Ex. 190 ¶ 19; Ex. 217 ¶¶ 14-15; Ex. 275 ¶¶ 18-19; Ex. 282 ¶ 21.)

Depending on the meaning of the word "apply," disputed to the extent the statement

suggests that AT&T intended the $ echo newsletter to have any binding legal effect. (Ex. 5 at

100-01; Ex. 69 at 120-21; Ex. 10 ¶ 8; Ex. 14 ¶ 4; see also IBM Ex. 301 at 68; IBM Ex. 302 at

246-47.)

66.   The April 1985 edition of $ echo describes presentations made by a member of Mr. Wilson's licensing group, Mr. Frasure, outlining changes that AT&T intended to make to the licensing and sublicensing agreements as a result of discussions that Mr. Wilson and others in his group had with AT&T's licensees. (See Ex. 190 ¶ 20; Ex. 217 ¶ 16; Ex. 275 ¶ 20; Ex. 282 ¶ 22.)

Disputed to the extent that the statement suggests that in April 1985 Mr. Wilson had the

lone or ultimate authority over AT&T's UNIX software licensing, or that Mr. Wilson or Mr.

Frasure alone had the authority to make any "changes" to the standard licensing and sublicensing agreements. (¶ 90.)

67.   As discussed in the newsletter, among the changes AT&T 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". (See Ex. 190 ¶ 20; Ex. 217 ¶ 17; Ex. 275 ¶ 21; Ex. 282 ¶ 23.) The August 1985 edition of $ echo 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.

(Ex. 190 ¶ 21; Ex. 217 ¶ 18; Ex. 275 ¶ 22; Ex. 282 ¶ 24.)

Depending on the meaning of the term "control" in previous statements, disputed to the extent the statement suggests that AT&T's statement regarding ownership was one relieving the licensees of their existing obligations to keep confidential all parts of their modifications and derivative works based on the licensed UNIX System software product, or to remove that obligation for future licensees. (¶¶ 82-86.)

68.   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. AT&T intended only to make clear to its 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. (See Ex. 182 ¶ 20; Ex. 190 ¶ 21; Ex. 217 ¶ 18; Ex. 275 ¶ 22; Ex. 282 ¶ 24.)

Depending on the meaning of the term "any right," disputed to the extent the statement suggests that AT&T intended to relieve the licensees of their existing obligations to keep confidential all parts of their modifications and derivative works based on the licensed UNIX System software product, or to remove that obligation for future licensees. (¶¶ 82-86.)

69.   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. That agreement includes the following language:

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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 <u>that contains any part of a SOFTWARE PRODUCT subject to this Agreement</u> is treated hereunder the same as - such SOFTWARE PRODUCT. <u>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.</u>

(Ex. 127 ¶ 2.01 (emphasis added).)

Disputed to the extent the statement suggests that AT&T did not intend to require Santa Cruz to keep confidential all parts of its modifications and derivative works based on the licensed UNIX System software product. (¶¶ 82-86.)

70.   As AT&T communicated at its seminars and in its 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. Mr. Wilson's licensing group interpreted the language of the original Section 2.01 and thus revised Section 2.01 in exactly the same way. (See Ex. 190 ¶ 22; Ex. 217 ¶ 20; Ex. 275 ¶ 24; Ex. 282 ¶ 25.)

Disputed to the extent that the statement suggests that at the time Mr. Wilson had the lone or ultimate authority over AT&T's UNIX software licensing (¶¶ 90-105) and to the extent the statement suggests that AT&T intended to eliminate from their existing or prospective UNIX System V license agreements the obligation on the part of the licensees to keep confidential all parts of their modifications and derivative works based on the licensed UNIX System software product (¶¶ 82-87).

71.   Although AT&T made "specimen copies" of the revised software agreement available to its licensees, it did not require that its licensees enter into new agreements. AT&T intended for all of AT&T's UNIX System V licensees to receive the benefit of the changes and clarifications it outlined at its seminars and in the newsletter. (See Ex. 190 ¶ 23; Ex. 217 ¶ 21; Ex. 275 ¶ 26; Ex. 282 ¶ 26.)

Depending on the meaning of the phrase "to receive the benefit of the changes and clarifications," disputed to the extent the statement suggests that AT&T intended the $ echo

newsletter to have any binding legal effect. (Ex. 5 at 100-01; Ex. 69 at 120-21; Ex. 10 ¶ 8; Ex.

14 ¶ 4; see also IBM Ex. 301 at 68; IBM Ex. 302 at 246-47.) Disputed to the extent the

statement suggests that AT&T intended to eliminate from their existing or prospective UNIX

System V license agreements the obligation on the part of the licensees to keep confidential all

parts of their modifications and derivative works based on the licensed UNIX System software

product. (¶¶ 82-87.)

> H.   IBM's and Sequent's Reliance.

72.   Based in important part on the Agreements and AT&T's repeated and consistent
explanations of them, IBM continued the development of and distributed a flavor of the UNIX
operating system known as AIX (see Ex. 5 ¶ 13), and Sequent (which IBM acquired in 1999)
continued the development of and distributed a flavor of the UNIX operating system known as
Dynix (see id. ¶ 16).

Disputed to the extent the statement suggests that IBM and Sequent did not enter into a

written agreement requiring them to hold in confidence all parts of their modifications and

derivative works based on the licensed UNIX System V software product. (¶¶ 82-87.) Disputed

to the extent that the statement suggests that, upon entering into their written agreement, the

parties did not intend to exclude any previous and subsequent oral discussion from the agreement

the parties had reached. (¶¶ 82-87.) "The IBM Agreements and the Sequent Agreements

(collectively "the Agreements") set forth the terms under which UNIX System V could be used

and disclosed by them and under which they could distribute software programs "based on"

UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.) Depending on the meaning of

the terms "control" and "original works" as used in previous statements, disputed to the extent

the statement suggests that AT&T ever represented to IBM or Sequent that those companies

would have the right to "control" their "original works" that were part of any modification or

derivative work they had developed based on the licensed UNIX System V software product. (¶¶ 63-163.) Depending on the meaning of the term "UNIX flavor," disputed to the extent the statement suggests that AIX and Dynix are not "derivative works" of the licensed UNIX System V software product within the meaning of their agreements, as well as the copyright law. (¶ 192.) Disputed to the extent the statement suggests that IBM or Sequent had compelling business reasons to insist on the "control" as described by IBM herein. (¶¶ 30-62.)

73.   Both IBM and Sequent invested in the development of AIX and Dynix based on the understanding – reinforced by the repeated assurances of AT&T representatives – that AT&T claimed no interest whatsoever in IBM's and Sequent's original works, even if they might be included in a modification or derivative work of UNIX System V. (Ex. 257 ¶¶ 3-5; Ex. 310 at 29:8-31:5, 56:11-57:5, 62:20-63:17, 119:16-120:2, 127:15-128:1.)

Disputed to the extent the statement suggests that IBM and Sequent did not enter into a written agreement requiring them to hold in confidence all parts of their modifications and derivative works based on the licensed UNIX System V software product. (¶¶ 13-29, 82-86.) Disputed to the extent that the statement suggests that, upon entering into their written agreement, the parties did not intend to exclude any previous and subsequent oral discussion from the agreement the parties had reached. (¶¶ 18, 91-92.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.) Depending on the meaning of the term "no interest whatsoever," disputed to the extent the statement suggests that AT&T ever represented to IBM or Sequent that those companies would have the right to "control" their "original works" that were part of any modification or derivative work they had developed based on the licensed UNIX System V software product. (¶¶ 63-163.)

Disputed to the extent the statement suggests that IBM or Sequent had compelling business

reasons to insist on the "control" as described by IBM herein. (¶¶ 30-62.)

74.   IBM devoted hundreds of millions of dollars and tens of thousands of personal
hours to the development and marketing of AIX, including writing many millions of lines of
original source code for AIX. Similarly, Sequent spent tens of millions of dollars and hundreds
of person-hours in the development and marketing of Dynix, including writing millions of lines
of original source code for Dynix/ptx. (Ex. 257 ¶¶ 7-10; Ex. 252 at 97:25-98:20, 140:12-21; Ex.
81, Ex. G; Ex. 596 ¶¶ 3-4.)

Depending on the meaning of the term "original," disputed to the extent the cited material

does not identify what lines of code in AIX or Sequent were written by developers without

exposure, reference or access, or experience based on such exposure, reference or access, to the

licensed UNIX System V software product.

75.   AIX and Dynix are comprised of code from numerous sources, including code
written by IBM and Sequent software engineers (or outside contractors retained by IBM or
Sequent) and also code written by third parties and licensed to IBM or Sequent for inclusion in
AIX or Dynix. (See Ex. 270 ¶¶ 4-5; Ex. 236 ¶¶ 4-5.)

Undisputed.

76.   The overwhelming majority of the code in AIX and Dynix is original IBM or
Sequent work, written or created independent of UNIX System V. (Ex. 181, Ex. C, Ex. G.)

Depending on the meaning of the term "original," disputed to the extent the cited material

does not identify what lines of code in AIX or Sequent were written by developers without

exposure, reference or access, or experience based on such exposure, reference or access, to the

licensed UNIX System V software product.

77.   For example, AIX 5.1.G for Power is comprised of 123,821 files and 160,198,865
lines of source code. (Ex. 181, Ex. G.) The Final Disclosures identify   REDACTED   lines of
System V code in any version of AIX. (Ex. 54, Item I, Tab 425.)

Disputed to the extent the cited material does not identify what lines of code in AIX or

Sequent were written by developers without exposure, reference or access, or experience based

on such exposure, reference or access, to the licensed UNIX System V software product.

REDACTED

78.   The base operating system of Dynix/ptx 4.6.1 alone is comprised of 36,096 files and 10,238,823 lines of source code. (Ex. 181, Ex. G.) Here again, the Final Disclosures identify   REDACTED   lines of System V code in any version of Dynix. (Ex. 54, Item 204, Tab 220.)

Disputed to the extent the statement suggests that Dynix/ptx is not a derivative work

based on UNIX System V. (¶ 192.) Disputed to the extent the cited material does not identify

what lines of code in AIX or Sequent were written by developers without exposure, reference or

access, or experience based on such exposure, reference or access, to the licensed UNIX System

V software product.

79.   Over the years, IBM has spent more than $2 billion in the development of original IBM code for AIX. IBM has also expended significant resources to license third party code (excluding System V code) for inclusion in AIX. (Ex. 257 ¶ 7.)

Depending on the meaning of the term "original," disputed to the extent the cited material

does not identify what lines of code in AIX were written by developers without exposure,

reference or access, or experience based on such exposure, reference or access, to the licensed

UNIX System V software product.

80.   Among the original IBM works in AIX are Virtual Resource Manager, Logical Volume Manager, Object Data Manager, System Management Interface Tool, Network Install Manager, Web-based System Manager, IBM Java Development Kit, AIX Workload Manager, Dynamic Logical Partitioning, Capacity On Demand, Cluster Systems Management, and many other developments. (Ex. 257 ¶ 8; Ex. 283 ¶ 85.)

Depending on the meaning of the term "original works," disputed to the extent the cited

material does not identify whether the works were written by developers without exposure,

reference or access, or experience based on such exposure, reference or access, to the licensed

UNIX System V software product.

81.   Among the original Sequent works in Dynix are Read-Copy Update, Symmetric
Multiprocessing and Non-Uniform Memory Access capabilities, and functionality for
Transmission Control Protocol/Internet Protocol (TCP/IP) networking protocols on parallel
computers. (Ex. 283 ¶ 86.)

Depending on the meaning of the term "original Sequent works," disputed to the extent

the cited material does not identify whether the works were written by developers without

exposure, reference or access, or experience based on such exposure, reference or access, to the

licensed UNIX System V software product.

I.   Continued Assurances and Reliance.

82.   Following execution of the Agreements, AT&T and USL communicated with
licensees on a regular basis and frequently explained their intent, view, and understanding as to
their licensees' rights to their own original materials. (Ex. 191 ¶ 11; Ex. 250 ¶ 4; Ex. 271 ¶¶ 3-4;
Ex. 276 ¶¶ 4-5; Ex. 280 ¶¶ 3-4.)

Disputed to the extent the statement suggests that AT&T or USL held the view or told

IBM or Sequent that the proposed agreements did not require their licensees to hold in

confidence all parts of their modifications and derivative works based on the licensed System V

software product. (¶¶ 63-163.) Disputed to the extent that the statement suggests that, upon

entering into their written agreement, the parties did not intend to exclude any previous and

subsequent oral discussion from the agreement the parties had reached. (¶¶ 18, 91-92.) "The

IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the

terms under which UNIX System V could be used and disclosed by them and under which they

could distribute software programs "based on" UNIX System V." (IBM Statement of

Undisputed Facts ¶ 50.)

83.   AT&T and USL representatives communicated to licensees, including IBM and Sequent, that they owned and could do as they wished with their own original works, even if those works might be included in a modification or derivative work of UNIX System V, so long as they protected AT&T's UNIX System V source code. (Ex. 183 ¶ 5; Ex. 191 ¶¶ 4-6; Ex. 250 ¶¶ 3-4; Ex. 271 ¶¶ 3-4; Ex. 276 ¶¶ 4-5; Ex. 280 ¶¶ 3-5.)

Disputed in that substantial evidence shows (and easily permits the inference) that AT&T

and USL held no such understanding and made no such statements. (¶¶ 63-163.) Depending on

the definition of the phrase "original works," disputed to the extent the statement suggests that

the licensees did not enter into written agreements requiring them to hold in confidence all parts

of their modifications and derivative works based on the licensed UNIX System V software

product. (¶¶ 13-29, 82-86.) Disputed to the extent that the statement suggests that, upon

entering into their written agreements, the parties did not intend to exclude any previous or

subsequent oral discussions from the agreement the parties had reached. (¶¶ 18, 91-92.) "The

IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the

terms under which UNIX System V could be used and disclosed by them and under which they

could distribute software programs "based on" UNIX System V." (IBM Statement of

Undisputed Facts ¶ 50.)

84.   Some licensees sought to clarify that, under the agreements, they, not AT&T or USL, would own and control modifications and derivative works prepared by or for the licensees (except for any original UNIX System V source code provided by AT&T or USL and included therein). (Ex. 182 ¶ 18; Ex. 189 ¶ 17; Ex. 275 ¶¶ 15-17; Ex. 281 ¶¶ 12-16.)

Disputed to the extent the referenced materials are cited for the truth of the proposition

that other licensees sought such clarification, and disputed to the extent the statement suggests

that AT&T held the view that the agreements did not preclude the licensees' use, export,

disclosure, or transfer of the licensees modifications and derivative works based on the licensed System V software product, in that substantial evidence shows (and easily permits the inference) that AT&T had no such intent. (¶¶ 63-163.)

85. Mr. Wilson and members of this staff stated, orally and in writing, that AT&T's licensees, 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). (Ex. 182 ¶ 18; Ex. 189 ¶¶ 17-22; Ex. 271 ¶¶ 3-5; Ex. 275 ¶¶ 25; Ex. 280 ¶¶ 73-75; Ex. 282 ¶ 17.)

Disputed to the extent the statement suggests that AT&T ever represented to IBM or Sequent that those companies were not obligated to hold in confidence all parts of their modifications and derivative works based on the licensed UNIX System V software product. (¶¶ 63-163.) Disputed to the extent that the statement suggests that Mr. Wilson or the "members of this staff" had the lone or ultimate authority over AT&T's UNIX software licensing, or that Mr. Wilson or any "member of his staff" had the authority to amend the licensing and sublicensing agreements. (¶¶ 76-96.) Disputed to the extent the statement suggests that IBM and Sequent did not enter into a written agreement requiring them to hold in confidence all parts of their modifications and derivative works based on the licensed UNIX System V software product. (¶¶ 13-29, 82-86.) Disputed to the extent that the statement suggests that, upon entering into their written agreement, the parties did not intend to exclude any previous and subsequent oral discussion from the agreement the parties had reached. (¶¶ 18, 91-92.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.) Disputed to the extent the statement suggests that AT&T ever represented to IBM or Sequent

that those companies would have the right to "control" their "original works" that were part of

any modification or derivative work they had developed based on the licensed UNIX System V

software product. (¶¶ 63-163.) Disputed to the extent that the cited material does not support the

assertion that AT&T or USL ever represented in writing that any licensee would "control" any

part of the modifications or derivative works it developed based on the licensed UNIX System V

software product.

86.   For example, Mr. Frasure, who continued to work with and for Mr. Wilson until
he retired, was in daily communication with UNIX licensees. He personally communicated with
them both in writing and orally, and participated in conferences that clarified AT&T's position
regarding ownership of code that licensees developed themselves. Mr. Frasure assured licensees
that they owned any code they developed themselves, or that third parties developed on their
behalf and that they could disclose their code to whomever they wanted, just as long as they kept
UNIX System V source code confidential. (Ex. 191 ¶¶ 4-6.)

Disputed in that substantial evidence shows (and easily permits the inference) that Mr.

Frasure held no such understanding of the licenses and had no such communications with

licensees regarding rights of disclosure. (¶¶ 63-163.) Disputed to the extent that the cited

material does not support the assertion that Mr. Frasure had any such communications in writing.

87.   Similarly, Mr. DeFazio, who remained head of the overall AT&T/USL/Novell
organization responsible for UNIX software until 1997, made sure licensees understood they
could do as they wished with their original works, even if they might have been included in a
modification or derivative work of UNIX System V, and that AT&T and USL had no interest in
maintaining the confidentiality of code their customers developed. (Ex. 183 ¶¶ 4-5.)

Disputed to the extent the statement suggests that Mr. DeFazio had the authority to

modify the terms of AT&T's standard UNIX license agreements or was the person under whose

ultimate direction AT&T licensed its UNIX software product. (¶¶ 76-96.) Disputed in that

substantial evidence shows (and easily permits the inference) that Mr. DeFazio held no such

understanding of the licenses and had no such communications with licensees regarding rights of disclosure. (¶¶ 63-163.)

88.   In addition to dealing with licensees on a daily basis regarding the Agreements, AT&T and USL communicated with their licensees at users conferences, such as USENIX (an organization that supports the development of UNIX variants), and in other public presentations. Representatives of AT&T and USL emphasized that their licensees, including IBM and Sequent, could do as they wished with their own original material. (Ex. 255 ¶¶ 6-7.)

Disputed to the extent the statement suggests that AT&T or USL stated in any such communications that UNIX System V licensees "could do as they wished with their own original material" without regard to whether such material was included in the licensees' modifications or derivative works based on the licensed UNIX System V software product. (¶¶ 63-163.) Disputed to the extent the statement suggests that IBM and Sequent did not enter into a written agreement requiring them to hold in confidence all parts of their modifications and derivative works based on the licensed UNIX System V software product. (¶¶ 13-29, 82-86.) Disputed to the extent that the statement suggests that, upon entering into their written agreement, the parties did not intend to exclude any previous and subsequent oral discussion from the agreement the parties had reached. (¶¶ 18, 91-92.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.) Depending on the meaning of the term "their own original material," disputed to the extent the statement suggests that AT&T ever represented to its licensees that they would have the right to "do as they wished" with their "original works" that were part of any modification or derivative work they had developed based on the licensed UNIX System V software product. (¶¶ 63-163.)

89.   AT&T and its representatives intended for their licensees to rely upon their statements and assurances about what licensees could and could not do with their original works. (Ex. 183 ¶ 6; Ex. 191 ¶ 7; Ex. 250 ¶¶ 4-5; Ex. 271 ¶ 5; Ex. 276 ¶¶ 4-5.)

Depending on the meaning of the term "original works," disputed to the extent the statement suggests that AT&T ever represented to its licensees that they would have the right to "do as they wished" with their "original works" that were part of any modification or derivative work they had developed based on the licensed UNIX System V software product. (¶¶ 63-163.) Disputed to the extent the statement suggests that IBM and Sequent did not enter into a written agreement requiring them to hold in confidence all parts of their modifications and derivative works based on the licensed UNIX System V software product. (¶¶ 13-29, 82-86.) Disputed to the extent that the statement suggests that, upon entering into their written agreement, the parties did not intend to exclude any previous and subsequent oral discussion from the agreement the parties had reached. (¶¶ 18, 91-92.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.)

90.   Taking Mr. Wilson and his colleagues at their word, IBM, Sequent and other UNIX licensees exercised ownership and control over their original works, despite the fact that those works had been part of a modification and derivative work of UNIX System V or had been associated in some respect with UNIX System V code, such as by publicly disclosing them. (Ex. 508; Ex. 509; Ex. 510; Ex. 511; Ex. 512; Ex. 559; Ex. 560; Ex. 561; Ex. 562; Ex. 563; Ex. 564; Ex. 565; Ex. 566; Ex. 567; Ex. 568; Ex. 569; Ex. 570; Ex. 571.)

Disputed in that the referenced exhibits do not disclose internal operating system source code, methods or concepts at all; disclose operating system source code, methods or concepts at only a general and superficial level such that the disclosure would be of no use to operating system developers or disclose material that is so specific to a particular operating system that it

would not be applicable to another operating system, such as Linux; are confidential documents, patents whose purpose is to prevent the use of the disclosed invention, or materials that are protected by clear copyright language; and/or give no indication that they were published or distributed, or that their existence was ever known to individuals outside of IBM. (Ex. 139 ¶¶ 2-22.) Disputed to the extent the statement suggests that IBM and Sequent did not enter into a written agreement requiring them to hold in confidence all parts of their modifications and derivative works based on the licensed UNIX System V software product. (¶¶ 13-29, 82-86.) Disputed to the extent that the statement suggests that, upon entering into their written agreement, the parties did not intend to exclude any previous and subsequent oral discussion from the agreement the parties had reached. (¶¶ 18, 91-92.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.)

91.   For example, IBM publicly disclosed -- in open and candid fashion -- code, methods and concepts of AIX in <u>AIX Operating System: Programming Tools and Interfaces</u> (1989) (Ex. 560). IBM also disclosed AIX methods and concepts in patent applications and in the resulting patents, such as Patent No. 4,742,447 (Ex. 509), Patent No. 4,742,450 (Ex. 510), Patent No. 4,918,653 (Ex. 511), and Patent No. 5,032,979 (Ex. 512.)

<u>See</u> Response to IBM Statement of Fact No. 90. Disputed to the extent that the statement suggests that AT&T or USL knew or should have known about the substance of IBM's patent applications. (<u>See</u> Argument at III-IV.)

92.   Mr. Wilson, his staff, and other AT&T representatives were aware and understood that AT&T's licensees were exercising ownership and control over, and disclosing, code, methods and concepts from their flavors of UNIX, including AIX and Dynix. At no point did AT&T or USL take any steps to preclude their licensees from doing as they wished with their original works. (Ex. 183 ¶¶ 76-77; Ex. 191 ¶ 8; Ex. 250 ¶¶ 6-7; Ex. 271 ¶¶ 5-6; Ex. 276 ¶¶ 6-7.)

Disputed to the extent the statement suggests that Mr. Wilson or "his staff" had the

authority to modify the terms of AT&T's standard UNIX license agreements or was the person

under whose ultimate direction AT&T licensed its UNIX software product, or had the authority

to waive any of AT&T's or USL's rights under the UNIX System license agreements. (¶ 90.)

Depending on the meaning of the term "their original works," disputed in that substantial

evidence shows (and easily permits the inference) that Mr. Wilson or "his staff" did not know

about such disclosures. (¶¶ 63-163.) The evidence further shows (and easily permits the

inference) that such disclosures, including as made under copyright protection, were not material

breaches of the agreements. (Ex. 139 ¶¶ 2-22.)

93.   Based on their understanding of the Agreements, the representations of AT&T's
representatives and AT&T's failure to take any action to preclude licensees from doing as they
wished with their original works, IBM and Sequent (like other licensees) continued to develop
their flavors of UNIX. (Ex. 257 ¶¶ 3-10; Ex. 310 at 29:8-31:5, 56:11-57:5, 62:20-63:17, 119:
16-120:2, 127:15, 128:1.)

Disputed to the extent the statement suggests that IBM and Sequent did not enter into a

written agreement requiring them to hold in confidence all parts of their modifications and

derivative works based on the licensed UNIX System V software product. (¶¶ 13-29, 82-86.)

Disputed to the extent that the statement suggests that, upon entering into their written

agreement, the parties did not intend to exclude any previous and subsequent oral discussion

from the agreement the parties had reached. (¶¶ 18, 91-92.) "The IBM Agreements and the

Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX

System V could be used and disclosed by them and under which they could distribute software

programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.) Disputed

to the extent that the cited material does not support the assertion that IBM or Sequent relied on

"AT&T's failure to take any action to preclude licensees from doing as they wished with their original works" in deciding to continue to develop their AIX and Dynix derivative works. (IBM Statement of Undisputed Facts ¶ 50.) Depending on the meaning of the term "original works," disputed to the extent that IBM and Sequent had compelling reasons to continue to invest in AIX and Dynix as they did under the terms of their UNIX System V license agreements. (¶¶ 30-62.) Disputed to the extent the statement suggests that IBM or Sequent had compelling business reasons to insist on the "control" as described by IBM herein. (¶¶ 30-62.)

94.   REDACTED
                                            During this time Sequent likewise
invested heavily in the development and marketing of Dynix and wrote millions of lines of
original source code. (Ex. 257 ¶ 10; Ex. 252 at 67:21-68:11; 97:25-98:20, 140:12-21; Ex. 181,
Ex. G; Ex. 596 ¶¶ 3-4.)

Depending on the meaning of the term "original source code," disputed to the extent the cited material does not identify what lines of code in AIX or Sequent were written by developers without exposure, reference or access, or experience based on such exposure, reference or access, to the licensed UNIX System V software product.

95.   Neither IBM nor Sequent would have invested in AIX and Dynix as they did if they had believed that AT&T or its successors, instead of IBM and Sequent, owned and had the right to control IBM's or Sequent's original works, whether or not they were part of a modification or derivative work of UNIX System V. (Ex. 257 ¶ 6; Ex. 295 at 27:2-25.)

Disputed to the extent the statement suggests that IBM and Sequent did not enter into a written agreement requiring them to hold in confidence all parts of their modifications and derivative works based on the licensed UNIX System V software product. (¶¶ 13-29, 82-86.) Disputed to the extent that the statement suggests that, upon entering into their written agreement, the parties did not intend to exclude any previous and subsequent oral discussion from the agreement the parties had reached. (¶¶ 18, 91-92.) "The IBM Agreements and the

Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX

System V could be used and disclosed by them and under which they could distribute software

programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.) Disputed

to the extent the statement suggests that AT&T or any of its successors-in-interest claimed to

own IBM's or sequent's "original works." (¶¶ 76-96.) Disputed to the extent the statement

suggests that IBM or Sequent had compelling business reasons to insist on the "control" as

described by IBM herein. (¶¶ 30-62.)

J.   Wide Availability of UNIX Information.

96.   Over the years, AT&T made the source code to its UNIX operating systems
available to many thousands of persons and entities, without necessarily requiring that the code
be kept confidential. AT&T's view was that a large number of UNIX-knowledgeable
programmers would help foster the adoption of UNIX System V as an industry standard within
the information technology marketplace. (Ex. 182 ¶ 37; Ex. 281 ¶¶ 33-37.)

Disputed to the extent the statement suggests that by making its source code available to

persons and entities, AT&T waived or intended to waive any of its copyrights or other legal

rights in UNIX. "The mere fact of publishing a copyrighted work does not give others the right

to use, copy, modify, or distribute that work." (IBM Statement of Undisputed Facts in Support

of IBM's Motion for Summary Judgment on Its Claim for Copyright Infringement (IBM's

Eighth Counterclaim) ¶ 8.) Disputed in that the cited material does not properly support the

assertion that AT&T did not "necessarily" require its UNIX source code to be kept confidential.

Disputed to the extent the statement suggests that AT&T intentionally decided not to keep its

UNIX System V source code confidential.

97.   Because AT&T and USL intended to distribute the UNIX System V source code
and related information widely, they understood that it would be difficult to require that the code
and related information be kept confidential. (Ex. 182 ¶ 36; Ex. 189 ¶¶ 35-36; Ex. 279 ¶ 9; Ex.
281 ¶ 29)

Disputed to the extent the statement suggests that by making its source code available to

persons and entities, AT&T waived or intended to waive any of its copyrights or other legal

rights in UNIX. "The mere fact of publishing a copyrighted work does not give others the right

to use, copy, modify, or distribute that work." (IBM Statement of Undisputed Facts in Support

of IBM's Motion for Summary Judgment on Its Claim for Copyright Infringement (IBM's

Eighth Counterclaim) ¶ 8.) Disputed in that there was nothing inherent in AT&T's or USL's

UNIX licensing program that would result in the disclosure of any confidential UNIX material,

modifications, or derivative works. (¶¶ 78-79.)

98. AT&T licensed its UNIX source code to universities worldwide on very favorable
terms, to encourage use by professors and students alike. AT&T sought to promote the
widespread adoption of UNIX operating systems by ensuring that UNIX System V ideas,
concepts, know-how, methods, and techniques would be widely known and understood by future
programmers. (Ex. 182 ¶¶ 36-37; Ex. 281 ¶ 34.)

Depending on the meaning of the phrase "very favorable forms," disputed to the extent

the statement suggests that by making its source code available to persons and entities, AT&T

waived or intended to waive any of its copyrights or other legal rights in UNIX. "The mere fact

of publishing a copyrighted work does not give others the right to use, copy, modify, or

distribute that work." (IBM Statement of Undisputed Facts in Support of IBM's Motion for

Summary Judgment on Its Claim for Copyright Infringement (IBM's Eighth Counterclaim) ¶ 8.)

Disputed in that there was nothing inherent in AT&T's or USL's UNIX licensing program that

would result in the disclosure of any confidential UNIX material, modifications, or derivative

works. (¶¶ 78-79.)

99. AT&T knew that some universities made the source code available to individual
students who were not bound by confidentiality obligations. AT&T also knew that such students
often took copies of the source code with them when they graduated. AT&T's practice was not

to take action regarding such breaches of the license agreements unless the students sought to commercialize the software, in which case it would require the students to enter into license agreements and pay royalties. (Ex. 281 ¶ 34.)

Disputed to the extent the statement suggests that by making its source code available to persons and entities, AT&T waived or intended to waive any of its copyrights or other legal rights in UNIX. "The mere fact of publishing a copyrighted work does not give others the right to use, copy, modify, or distribute that work." (IBM Statement of Undisputed Facts in Support of IBM's Motion for Summary Judgment on Its Claim for Copyright Infringement (IBM's Eighth Counterclaim) ¶ 8.) Disputed in that there was nothing inherent in AT&T's or USL's UNIX licensing program that would result in the disclosure of any confidential UNIX material, modifications, or derivative works. (¶¶ 78-79.)

100.   AT&T's commercial licensing practices also resulted in the wide availability of UNIX source code. AT&T licensed the source code to hundreds of licensees, who in turn (with AT&T's permission) made it available to tens of thousands of individuals, such as professional software developers that AT&T knew would become knowledgeable about its source code. (Ex. 281 ¶ 33.)

Disputed to the extent the statement suggests that by making its source code available to persons and entities, AT&T waived or intended to waive any of its copyrights or other legal rights in UNIX. "The mere fact of publishing a copyrighted work does not give others the right to use, copy, modify, or distribute that work." (IBM Statement of Undisputed Facts in Support of IBM's Motion for Summary Judgment on Its Claim for Copyright Infringement (IBM's Eighth Counterclaim) ¶ 8.) Disputed in that there was nothing inherent in AT&T's or USL's UNIX licensing program that would result in the disclosure of any confidential UNIX material, modifications, or derivative works. (¶¶ 78-79.)

101.   AT&T expressly granted IBM the right to disclose UNIX System V ideas, concepts, know-how, methods, and techniques embodied in UNIX System V (Ex. 122 ¶ 9) and

then afforded the same right to its licensees, which AT&T endeavored to hold to the same standard (Ex. 281 ¶¶ 13-17). At approximately the same time, AT&T "abandoned" (to use Mr. Wilson's term) an early interest in protecting the methods and concepts of its UNIX operating systems. (Ex. 346 at 62:23-25, 84:8-13, 86:4-18, 264:8-265:8.)

Disputed in that substantial evidence shows (and easily permits the inference) that AT&T did not intend and it was not its policy to hold all licensees to the same basic standard, without regard to the provisions of any side letters with its licensees. (¶ 89.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.) Disputed in that AT&T did not grant IBM "the right to disclose UNIX System V ideas, concepts, know-how, methods, and techniques embodied in UNIX System V." (¶¶ 88-89.) Disputed in that neither AT&T or nor its successors-in-interest ever "abandoned" any intent to protect the methods and concepts of its UNIX operating systems. (¶¶ 63-96.)

102.   In an effort to make UNIX an "open" operating system, meaning that customers would not be locked in with a particular hardware vendor or a particular operating system vendor, AT&T itself published information concerning the interface of the operating system. For example, AT&T published a System V Interface Definition ("SVID"), which provided a complete interface specification that could even be used by AT&T's competitors to develop independently their own UNIX-like operating systems. (Ex. 281 ¶ 36; Ex. 182 ¶ 37.)

Disputed to the extent the statement suggests that by publishing a System V Interface Definition, AT&T waived or intended to waive any of its copyrights or other legal rights in UNIX. "The mere fact of publishing a copyrighted work does not give others the right to use, copy, modify, or distribute that work." (IBM Statement of Undisputed Facts in Support of IBM's Motion for Summary Judgment on Its Claim for Copyright Infringement (IBM's Eighth

Counterclaim) ¶ 8.) Disputed in that a UNIX system could not be created, even in theory, from information in the SVID alone. (Ex. 139 ¶¶ 36-39.)

103. AT&T and its successors authorized, or at least did not prevent, the publication of hundreds, if not thousands, of books, articles, internet web-sites and other materials regarding UNIX, many of which provide detailed information regarding the design and implementation of the UNIX operating system. (Ex. 181 ¶¶ 58-59 & Ex. E; Ex. 281 ¶¶ 37-38; Ex. 182 ¶¶ 37-38.)

Disputed to the extent the statement suggests that by making its source code available to persons and entities, AT&T waived or intended to waive any of its copyrights or other legal rights in UNIX. "The mere fact of publishing a copyrighted work does not give others the right to use, copy, modify, or distribute that work." (IBM Statement of Undisputed Facts in Support of IBM's Motion for Summary Judgment on Its Claim for Copyright Infringement (IBM's Eighth Counterclaim) ¶ 8.) Depending on the meaning of the phrase "design and implementation," disputed to the extent the statement suggests that such publications disclosed the internal materials and concepts in UNIX, which statement the cited material does not support, and which is not correct. (Ex. 139 ¶¶ 2-22.)

104. Between 1985 and 1996, AT&T Capital Corporation, then a subsidiary of AT&T, sold thousands of used or discontinued AT&T computer systems, hundreds of them from Bell Labs, without imposing any confidentiality restrictions on the purchasers. Some of the computers included UNIX System V, Release 3, and Release 4 source code. (Ex. 174 ¶¶ 10-16; Ex. 223 ¶¶ 4-10; Ex. 253 ¶¶ 3-5; Ex. 281 ¶ 39; Ex. 189 ¶ 32.)

Disputed in that the cited material does not properly support the assertions. Disputed to the extent the statement suggests that by making its source code available to persons and entities, AT&T waived or intended to waive any of its copyrights or other legal rights in UNIX. "The mere fact of publishing a copyrighted work does not give others the right to use, copy, modify, or distribute that work." (IBM Statement of Undisputed Facts in Support of IBM's Motion for Summary Judgment on Its Claim for Copyright Infringement (IBM's Eighth Counterclaim) ¶ 8.)

105.   AT&T recognized that its goal of promoting the widespread adoption of UNIX System V was inconsistent with its general desire to preserve the confidentiality of the source code. However, AT&T was more concerned with promoting the widespread adoption of UNIX System V, and collecting the associated royalties, than it was with protecting the confidentiality of its source code. (Ex. 281 ¶ 35; Ex. 190 ¶ 25.)

Disputed to the extent the statement suggests that by making its source code available to

persons and entities, AT&T waived or intended to waive any of its copyrights or other legal

rights in UNIX. "The mere fact of publishing a copyrighted work does not give others the right

to use, copy, modify, or distribute that work." (IBM Statement of Undisputed Facts in Support

of IBM's Motion for Summary Judgment on Its Claim for Copyright Infringement (IBM's

Eighth Counterclaim) ¶ 8.) Disputed in that there was nothing inherent in AT&T's or USL's

UNIX licensing program that would result in the disclosure of any confidential UNIX material,

modifications, or derivative works. (¶¶ 78-79.)

106.   The code, methods, and concepts of UNIX System V are available without restriction to the general public within the meaning of 7.06(a), as the provision was intended by AT&T. (Ex. 181 ¶¶ 58-59 & Ex. E; Ex. 122 ¶ 14; Ex. 125 ¶ 2; Ex. 207 ¶¶ 11-13; Ex. 281 ¶¶ 33-39; Ex. 219.)

Disputed to the extent the statement suggests that by making its source code available to

persons and entities, AT&T waived or intended to waive any of its copyrights or other legal

rights in UNIX. "The mere fact of publishing a copyrighted work does not give others the right

to use, copy, modify, or distribute that work." (IBM Statement of Undisputed Facts in Support

of IBM's Motion for Summary Judgment on Its Claim for Copyright Infringement (IBM's

Eighth Counterclaim) ¶ 8.) Disputed in that there was nothing inherent in AT&T's or USL's

UNIX licensing program that would result in the disclosure of any confidential UNIX material,

modifications, or derivative works. (¶¶ 78-79.) Disputed to the extent the statement draws a

legal conclusion. Disputed in that the code, methods, and concepts of UNIX System V are not

available without restriction to the general public. (Ex. 139 ¶¶ 23-26.)

K.   Development of the Linux Operating System.

107.   In 1991, an undergraduate student at the University of Helsinki, named Linus
Torvalds, set out to create a new, free operating system, which later became known as "Linux".
(Ex. 272 ¶ 3; Ex. 398 at 1-5.)

Disputed. SCO disputes IBM's assertion that Linux Torvalds set out to create a "new"

operating system. Rather, Mr. Torvalds based Linux on the Minix operating system, which he

describes as a "Unix variant." Linux Torvalds & David Diamond, *Just for Fun: The Story of an*

Accidental Revolutionary 61 (2001) (Ex. 169 at 61.). Mr. Torvalds then used the manuals for the

Sun Microsystems version of Unix for his early development of the operating system: "That's

how early development was done. I was reading the standards from either the Sun OS

[Operating System] manual or various books, just picking off system calls one by one and trying

to make something that worked." (Id. at 82.)

108.   Torvalds began developing the core of the operating system, known as the
"kernel", and some months later posted news of his project to Internet newsgroups, inviting
volunteers to assist him in his efforts. (Ex. 398 at 1-5; Ex. 272 ¶ 4.)

Disputed. SCO disputes that Mr. Torvalds "developed" much of the Linux material,

because such "development" consisted of appropriating material from Minix and other UNIX-

like operating systems, at least as to the material in dispute in this case and as described in

SCO's expert Dr. Thomas A Cargill's expert reports. See Disputed Facts #1, 283-85; (Cargill I

Ex. 274; Cargill II Ex. 275; Cargill III Ex. 276.).

109.   With the Internet providing for a distributed collaboration, other programmers
joined to create code making up the kernel. (Ex. 398 at 1-5; Ex. 272 ¶ 5.) Torvalds directed the
collaboration to a version 1.0 release of the Linux kernel in 1994 and has continued to maintain
the kernel development since. (Ex. 398 at 1-5; Ex. 272 ¶ 5.)

Disputed. SCO disputes that Mr. Torvalds and/or other Linux contributors "created" much of the material in Linux, as opposed to copying such material from pre-existing sources, to the extent Linux versions contain the material in dispute in this case as described in SCO's expert Dr. Thomas A. Cargill's expert reports. (See Disputed Facts Nos. 1-2, 283-85 to SCO's Memorandum in Opposition to IBM's Motion for Summary Judgment on Its Tenth Counterclaim (Nov. 11, 2006).)

110. In the years that followed, thousands of developers, including developers at SCO, contributed to the further development of Linux. (See Ex. 5 ¶ 45; Ex. 364 (identifying SCO contributions to Linux); Ex. 105 at 15, 22, 26; Ex. 194 ¶ 5.)

Disputed in part and undisputed in part. It is undisputed that developers at SCO have contributed to the development of Linux-related products. However, neither Santa Cruz, Caldera International, nor SCO have contributed or intended to contribute any of the material at issue in this litigation to Linux. (Ex. 269 ¶¶ 9-14; Ex. 233 ¶¶ 4, 6, 13; Ex. 11 ¶ 17; Ex. 6 ¶ 11.) IBM's sources do not support the assertion that SCO, or any other entity that held copyrights to UNIX, contributed to Linux. Neither Caldera, Inc. nor Caldera Systems, Inc. ("Caldera Systems") held any copyrights to UNIX prior to the 2001 merger that created Caldera International. (Ex. 269 ¶ 9; Disputed Facts Nos. 9, 34-37, 104 to SCO's Memorandum in Opposition to IBM's Motion for Summary Judgment on Its Tenth Counterclaim (Nov. 11, 2006).).

IBM Ex. 5 (SCO's Answer to IBM's Second Amended Counterclaims) ¶ 45:

The cited source does not support the assertion that SCO "contributed to the further development of Linux." Rather, the cited source supports the assertion that *IBM* contributed source code to

Linux, and denies all other allegations, including allegations that SCO distributed IBM's

contributions under the GNU General Public License ("GPL").

IBM Ex. 105 (Caldera Systems, Inc.'s October 2000 Form 10-K/A) at 15, 22, 26:

The cited source refers to Caldera Systems, Inc. ("Caldera Systems"), which did not own any

copyrights in UNIX. (Disputed Facts Nos. 9, 34-37, 104 to SCO's Memorandum in Opposition

to IBM's Motion for Summary Judgment on Its Tenth Counterclaim (Nov. 11, 2006).) The cited

source shows that Caldera Systems sought to deliver Linux-related products (p. 15), would be

forced to contribute to the development of Linux *if* independent third-parties ceased such

development (p. 22), and competed with Linux providers (p. 26). The source does not mention

SCO and does not support the assertion that either SCO or Caldera Systems contributed source

code to the Linux kernel or any non-proprietary, Linux-related software. Rather, the source

stresses that "most of the components of [Caldera Systems'] software offerings are developed by

independent parties" (p. 26).

IBM Ex. 364 (SCO website): The cited source shows only vague support for limited

contribution by SCO to elements of Linux that do not constitute part of the infringing Linux

material. The cited source does not specify a time frame for the asserted actions.

111.   Linux is an "open source" program, which means, among other things, that its
source code is publicly available, royalty-free, and users have the freedom to run, copy,
distribute, study, adapt, and improve the software. (Ex. 5 ¶ 22; Ex. 272 ¶ 6; Ex. 221 ¶ 7; Ex. 64 ¶
8.)

Disputed in part and undisputed in part. SCO disputes that Linux is an "open source"

program, because it contains material that has not been properly licensed by the owner(s) of the

copyright in such material. In particular, neither SCO nor any other UNIX copyright holder properly released the copyrighted, disputed UNIX material at issue in this case under the GPL.

Neither AT&T, Unix Systems Laboratories ("USL"), Novell, Inc. ("Novell"), Santa Cruz, Caldera International, or SCO have placed a notice on or in any products indicating that they grant the rights "to run, copy, distribute, study, adapt and improve" the infringing UNIX material in Linux without royalties, under the terms of the GPL or any other "open source" license, nor did they ever intend to grant such rights. (Ex. 11; Ex. 233 ¶¶ 4, 6, 13; Ex. 269 ¶¶ 9-14; Ex. 6 ¶¶ 11, 14. Placement of such a notice by the copyright holder in the UNIX material is a pre-requisite to granting such rights in the UNIX material under the GPL. (IBM Ex. 128 § 0.)

IBM has put forth no evidence that any UNIX copyright holder contributed the infringing Linux material to Linux or placed an appropriate GPL notice on Linux, or that other Linux contributors actually owned the copyright in the material they contributed. For instance, Mr. Torvalds admits to having incorporated system calls taken from a Unix licensee – Sun Microsystems. (Disputed Fact No. 2 to Yet, IBM has put forth no evidence showing that Sun granted rights to use such material in Linux.

Furthermore, whether SCO or any other UNIX copyright holder has granted such rights, to whom such rights were granted, what conditions were imposed on such rights, and whether use of the infringing Linux material complies with such conditions, are all disputed legal conclusions, not "Disputed Facts."

IBM Ex. 5 (SCO's Answer to IBM's Second Amended Counterclaims) ¶ 22:

The cited source does not support the assertion that such rights have been granted in *all* of Linux, and does not specify any particular portion of Linux in which such rights have been granted.

IBM Ex. 272 (Declaration of Linux Torvalds) ¶ 6; Ex. 221 (Declaration of Ransom

Love) ¶ 7: The cited sources constitute legal conclusions asserted without any supporting factual

basis.

112.   Linux not only adheres to open standards, but also is built and maintained by a
worldwide group of engineers who share the common goal of making open systems and open
source ubiquitous. (Ex. 106 at 3; Ex. 272 ¶ 7; Ex. 22 ¶ 8.) Anyone can freely download Linux
and many Linux applications and modify and re-distribute them with few restrictions. (Ex. 107
at 5; Ex. 272 ¶ 8; Ex. 221 ¶ 9.)

Disputed in that the cited material is inadmissible to support the assertion that a

worldwide group of engineers who build and maintain Linux share the common goal of making

open systems and open source ubiquitous.

113.   The Linux kernel is distributed under the GNU General Public License ("GPL").
The GPL provides that a person receiving code under the GPL "may copy and distribute
verbatim copies of the Program's source code" and "modify [their] copy or copies of the
Program or any portion of it". (Ex. 272 ¶ 9; Ex. 128 ¶¶ 1, 2; Ex. 107 at 24; Ex. 221 ¶ 10.) The
GPL also provides that a person receiving code under the GPL receives "a license from the
original licensor to copy, distribute or modify the Program". (Ex. 128 ¶ 6.)

Disputed to the extent the statement suggests that the foregoing provisions of Linux are

the only ones relevant to the terms under which the Linux kernel is distributed.

L.   USL and Novell.

114.   At approximately the same time Mr. Torvalds began the development of Linux,
Novell acquired (in 1991) an interest in USL, which held all of AT&T's UNIX-related assets,
including AT&T's UNIX licensing agreements and copyrights. (Ex. 5 ¶ 10; Ex. 182 ¶ 8.) In
1993, Novell acquired all of the UNIX assets held by USL. (Ex. 240 ¶ 9.)

Disputed in that IBM Exhibit 240 constitutes, in relevant part, inadmissible evidence.

The declarant is Joseph A. LaSala, Jr. "on behalf of Novell, Inc." (IBM Ex. 240.) Mr. LaSala

identifies himself as "Senior Vice President and General Counsel at Novell, Inc." Although not

mentioned in the declaration, Mr. LaSala was hired by Novell in 2001. See http://www

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.novell.com/company/bios/jlasala.html. Mr. LaSala makes no assertion that he has personal

knowledge of any matter contained in the declaration. To the contrary, he asserts that the

declaration is "based on Novell's knowledge and understanding of the matters described herein,"

and that he is authorized to submit the declaration "on behalf of Novell." (IBM Ex. 240 ¶ 4.)

Federal Rule of Civil Procedure 56(e) states that affidavits in support of summary judgment

motions are required to "be made on personal knowledge." Only in paragraphs 30-36 of the

declaration does Mr. LaSala make statements that are based on his personal knowledge. Where

the deficiencies in an affidavit make it impossible for the Court to determine "which facts it can

accept as based on personal knowledge and which must be rejected as being conjecture or

belief," the Court should disregard the entire affidavit. Malek v. Martin Marietta Corp., 859 F.

Supp. 458, 460-61 (D. Kan. 1994). Those statements regarding occurrences prior to Mr.

LaSala's joining Novell in 2001 were clearly not made upon personal knowledge, constitute

inadmissible hearsay, and should be disregarded by the Court. See Perez v. Volvo Car Corp.,

247 F. 3d 303, 316 (1st Cir. 2001) (where record made clear that events in question occurred

prior to affiant's hiring, parts of affidavit concerning those events "cannot properly be

considered"). Additionally, to the extent the entire declaration purports to relay Novell's

"understanding" of matters, it should be disregarded as not in accordance with Rule 54(e). See

Malek, 859 F. Supp. at 460 ("It is the plaintiff's personal knowledge and not his beliefs,

opinions, rumors or speculation, that are admissible at trial and the proper subject of any

affidavit."); accord Ricks v. Xerox Corp., 877 F. Supp. 1468, 1470 n.1 (D. Kan. 1995).

Specifically, paragraphs 7, 11-28, and 40-43 of the declaration convey on their face Novell's

"understanding" of the significance of events and are therefore inappropriate evidence in support

of a summary judgment motion, in addition to the fact that the Federal Rules of Civil Procedure

do not permit Mr. LaSala to declare anything "on behalf of" Novell.

115. As an owner of AT&T's UNIX assets, Novell assumed AT&T's rights and obligations under its UNIX licenses, including AT&T's UNIX licensing agreements with IBM and Sequent. Like AT&T and USL before it, Novell managed UNIX licensing agreements by, among other things, interpreting, explaining, and enforcing their terms. (Ex. 240 ¶ 10.)

Disputed in that IBM Exhibit 240 constitutes, in relevant part, inadmissible evidence.

(See response to IBM Paragraph 114.)

116. In acquiring AT&T's rights to the Agreements, Novell understood them to place restrictions on the extent to which AT&T's licensees could use UNIX System V. Novell did not understand the UNIX licenses to confer on AT&T or Novell (as AT&T's successor) any rights to the code, methods or concepts of AT&T's and Novell's licensees -- whether or not the licensees' code, methods or concepts were or had been part of a modification or derivative work of AT&T's UNIX software product. (Ex. 240 ¶¶ 11-23.)

Disputed in that there is substantial evidence demonstrating (and easily permitting the

inference) that the members of Novell's UNIX licensing group understood the UNIX licenses to

require the licensees to keep confidential all parts of their modifications and derivative works

based on the licensed UNIX System V software product. (¶¶ 63-96.) Disputed in that IBM

Exhibit 240 constitutes, in relevant part, inadmissible evidence. (See response to IBM Paragraph

114.)

117. Novell understood that UNIX licensees could do as they wished with any non-UNIX portions of their modifications and derivative works of the UNIX software product. That is how Novell understood its own UNIX license with AT&T. AT&T made it clear to Novell, and Novell to AT&T, that Novell, as an AT&T licensee, could do as it wished with its own code, methods, and concepts. AT&T stated that it asserted no rights to Novell material, even if included in a modification or derivative work of UNIX software. (Ex. 240 ¶¶ 11-23.)

Disputed in that there is substantial evidence demonstrating (and easily permitting the

inference) that AT&T and Novell understood the UNIX licenses to require the licensees to keep

confidential all parts of their modifications and derivative works based on the licensed UNIX

System V software product, and that neither AT&T nor Novell suggested otherwise to each other. (¶¶ 63-96.) Disputed in that IBM Exhibit 240 constitutes, in relevant part, inadmissible evidence. (See response to IBM Paragraph 114.)

118. Novell shared its view of its licenses with its new (and AT&T's former) licensees with whom Novell (like AT&T) had frequent dealings. Like AT&T, Novell intended for its licensees to rely on its statements and assurances about what licensees could do and not do with their original works. (Ex. 183 ¶¶ 5-6; Ex. 240 ¶¶ 11-23.)

Disputed in that there is substantial evidence demonstrating (and easily permitting the inference) that AT&T and Novell understood the UNIX licenses to require the licensees to keep confidential all parts of their modifications and derivative works based on the licensed UNIX System V software product, and that neither AT&T nor Novell suggested otherwise to each other. (¶¶ 63-96.) Disputed in that like the AT&T licenses, Novell's own UNIX System V license agreements state expressly that Novell and its licensees intended to exclude any previous or subsequent discussions from the agreement the parties had reached. (¶¶ 18, 91-92.) Disputed to the extent the statement suggests that licensees did not enter into agreements requiring them to hold in confidence all parts of their modifications and derivative works based on the licensed UNIX System V software product. (¶¶ 13-29, 82-86.) Disputed to the extent that the statement suggests that, upon entering into their written agreement, the licensees did not intend to exclude any previous and subsequent oral discussion from the agreement the parties had reached. (¶¶ 18, 91-92.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.)Disputed in that IBM Exhibit 240 constitutes, in relevant part, inadmissible evidence. (See response to IBM Paragraph 114.)

119.   Novell representatives made clear to Novell's licensees, including IBM and Sequent, that Novell asserted no rights to the licensees' code, methods and concepts and that they could do with them as they wished, whether or not they were included in modifications or derivative works of UNIX software products. To the extent Novell ever had any right to its licensees' code, methods, and concepts, Novell relinquished it. (Ex. 240 ¶¶ 11-23.)

Disputed in that substantial evidence shows (and easily permits the inference) that Novell

held no such understanding of the licenses and had no such communications with licensees

regarding rights of disclosure. (¶¶ 63-96.) Disputed to the extent the statement suggests that

Novell represented that UNIX System V licensees could do as they wished with "the licensees'

code, methods and concepts" without regard to whether such material was included in the

licensees' modifications or derivative works based on the licensed UNIX System V software

product. (¶¶ 63-96.) Disputed to the extent the statement suggests that licensees did not enter

into agreements requiring them to hold in confidence all parts of their modifications and

derivative works based on the licensed UNIX System V software product. (¶¶ 13-29, 82-86.)

Disputed to the extent that the statement suggests that, upon entering into their written

agreement, the licensees did not intend to exclude any previous and subsequent oral discussion

from the agreement the parties had reached. (¶¶ 18, 91-92.) "The IBM Agreements and the

Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX

System V could be used and disclosed by them and under which they could distribute software

programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.) Disputed to

the extent the statement call for a legal conclusion. Disputed in that IBM Exhibit 240

constitutes, in relevant part, inadmissible evidence. (See response to IBM Paragraph 114.)

120.   Just as they had before Novell acquired USL, IBM, Sequent and other UNIX licensees exercised ownership and control over their original works, despite the fact that those works were (or had been) part of a modification and derivative work of UNIX System V or were

(or had been) associated in some respect with UNIX System V, such as by publicly disclosing them. (Ex. 561; Ex. 562; Ex. 563; Ex. 567; Ex. 568; Ex. 569; Ex. 571.)

See Response to IBM Statement of Fact No. 90.

121. Put differently, Novell's UNIX licensees publicly disclosed code, methods, and concepts from their flavors of UNIX after Novell acquired AT&T's UNIX assets. (Ex. 561; Ex. 562; Ex. 563; Ex. 567; Ex. 568; Ex. 569; Ex. 571.)

See Response to IBM Statement of Fact No. 90.

122. For example, IBM published The Advanced Programmer's Guide to AIX 3.x, which contained source code, methods and concepts from AIX (Ex. 493), and disclosed AIX methods and concepts in patent applications and issued patents including Patent No. 5,202,971 (Ex. 567), Patent No. 5,175,852 (Ex. 499), Patent No. 5,421,011 (Ex. 496), and Patent No 5,428,771. (Ex. 497.) Likewise, Sequent disclosed methods and concepts in patent applications and issued patents including Patent No. 5,442,758 (Ex. 498), and Patent No. 5,185,861 (Ex. 499.)

See Response to IBM Statement of Fact No. 90. Disputed to the extent that the statement

suggests that AT&T or USL knew or should have known about the substance of IBM's patent

applications. (See Argument, Part IV.)

123. IBM and Sequent were not alone in disclosing the code, methods, and concepts of their flavors of UNIX. For example, Sun Microsystems, Inc ("Sun") disclosed source code from Solaris, its UNIX flavor, in Solaris Porting Guide (1995) (Ex. 561 at 228), and Solaris Multithreaded Programming Guide (Ex. 562).

See Response to IBM Statement of Fact No. 90.

124. Like AT&T and USL before it, Novell was aware and understood that its licensees were exercising their full rights of ownership and disclosing the code, methods and concepts of their flavors of UNIX. (Ex. 186 ¶¶ 6-7; Ex. 250 ¶¶ 6-7; Ex. 271 ¶¶ 5-6; Ex. 276 ¶¶ 6-7.) Yet, Novell took no steps to stop its licensees from doing as they wished with their original works. (Ex. 183 ¶¶ 6-7; Ex. 250 ¶¶ 6-7; Ex. 271 ¶¶ 15-16; Ex. 276 ¶¶ 6-7.)

Disputed in that substantial evidence shows (and easily permits the inference) that Novell

representatives did not actually know about such disclosures. (¶ 96.) The evidence further

shows (and easily permits the inference) that such disclosures, including as made under

copyright protection, were not material breaches of the agreements. (Ex. 139 ¶¶ 2-22.)

125. Based on its understanding of the Agreements, the statements of Novell representatives and Novell's failure to take any action to preclude licensees from doing as they wished with their original works, IBM continued to develop its flavor of UNIX. Similarly, Sequent, having received no indication of a different interpretation of the Agreements from Novell, continued to develop its own Dynix operating system. (Ex. 257 ¶¶ 3-5; Ex. 252 at 67:21-68: 11; 97:25-98:20, 140:12-21; Ex. 596 ¶¶ 2-4.)

Disputed to the extent the statement suggests that IBM and Sequent did not enter into a

written agreement requiring them to hold in confidence all parts of their modifications and

derivative works based on the licensed UNIX System V software product. (¶¶ 13-29, 82-86.)

Disputed to the extent that the statement suggests that, upon entering into their written

agreement, the parties did not intend to exclude any previous and subsequent oral discussion

from the agreement the parties had reached. (¶¶ 18, 91-92.) "The IBM Agreements and the

Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX

System V could be used and disclosed by them and under which they could distribute software

programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.) Disputed

to the extent that the cited material does not support the assertion that IBM or Sequent relied on

"Novell's failure to take any action to preclude licensees from doing as they wished with their

original works" in deciding to continue to develop their AIX and Dynix derivative works.

Disputed to the extent the statement suggests that, absent an "indication of a different

interpretation of the Agreements," IBM and Sequent would not have continued to develop AIX

and Sequent as they did. (¶¶ 30-62.) Disputed to the extent the statement suggests that IBM

knew the terms and conditions of any other UNIX licensee's license arrangement. (Ex. 333 ¶ 23;

Ex. 355 ¶ 23.)

126.   REDACTED

                                                    Sequent likewise invested tens of
millions of dollars in the development and marketing of Dynix and wrote millions of lines of

original source code. (Ex. 257 ¶ 10; Ex. 252 at 67:21-68:11; 97:25-98:20, 140:12-21; Ex. 181, Ex. G; Ex. 596 ¶¶ 3-4.)

Depending on the meaning of the term "original source code," disputed to the extent the cited material does not identify what lines of code in AIX or Sequent were written by developers without reference or access, or experience based on such reference or access, to the licensed UNIX System V software product.

127.   Neither IBM nor Sequent would have continued to invest in AIX and Dynix as they did if they had believed that Novell (instead of IBM and Sequent) owned and had the right to control their original works, whether or not they were included in a modification or derivative work of UNIX System V. (Ex. 257 ¶ 6; Ex. 295 at 27:2-25.)

Disputed to the extent the statement suggests that IBM and Sequent did not enter into a written agreement requiring them to hold in confidence all parts of their modifications and derivative works based on the licensed UNIX System V software product. (¶¶ 13-29, 82-86.) Disputed to the extent that the statement suggests that, upon entering into their written agreement, the parties did not intend to exclude any previous and subsequent oral discussion from the agreement the parties had reached. (¶¶ 18, 91-92.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.) Disputed to the extent the statement suggests that AT&T or any of its successors-in-interest claimed to own IBM's or sequent's "original works." (¶¶ 76-96.) Disputed in that IBM and Sequent had compelling reasons to continue to invest in AIX and Dynix as they did under the terms of their UNIX System V license agreements. (¶¶ 30-62.)

M.   Formation of SCO.

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128.   After Novell announced the termination of a project related to Linux, members of Project Corsair (as it was known) left Novell to form Caldera, Inc. ("Caldera"), a predecessor of SCO, in 1994. (Ex. 107; Ex. 440; Ex. 193 ¶ 6; Ex. 221 ¶ 16.)

Disputed in part and undisputed in part. Caldera, Inc. is not a "predecessor" of SCO to

the extent that term could be construed as making the past actions of Caldera, Inc. attributable to

SCO or indicating that Caldera, Inc. could grant others rights to use the infringed SVr4 material.

(See Disputed Fact No. 4 to IBM's Motion for Summary Judgment on Its Tenth Counterclaim.)

129.   Caldera was formed to develop and market software based on the Linux operating system and to provide related services enabling the development, deployment, and management of Linux-specialized servers. (Ex. 221 ¶ 17; Ex. 107 at 6, 31; Ex. 193 ¶ 7; 242 ¶ 6.) In fact, Caldera was the first company to invest heavily in the establishment of Linux as an acceptable business solution. (Ex. 221 ¶ 18; Ex. 441.)

Disputed in part and undisputed in part. SCO disputes IBM's implication that the actions

of Caldera, Inc. or Caldera Systems prior to May 2001 are attributable to SCO, or that Caldera,

Inc. or Caldera Systems had the power to grant or release rights in the infringed SVr4 material.

The actions of Caldera, Inc. and Caldera Systems prior to May 2001 are not attributable

to SCO and could not grant IBM any rights to use the infringed SVr4 material, because neither

Caldera, Inc. nor Caldera Systems owned copyrights in any UNIX material. (See Disputed Facts

Nos. 4, 22 to IBM's Memorandum in Support of Its Motion for Summary Judgment on Its Tenth

Counterclaim (Nov. 11, 2006).)

130.   Caldera continued the work done by Novell on Project Corsair to develop a Linux desktop operating system and eventually delivered a product called "Caldera Network Desktop" in 1995. (Ex. 221 ¶ 19; Ex. 440; Ex. 107 at 8; Ex. 283 at 33; Ex. 198 ¶ 8; Ex. 242 ¶ 7.)

Disputed in part and undisputed in part. SCO disputes IBM's implication that the actions

of Caldera, Inc. or Caldera Systems prior to May 2001 are attributable to SCO, or that Caldera,

Inc. or Caldera Systems had the power to grant or release rights in the infringed SVr4 material.

The actions of Caldera, Inc. and Caldera Systems prior to May 2001 are not attributable

to SCO and could not grant IBM any rights to use the infringed SVr4 material, because neither

Caldera, Inc. nor Caldera Systems owned copyrights in any UNIX material (See Disputed Facts

Nos. 4, 22 to IBM's Motion for Summary Judgment on Its Tenth Counterclaim.)

IBM's cited sources do not indicate that the Linux products created by Caldera, Inc. were

created through any affiliation with Novell, or that Novell transferred any rights or copyrights to

Caldera, Inc. (See Disputed Facts Nos. 4, 22 to IBM's Motion for Summary Judgment on Its

Tenth Counterclaim.)

131. Caldera also made code contributions to Linux and helped and encouraged
independent software vendors and manufacturers to port their programs to its Linux products in
an attempt to provide the types of software that had been unavailable for Linux to that time. (Ex.
440; Ex. 442; Ex. 221 ¶ 31.)

Disputed in part and undisputed in part. SCO disputes IBM's implication that the actions

of Caldera, Inc. or Caldera Systems prior to May 2001 are attributable to SCO, or that Caldera,

Inc. or Caldera Systems had the power to grant or release rights in the infringed SVr4 material.

The actions of Caldera, Inc. and Caldera Systems prior to May 2001 are not attributable

to SCO and could not grant IBM any rights to use the infringed SVr4 material, because neither

Caldera, Inc. nor Caldera Systems owned copyrights in any UNIX material. (See Disputed Facts

Nos. 4, 22 to IBM's Motion for Summary Judgment on Its Tenth Counterclaim.)

132. To facilitate the porting of Linux to the existing applications in the market that
were written primarily for UNIX-based operating systems, Caldera worked on making its Linux
products compliant with various UNIX standards, including the X/Open brand for UNIX 95, and
the POSIX.1 specification. (Ex. 221 ¶ 32; Ex. 442.)

Disputed in part and undisputed in part. SCO disputes IBM's implication that the actions

of Caldera, Inc. or Caldera Systems prior to May 2001 are attributable to SCO, or that Caldera,

Inc. or Caldera Systems had the power to grant or release rights in the infringed SVr4 material.

The actions of Caldera, Inc. and Caldera Systems prior to May 2001 are not attributable

to SCO and could not grant IBM any rights to use the infringed SVr4 material, because neither

Caldera, Inc. nor Caldera Systems owned copyrights in any UNIX material. (See Disputed Facts

Nos. 4, 22 to IBM's Motion for Summary Judgment on Its Tenth Counterclaim.)

133.   To achieve compliance with UNIX standards with its Linux products, Caldera
hired software developers that had both UNIX and Linux experience to work on making Linux
compliant with UNIX standards. (Ex. 221 ¶ 35; Ex. 442.)

Disputed in part and undisputed in part. SCO disputes IBM's implication that the actions

of Caldera, Inc. or Caldera Systems prior to May 2001 are attributable to SCO, or that Caldera,

Inc. or Caldera Systems had the power to grant or release rights in the infringed SVr4 material.

The actions of Caldera, Inc. and Caldera Systems prior to May 2001 are not attributable

to SCO and could not grant IBM any rights to use the infringed SVr4 material, because neither

Caldera, Inc. nor Caldera Systems owned copyrights in any UNIX material. (See Disputed Facts

Nos. 4, 22 to IBM's Motion for Summary Judgment on Its Tenth Counterclaim.)

N.   Novell and Santa Cruz Share UNIX Interests.

134.   In 1995, as Caldera was beginning its Linux business, Novell entered negotiations
with The Santa Cruz Operation, Inc. ("Santa Cruz") concerning the sale of certain Novell assets
relating to its UNIX and UnixWare software products. (Ex. 239 ¶ 14; Ex. 123.)

Depending on the meaning of the term "certain Novell assets," disputed in that the parties

negotiated the sale of Novell's UNIX business assets, and intellectual property, with few limited

exceptions. (¶¶ 169-82.)

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135.   On September 19, 1995, Novell and Santa Cruz executed an Asset Purchase Agreement ("APA"). (Ex. 239 ¶ 5.) The parties entered into two Amendments to the APA: Amendment No. 1 on December 6, 1995, and Amendment No. 2 on October 16, 1996. (Ex. 239 ¶ 6; Ex. 502; Ex. 444; Ex. 123.)

Undisputed.

136.   Santa Cruz did not have the financial capacity to pay the purchase price contemplated by Novell for its UNIX assets. (Ex. 182 ¶ 43; Ex. 254 ¶ 10; Ex. 239 ¶ 8.) To bridge the price gap and consummate the transaction, Novell and Santa Cruz agreed that Novell would receive Santa Cruz stock and retain certain UNIX rights. (Ex. 123; Ex. 239 ¶ 8.)

Undisputed.

137.   Under the APA and its Amendments, Santa Cruz obtained a variety of assets, including hundreds of contracts and licenses, various trademarks, source code and binaries to UnixWare products, and physical assets such as furniture and personal computers. (Ex. 123; Ex. 444; Ex. 502; Ex. 239 ¶ 7.)

Depending on the meaning of the term "a variety of assets," disputed in that the parties

negotiated the sale of Novell's UNIX business assets, and intellectual property, with limited

exceptions. (¶¶ 169-82.) Disputed to the extent the statement suggests that Santa Cruz did not

obtain the UNIX copyrights. (¶¶ 169-82.)

138.   Novell retained the right to receive royalty payments under System V Release X ("SVRX") licenses, prior approval rights relating to new SVRX licenses and amended SVRX licenses, the right to direct Santa Cruz to take certain actions relating to SVRX licenses and the right to conduct audits of the SVRX license programs. (Ex. 123 § 4.16; Ex. 239 ¶ 8.)

Disputed to the extent the statement suggests that the rights retained by Novell under the

APA extend beyond the right to continue to receive and protect royalties paid by then-existing

SVRX licensees for their ongoing distribution of SVRX binary products pursuant to UNIX

sublicensing agreements. (¶¶ 279-93.)

139.   Santa Cruz assumed responsibility for administering the collection of royalty payments from SVRX licenses. The APA provided that Santa Cruz would collect and pass through to Novell 100% of the SVRX royalties. In return, Novell agreed to pay Santa Cruz an

administrative fee of 5% of those royalty amounts. Santa Cruz also agreed to pay additional royalties relating to other products. (Ex. 123 § 4.16(a); Ex. 239 ¶ 9.)

Disputed to the extent the words "royalty" or "royalties" in the first three sentences refers to anything other than the royalties paid by then-existing SVRX licensees for their ongoing distribution of SVRX binary products pursuant to UNIX sublicensing agreements, and disputed to extent the word "royalties" in the last sentence suggests that Novell retained any rights to the "other products" other than the right to receive certain contingent payments for the projected (but ultimately unrealized) sales of the "other products." (¶¶ 279-93.)

140. As specified by Section V.A of Schedule 1.l(b) of the APA, it excluded from the transfer and Novell retained "[a]ll copyrights and trademarks, except for the trademarks UNIX and UnixWare". Amendment No. 2 to the APA addressed copyrights but did not effect the transfer of any copyrights to Santa Cruz. (Ex. 123 § 1.1(b); Ex. 444; Ex. 239 ¶ 10.)

Disputed. The parties intended to have the UNIX copyrights transferred from Novell to Santa Cruz in the APA, and Amendment No. 2 clarified that the parties had so intended. (¶¶ 169-82.)

141. Novell also retained rights to supervise Santa Cruz's administration of SVRX licenses. (Ex. 239 ¶ 11.) Section 4.16(b) of the APA provides that:

> Buyer shall not, and shall not have the authority to, amend, modify or waive any right under or assign any SVRX License without the prior written consent of Seller. In addition, at Seller's sole discretion and direction, Buyer shall amend, supplement, modify or waive any rights under, or shall assign any rights to, any SVRX License to the extent so directed in any manner or respect by Seller. In the event that Buyer shall fail to take any such action concerning the SVRX Licenses as required herein, Seller shall be authorized, and hereby is granted, the rights to take any action on Buyer's own behalf. (Ex. 123 § 4.16(b).)

Depending on the meaning of the phrase "supervise Santa Cruz's administration of SVRX licenses" and the term "SVRX licenses," disputed in that the parties did not intend to

permit Novell to interfere with Santa Cruz's exercise of its rights with respect to SVRX source

code in accordance with the transfer of assets under the APA. (¶¶ 279-93.)

142.   Novell, therefore, retained the "sole discretion" to direct Santa Cruz to amend, supplement, modify, waive, or assign any rights under or to the SVRX licenses; if Santa Cruz fails to take any such action, the APA specifically granted Novell the right to take these actions on behalf of Santa Cruz. (Ex. 123 § 4.16(b); Ex. 239 ¶ 8.) Santa Cruz recognized this right in Amendment X to IBM's Software and Sublicensing Agreements, to which Novell was a party, and which noted that "Novell retained . . . certain rights with respect to" the agreements IBM entered into with AT&T, including "Software Agreement SOFT-00015 as amended" and "Sublicensing Agreement SUB-00015A as amended". (Ex. 124 at 1.)

Disputed to the extent the statement suggests that the rights retained by Novell under the

APA extend beyond the right to continue to receive and protect royalties paid by then-existing

SVRX licensees for their ongoing distribution of SVRX binary products pursuant to UNIX

sublicensing agreements (¶¶ __-__), in that the parties did not intend to permit Novell to interfere

with Santa Cruz's exercise of its rights with respect to SVRX source code in accordance with the

transfer of assets under the APA. (¶¶169-82).

143.   While Novell and Santa Cruz shared ownership of AT&T's UNIX assets (from 1995 to 2001), representatives of Novell and Santa Cruz told SVRX licensees that they could do as they wished with their original code. They told licensees they were free to do as they wished with their own code, modifications and derivative works, so long as the code, modifications, and derivative works did not contain System V code. (Ex. 227 ¶¶ 8-11; Ex. 266 ¶¶ 6-13.)

Disputed to the extent the statement suggests that Novell had any ownership rights in

Santa Cruz's UNIX licenses or copyrights. (¶¶ 169-82.) Disputed in that substantial evidence

shows (and easily permits the inference) that Novell and Santa Cruz held no such understanding

of the licenses and had no such communications with licensees regarding rights of disclosure.

(¶¶ 63-163.) Disputed to the extent the statement suggests that Novell or Santa Cruz represented

that UNIX System V licensees could "do as they wished with their own code, modifications and

derivative works" without regard to whether such material was included in the licensees'

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modifications or derivative works based on the licensed UNIX System V software product. (¶¶ 63-163.) Disputed to the extent the statement suggests that licensees did not enter into agreements requiring them to hold in confidence all parts of their modifications and derivative works based on the licensed UNIX System V software product. (¶¶ 13-29, 82-86.) Disputed to the extent that the statement suggests that, upon entering into their written agreement, the licensees did not intend to exclude any previous and subsequent oral discussion from the agreement the parties had reached. (¶¶ 18, 91-92.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.)

144.   IBM, Sequent and other SVRX licensees continued to use the non-SVRX portions of their flavors of UNIX as they wished. (Ex. 564; Ex. 565.)

See Response to IBM Statement of Fact No. 90.

145.   For example, IBM publicly disclosed AIX methods and concepts in AIX/6000: Internals and Architecture (1996), which included an entire chapter on the Journaled File System (Ex. 503 at 55-65), and Hewlett-Packard disclosed the methods and concepts behind the Journaled File System in its version of UNIX called HP-UX in a book titled HP-UX: Tuning and Performance (2000) (Ex. 565).

See Response to IBM Statement of Fact No. 90.

146.   Representatives of Novell and Santa Cruz were aware and understood that its licensees were exercising their full rights of ownership and disclosing the code, methods and concepts of their flavors of UNIX. Neither company took any steps to preclude them from doing as they wished with their original works. (Ex. 183 ¶¶ 6-7; Ex. 250 ¶¶ 116-17; Ex. 271 ¶¶ 5-6; Ex. 276 ¶¶ 6-7; Ex. 227 ¶¶ 8-11.)

Disputed to the extent the statement suggests that Novell had any ownership rights in Santa Cruz's UNIX licenses or copyrights. (¶¶ 169-82.) Disputed to the extent the statement suggests that the cited declarants had the authority to modify the terms of the UNIX license

agreements, or had the authority to waive any of Santa Cruz's rights under the UNIX System license agreements. (¶¶ 90.) Disputed in that substantial evidence shows (and easily permits the inference) that Santa Cruz had no such awareness or understanding. (¶¶ 63-163.) Depending on the meaning of the term "original works," disputed to the extent the statement suggests that licensees did not enter into agreements requiring them to hold in confidence all parts of their modifications and derivative works based on the licensed UNIX System V software product. (¶¶ 13-29, 82-86.) The evidence further shows (and easily permits the inference) that such disclosures, including as made under copyright protection, were not material breaches of the agreements. (Ex. 139 ¶¶ 2-22.)

147. Santa Cruz representatives, including David McCrabb, the President of Santa Cruz's Server Software Division, told System V licensees that they were free to do as they wished with their own code, modifications and derivative works, so long as the code, modifications, and derivative works did not contain System V code. Santa Cruz representatives, including Mr. McCrabb, told licensees that it interpreted the license agreements in this manner. (Ex. 227 ¶ 8.)

Disputed to the extent the statement suggests that Mr. McCrabb had the actual or apparent authority to speak for Santa Cruz regarding the scope of Santa Cruz's UNIX licenses, or had the authority to modify the terms of the UNIX license agreements, or had the authority to waive any of Santa Cruz's rights under the UNIX System license agreements. (¶¶ 76-96.) Disputed in that substantial evidence shows (and easily permits the inference) that Mr. McCrabb and his colleagues at Santa Cruz had no such understanding and made no such statements. (¶¶ 63-163.) Depending on the meaning of the term "their own code, modifications and derivative works," disputed to the extent the statement suggests that licensees did not enter into agreements requiring them to hold in confidence all parts of their modifications and derivative works based on the licensed UNIX System V software product. (¶¶ 13-29, 82-86.) Disputed to the extent that

the statement suggests that, upon entering into their written agreements, the parties did not intend

to exclude any previous or subsequent oral discussions from the agreement the parties had

reached. (¶¶ 18, 91-92.) "The IBM Agreements and the Sequent Agreements (collectively "the

Agreements") set forth the terms under which UNIX System V could be used and disclosed by

them and under which they could distribute software programs "based on" UNIX System V."

(IBM Statement of Undisputed Facts ¶ 50.)

148.   Based on its understanding of the Agreements, the representations of Novell and
Santa Cruz representatives and Novell's failure to take any action to preclude licensees from
doing as they wished with their original works, IBM continued to develop its flavor of UNIX.
Similarly, Sequent, having received no indication of a different interpretation of the Agreements
from Santa Cruz, continued to develop its own Dynix operating system. (Ex. 257 ¶¶ 3-5; Ex.
252 at 67:21-68:11; 97:25-98:20, 140:12-21; Ex. 596 ¶¶ 2, 5.)

Disputed to the extent the statement suggests that IBM and Sequent did not enter into a

written agreement requiring them to hold in confidence all parts of their modifications and

derivative works based on the licensed UNIX System V software product. (¶¶ 13-29, 82-86.)

Disputed to the extent that the statement suggests that, upon entering into their written

agreement, the parties did not intend to exclude any previous and subsequent oral discussion

from the agreement the parties had reached. (¶¶ 18, 91-92.) "The IBM Agreements and the

Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX

System V could be used and disclosed by them and under which they could distribute software

programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.) Disputed

to the extent that the cited material does not support the assertion that IBM or Sequent relied on

"Novell's failure to take any action to preclude licensees from doing as they wished with their

original works" in deciding to continue to develop their AIX and Dynix derivative works.

Disputed to the extent the statement suggests that, absent an "indication of a different

interpretation of the Agreements," IBM and Sequent would not have continued to develop AIX

and Sequent as they did. (¶¶ 30-62.)

149.   REDACTED
                                        Up to the time it was acquired by IBM,
Sequent likewise invested tens of millions of dollars in the development and marketing of Dynix
and wrote millions of lines of original source code. (Ex. 257 ¶ 10; Ex. 596 ¶¶ 2-4.)

Depending on the meaning of the term "original source code," disputed to the extent the

cited material does not identify what lines of code in AIX or Sequent were written by developers

without reference or access, or experience based on such reference or access, to the licensed

UNIX System V software product.

150.   Neither IBM nor Sequent would have continued to invest in AIX and Dynix as
they did if they had believed that Novell or Santa Cruz (instead of IBM and Sequent) owned and
had the right to control their original works, whether or not they were part of a modification and
derivative work of UNIX System V. (Ex. 257 ¶ 6; Ex. 596 ¶¶ 3-4.)

Disputed to the extent the statement suggests that IBM and Sequent did not enter into a

written agreement requiring them to hold in confidence all parts of their modifications and

derivative works based on the licensed UNIX System V software product. (¶¶ 13-29, 82-86.)

Disputed to the extent that the statement suggests that, upon entering into their written

agreement, the parties did not intend to exclude any previous and subsequent oral discussion

from the agreement the parties had reached. (¶¶ 18, 91-92.) "The IBM Agreements and the

Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX

System V could be used and disclosed by them and under which they could distribute software

programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.) Disputed

to the extent the statement suggests that AT&T or any of its successors-in-interest claimed to

own IBM's or sequent's "original works," (¶¶ 76-96.) Disputed to the extent the statement

suggests that IBM or Sequent had compelling business reasons to insist on the "control" as

described by IBM herein. (¶¶ 30-62.)

O.   SCO's Promotion of Linux and Acquisition of UNIX.

151.   While Novell and Santa Cruz shared an interest in UNIX System V software and related assets, Caldera continued to develop and promote Linux. (Ex. 106 at 2-5.)

Disputed to the extent the statement suggests that Novell had any ownership rights in

Santa Cruz's UNIX licenses or copyrights. (¶¶ 169-82.)

152.   To expand and enhance its Linux business, Caldera acquired the Server Software and Professional Services divisions of Santa Cruz and its UNIX-related assets on May 7, 2001. (Ex. 106 at 16; Ex. 221 ¶ 80.)

Disputed to the extent the statement suggests that Caldera, Inc. made the acquisition, or

made it solely "to expand and enhance its Linux business," which statement the cited material

does not support.

153.   Caldera purchased the UNIX assets of Santa Cruz with an eye toward open-sourcing the UNIX technology to improve Linux. (Ex. 221 ¶ 85; Ex. 471.) Because the UNIX assets were rapidly losing their value and because the market was moving toward Linux, Caldera's CEO, Ransom Love, stated that "UNIX is dead, except as a value add to Linux". (Ex. 221 ¶ 85; Ex. 472.)

Disputed to the extent the statement suggests that either Caldera or Mr. Love immediately

intended to, or ever did, open-source the UNIX technology, to improve Linux or for any other

reason. (Ex. 386 ¶¶ 3-9.[31]) Disputed to the extent the statement suggests that Caldera, Inc.

("Caldera International") made the acquisition, which statement the cited material does not

support. Disputed to the extent the statement suggests that IBM's contributions to Linux in

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[31]   SCO has submitted a declaration from Ransom Love addressing certain points where Mr. Love was willing to clarify certain aspects of his prior testimony. Mr. Love is a paid consultant for IBM (Ex. 378), and SCO submits that a jury will be required to evaluate his testimony in light of all the facts and circumstances.

material breach of its UNIX System V license agreements were not a substantial factor in the downturn of Santa Cruz's UNIX business by the time of Caldera's acquisition of the business. (¶¶ 192-97.)

154.   Although Caldera ultimately did not contribute all of its UNIX assets to Linux and distributed certain UNIX products, Caldera positioned its Linux products ahead of its UNIX products. (Ex. 340 at 31:20-25, 33:12-25, 34:1-12; 55:4-15; Ex. 472.)

Disputed to the extent the statement suggests that IBM's contributions to Linux in material breach of its UNIX System V license agreements were not a substantial factor in the downturn of Santa Cruz's UNIX business by the time of Caldera International's acquisition of the business. (¶¶ 192-97.)

155.   At the time Caldera acquired Santa Cruz's UNIX assets, Santa Cruz did not believe it was selling, and Caldera did not believe it was buying, the right to control what all UNIX System V licensees could do with their original works. (Ex. 227 ¶¶ 37-38; Ex. 221 ¶¶ 107-09.)

Disputed to the extent the statement suggests that Mr. McCrabb had the actual or apparent authority to speak for Santa Cruz regarding the scope of Santa Cruz's UNIX licenses, or had the authority to modify the terms of the UNIX license agreements, or had the authority to waive any of Santa Cruz's rights under the UNIX System license agreements. (¶ 90.) Depending on the meaning of the term "their original works," disputed in that substantial evidence shows (and easily permits the inference) that Mr. McCrabb and his colleagues at Santa Cruz had no such understanding. (¶¶ 63-163.) Depending on the meaning of the term "their original works," disputed to the extent the statement suggests that licensees did not enter into agreements requiring them to hold in confidence all parts of their modifications and derivative works based on the licensed UNIX System V software product. (¶¶ 13-29, 82-86.) Depending on the meaning of the term "their original works," disputed to the extent the statement suggests

that Mr. Love specifically considered at the time of acquisition the issue of the extent of Caldera

International control over the modifications and derivative works the licensees had developed

based on the licensed UNIX System V software product. (Ex. 386 ¶ 7.)

P.   SCO's Distribution of the Disputed Material.

156.   In May 2002, SCO formed a partnership, known as UnitedLinux, with three other
Linux distributors, to streamline Linux development and certification around a global, uniform
distribution of Linux designed for business. (Ex. 348; Ex. 221 ¶¶ 94-96.)

Disputed to the extent the statement suggests that Caldera International or SCO chose to

undertake Linux activities "instead" of pursuing its UNIX products and services or UNIX

intellectual property rights. Neither Caldera International nor SCO ever did or intended to waive

intellectual property rights in UNIX as a result of any Linux-related activities. (See Disputed

Facts Nos. 4-5 to IBM's Motion for Summary Judgment on Its Tenth Counterclaim.) Caldera

International derived 95% of its revenues from its UNIX products and services. (See id. No. 83.)

Furthermore, Caldera International nor SCO investigated the infringement of UNIX material in

Linux until late 2002 or early 2003. (See id. No. 109.) IBM's cited documents do not support its

assertion that UnitedLinux activities were an alternative to litigation or other pursuit of UNIX

intellectual property rights.

157.   In a November 2002 launch event co-sponsored by IBM, UnitedLinux released its
first Linux distribution, "UnitedLinux Version 1.0". (Ex. 407.) In January 2003, IBM joined
UnitedLinux as a technology partner to, among other things, help promote the recently released
product. (Ex. 408.) UnitedLinux Version 1.0 was marketed and sold by each of the partners in
UnitedLinux under its own brand name. (Ex. 407.) SCO's release of UnitedLinux was called
"SCO Linux 4". (Ex. 349.)

Undisputed.

158.   SCO Linux 4 included the very code and technologies that SCO claims IBM
improperly contributed to Linux. (See Ex. 33 at 43; Ex. 44 at 3-22.) This material includes JFS
(Item 1), RCU (Item 2) and certain "negative know how" (Items 23 and 90). (See id.) For the

remaining Items of allegedly misused material, SCO indicates that it has "not presently determined" whether the material is included in its UnitedLinux distribution. (Id.)

Undisputed.

159.   In its Revised Response to IBM's interrogatories, SCO stated that the allegedly misused material "is included in any product that contains the Linux kernel 2.4 and above, which is sold or distributed by hundreds of entities around the world", including by SCO. (Ex. 33 ¶ 43.) In particular, SCO conceded that its "SCO Linux Server 4.0" products contain such code. (Id.)

Undisputed.

160.   Although not identified by SCO in its interrogatory responses, SCO's earlier Linux distributions also contain code SCO claims IBM improperly contributed to Linux. (See Ex. 350; Ex. 351.) Among other products, SCO's "OpenLinux Server 3.1.1" and "OpenLinux Workstation 3.1.1" products, which were released in January 2002, both include the Linux 2.4 kernel. (See Ex. 350 at 2; Ex. 351 at 2; Ex. 296 at 16:18-23.)

Disputed in part and undisputed in part. SCO disputes that IBM's cited sources support

the assertion that Caldera International or SCO distributed the OpenLinux Server 3.1.1 or

OpenLinux Workstation 3.1.1 at any time after January of 2002.

161.   In fact, SCO specifically advertised to its customers that its distributions of Linux included some of the very technology it now complains IBM should not have contributed to Linux. (See Ex. 350; Ex. 351; Ex. 352; Ex. 396; Ex. 353.)

Depending on the meaning of the clause "some of the very technology it now complains

IBM should not have contributed to Linux," disputed to the extent that the statement does not

specify the "very technology" at issue.

162.   For example, in its product announcements for OpenLinux Server 3.1.1 and OpenLinux Workstation 3.1.1, SCO specifically advertised that the products included new features such as "journaling file system support". (Ex. 350 at 2; Ex. 351 at 2.)

Disputed to the extent that the statement suggests that SCO specifically advertised that

the products included the Journaling File System (or "JFS") taken from AIX, which statement

the cited material does not support.

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163.   Similarly, in its November 2002 product announcement for "SCO Linux Server 4.0", which was based on UnitedLinux Version 1.0, SCO noted that "[t]he core of SCO Linux Server 4.0 is the 2.4.19 Linux kernel. New features include broadened USB support, Logical Volume Manager, improved journaling file system support". (Ex. 352 (emphasis added).)

Disputed to the extent that the statement suggests that SCO specifically advertised that

the products included the Journaling File System (or "JFS") taken from AIX, which statement

the cited material does not support.

164.   Likewise, SCO's Technical Overview of SCO Linux 4.0 emphasized that its product included "JFS (Journaling File System Developed by IBM)" (Ex. 396 (emphasis added).)

Undisputed.

165.   Although SCO claims to have "discontinued" distributing any products containing the source code it claims IBM should not have disclosed, it continued to do so after it filed this lawsuit. (See Ex. 44; Ex. 45; Ex. 296 at 92:1-22; 353:33 at Tab 121; Ex. 505; Ex. 486.)

Disputed to the extent the statement suggests that SCO did not timely discontinue its

intentional distribution of its Linux products. (¶¶ 220-33.) Disputed to the extent the statement

suggests that, as a legal conclusion, SCO was not entitled reasonably to wind-down its Linux

business in support of its existing customers after bringing this lawsuit.

166.   For example, SCO released its "SCO Linux Server 4.0 for the Itanium Processor Family" distribution on April 14, 2003, after SCO filed its original Complaint. (See Ex. 353; Ex. 1.) In the product announcement, SCO touted the new features of this release, including "improved journaling file system support". (Ex. 353 at SCO1269793.)

Undisputed.

167.   SCO has also produced invoices and other documentation reflecting SCO's continued distribution of its OpenLinux 3.1.1 and Linux Server 4.0 products until at least January 2004. (See Ex. 33 at Tab 121; Ex. 505; Ex. 296; Ex. 486.)

Undisputed.

168.   Moreover, SCO made available to the public as recently as the end of 2004 the Linux 2.4 kernel for download from its website. (See Ex. 45 at 3; Ex. 167 ¶ 11.) The version of

Linux available from SCO's website includes code SCO claims IBM disclosed in violation of its contracts. (See Ex. 44; Ex. 45; Ex. 33 at 43; Ex. 167 ¶¶ 5, 11.)

Undisputed.

169.   In addition, SCO has admitted that it made available to the public for download material that SCO claims IBM improperly contributed to Linux. (See Ex. 44 at 3-22.) This material includes JFS (Item 1), RCU (Item 2) and certain "negative know how" (Items 23 and 90). (See id.) For the remaining Items of allegedly misused material, SCO indicates that it has "not presently determined" whether it made the material available to the public for download. (Id.)

Undisputed.

170.   SCO distributed source code for the Linux 2.4 kernel, which is contained in SCO's OpenLinux Server 3.1.1, OpenLinux Workstation, and Linux Server 4.0 products, under the terms of the GPL. (Ex. 128; Ex. 296 at 75:9-12.) The terms of the GPL permit licensees freely to use, copy, distribute and modify whatever code is provided thereunder. (Ex. 128.)

Disputed to the extent the statement seeks to summarize the terms of the GPL and to the

extent the statement draws a legal conclusion.

Q.   SCO's Litigation.

171.   Following its acquisition of Santa Cruz's UNIX assets, Caldera was unable to make a profit, switched management, changed its name to SCO, and adopted a new business model focused on litigation. (See, e.g., Ex. 1; Ex. 141; Ex. 142; Ex. 423; Ex. 427.)

Disputed in that the cited material does not support the assertions.

172.   SCO filed its original Complaint, which featured a claim for the misappropriation of trade secrets, on March 6, 2003. (Ex. 1.) In that Complaint, SCO, among other things, alleged that IBM had breached its UNIX System V license by "subject[ing] SCO's UNIX trade secrets to unrestricted disclosure, unauthorized transfer and disposition, unauthorized use, and has otherwise encouraged others in the Linux development community to do the same". (Id. ¶ 135.)

Depending on the meaning of the term "featured," disputed in that the cited material does

not support the assertion that SCO treated its claim for the misappropriation of trade secrets with

any higher priority that the other claims brought in the original Complaint.

173. In the Complaint, SCO did not identify with any specificity what "UNIX trade secrets" it claimed were at issue. (See Ex. 1.) SCO instead described its trade secrets only as "unique know how, concepts, ideas, methodologies, standards, specifications, programming, techniques, UNIX Software Code, object code, architecture, design and schematics that allow UNIX to operate with unmatched extensibility, scalability, reliability and security". (Id. ¶ 105.) SCO did not identify any specific UNIX code upon which it based its claim. (See id.)

Depending on the meaning of the phrases "with any specificity" and "specific UNIX code," disputed to the extent the statement suggests that SCO did not detail the nature of its claims based on what SCO knew at the time. (Ex. 165 ¶ 37.)

174. SCO filed an Amended Complaint on July 22, 2003. (Ex. 2.) The Amended Complaint did not identify in any greater detail the trade secrets allegedly misappropriated by IBM. (See id.) Again, SCO described its trade secrets only as "unique know how, concepts, ideas, methodologies, standards, specifications, programming, techniques, UNIX Software Code, object code, architecture, design and schematics that allow UNIX to operate with unmatched extensibility, scalability, reliability and security".

Depending on the meaning of the phrase "in any greater detail," disputed to the extent the statement suggests that SCO did not detail the nature of its claims based on what SCO knew at the time. (Ex. 165 ¶ 37.)

175. SCO thereafter sought, and was granted, permission to file a Second Amended Complaint. (Ex. 3.) In its Second Amended Complaint, filed on February 27, 2004, SCO abandoned its claim for misappropriation of trade secrets altogether. (See id.) In fact, at a hearing on December 5, 2003, SCO acknowledged that there are in fact no trade secrets in UNIX System V. Counsel for SCO stated: "There is no trade secret in UNIX system [V]. That is on the record. No problem with that." (Ex. 414 at 46:2-3.)

Disputed to the extent the statement draws a legal conclusion.

176. In its Second Amended Complaint, SCO asserts four separate breach of contract claims, all of which rest on the underlying allegation that IBM breached its licenses for the UNIX System V software product. (Ex. 3 ¶¶ 110-72.)

Undisputed.

177. SCO's First and Third Causes of Action allege that IBM misused source code subject to the IBM and Sequent Software Agreements by contributing such code to Linux. (Ex.

3 ¶¶ 110-36, 143-66.) Specifically, SCO alleges that IBM and Sequent breached ¶¶ 2.01, 2.05, 4.01, 6.03, 7.06(a) and 7.10 of the Software Agreements. (Ex. 3 ¶¶ 112-25.)

Disputed to the extent the statement suggests that SCO does not allege as part of its claim for breach of contract that IBM misused methods, concepts and know-how subject to the IBM and Sequent Software Agreements by contributing such technology to Linux. (IBM Ex. 3.)

178.   SCO's claims rest on the proposition that "[t]he AIX work as a whole and the Dynix/ptx work as a whole are modifications of, or are derived from [UNIX] System V". (Ex. 132 at 2.) Under SCO's theory of the case, all of the tens of millions of lines of code ever associated with any technology found in AIX or Dynix, even if that code does not contain any UNIX System V code, is subject to the restrictions of the IBM and Sequent Software Agreements. (See id.)

Depending on the meaning of the phrase "SCO's claims rest on the proposition," disputed to the extent the statement suggests that SCO has brought no claims other than its claims for breach of contract. Depending on the meaning of the phrase "lines of code ever associated with any technology found in AIX or Dynix," disputed to the extent the statement suggests that SCO claims that any technology is subject to the restrictions of the IBM and Sequent Software Agreements if such technology were not included in a modification or derivative work based on the licensed UNIX System V software product. (¶¶ 13-29, 82-86.)

179.   SCO made this position clear in its opposition to IBM's motion for partial summary judgment on IBM's Tenth Counterclaim. (Ex. 64.) In that brief, SCO argued: "SCO's contract claims do not depend on any proof that IBM contributed original source code from UNIX to Linux. Rather, the theory of SCO's case -- which is based on the plain, unambiguous meaning of the Software Agreements -- is that IBM breached those agreements by contributing code from AIX and Dynix." (Id. ¶ 21.)

Depending on the meaning of the phrase "lines of code ever associated with any technology found in AIX or Dynix" in the prior statement of fact, disputed to the extent the statement suggests that SCO claims that any technology is subject to the restrictions of the IBM

and Sequent Software Agreements if such technology were never included in a modification or derivative work based on the licensed UNIX System V software product. (¶¶ 13-29, 82-86.)

180. SCO's Second and Fourth Causes of Action allege that IBM breached the IBM and Sequent Sublicensing Agreements by continuing to distribute AIX and Dynix after SCO's purported termination of those agreements on June 13, 2003. (See Ex. 311 ¶¶ 137-42, 167-72.)

Depending on the meaning of the term "purported," disputed to the extent the statement suggests that SCO did not properly terminate the agreements. (See SCO's Memorandum in Opposition to IBM's "Motion for Summary Judgment on SCO's Copyright Claim (Fifth Cause of Action).")

181. These two causes of action ultimately depend on SCO's allegation that IBM "fail[ed] to fulfill one or more of its obligations under the Software Agreements." (Ex. 3 ¶¶ 128, 158.) SCO contends that because IBM breached the IBM and Sequent Software Agreements, SCO had the right unilaterally to terminate the IBM and Sequent Sublicensing Agreements. (See id.) Absent breach of the Software Agreements, therefore, there is no breach of the Sublicensing Agreements.

Disputed to the extent the statement suggests that SCO did not terminate the agreements for IBM's material breach. (See SCO's Memorandum in Opposition to IBM's "Motion for Summary Judgment on SCO's Copyright Claim (Fifth Cause of Action).")

182. The construction and performance of the IBM and Sequent Software Agreements and the IBM and Sequent Sublicensing Agreements are governed by New York law. (See Ex. 492 ¶ 7.13; Ex. 119 ¶ 7.13; Ex. 120 ¶ 6.05; Ex. 121 ¶¶ 6.05.)

Disputed to the extent the statement draws a legal conclusion.

R.   SCO's Touting and Obfuscation.

183. From the beginning of this litigation, SCO has touted its claims and the strength of its alleged evidence. (See, e.g., Ex. 367; Ex. 368; Ex. 369.)

Disputed to the extent the statement suggests that SCO's public statements pertained

solely to the claims brought in this lawsuit, in that the cited material does not support such a

statement.

184.   According to SCO, the issues presented here are the most important issues faced
by the software industry in ten years and the future of the industry – indeed, the future of the
global economy – hangs in the balance:

      a. In an article for Salon.com, Sam Williams quotes SCO's CEO Darl McBride as
          saying, in reference to this case: "There really is no middle ground... The future
          of the global economy hangs in the balance." (See Ex. 370.)

      b. In an article from KSL.com, Jed Boal quotes McBride as saying, in reference to
          this case: "It has become the biggest issue in the computer industry in decades...
          The stakes are extremely high. The balance of the software industry is hanging
          on this." (See Ex. 371.)

Disputed to the extent the statement suggests that the quotes pertained solely to the

claims brought in this lawsuit, in that the cited material does not support such a statement, and to

the extent the statement ignores the following context: In (a), Mr. McBride was referring to the

protection of intellectual property rights, particularly in software, their significance to this case,

and the importance of the protection of intellectual property rights to the global economy. In (b),

Mr. McBride was referring more broadly to the question of whether Linux could be distributed

freely and without greater methods for protection of intellectual property. IBM's use of Linux to

commoditize the operating system, among other impacts, did have and is still having major

impacts on the software industry, as set forth in the expert reports of Drs. Gary Pisano and

Jeffrey Leitzinger. (Exs. 281, 282, 283, 284, 285, 286.) Furthermore, at the time of these

articles, this case was receiving a high level of national and international media attention,

consistent with it being considered a case of national or even global importance, and consistent

with its potential to have great consequence in the software industry.

185. SCO's public statements concerning its alleged evidence are no less grandiose:

    a. In an interview with CNet News.com in August 2003, McBride claimed that SCO had found a "mountain of code improperly contributed to Linux. (See Ex. 367.)

    b. In a teleconference with analysts and reporters on May 30, 2003, McBride stated: "Everybody's been clamoring for the code - show us two lines of code. We're not going to show two lines of code, we're going to show hundreds of lines of code. And that's just the tip of the iceberg of what's in this." (See Ex. 368.)

    c. In an interview in LinuxWorld.com, McBride claimed that a "truckload of code" was improperly contributed to Linux. (See Ex. 372.)

    d. In July 2003, in an interview with Business Week, McBride stated that the amount of LINUX code infringing on SCO's intellectual property rights is "gargantuan". (Ex. 480.)

    e. On August 18, 2003, at its SCO Forum in Las Vegas, SCO, through its Senior Vice President Chris Sontag, stated that it had uncovered more than a million lines of improperly copied UNIX code in Linux. (Ex. 383.)

Disputed to the extent the statement suggests that SCO's public statements pertained solely to the claims brought in this lawsuit, in that the cited material does not support such a statement. Disputed to the extent the statement ignores the following context: This and other statements about the volume of code that had been improperly contributed to Linux are truthful. Mr. McBride was referring to the large number of lines of code from derivative works (such as AIX and Dynix) that were identified by SCO consultants. For instance, SCO identified approximately 160,000 lines of code contributed by IBM from its Journaling File System that are derived from System V code and improperly contributed to Linux. (Ex. 144 at Item No. 1.) SCO also identified 1,200,000 lines of code in the form of test suites that IBM contributed improperly to the Linux development. (Ex. 144 at Item Nos. 18, 113-42).

186. At the same time, SCO refused to disclose the particulars of its claims and alleged evidence. (See Ex. 32; Ex. 33; Ex. 132; Ex. 34.) As a SCO representative stated, it was the company's strategy to obfuscate its alleged evidence. (Ex. 374; Ex. 375.)

Disputed to the extent the statement suggests that SCO did not proceed in discovery in good faith (¶¶ 234-93), to the extent the statement suggests that SCO chose not to disclose its evidence for any reason other than to protect what SCO regarded as confidential material (Ex. 165 ¶ 38), and to the extent the statement suggests that SCO's public statements pertained solely to the claims brought in this lawsuit, in that the cited material does not support such a statement.

187.   For example, SCO's counsel indicated in an interview with Maureen O'Gara of LinuxGram in March 2003, at the beginning of the case, that SCO "doesn't want IBM to know what they [SCO's substantive claims] are". (Ex. 374.)

Depending on the meaning of the term "indicated," disputed in that counsel for SCO made no such statement. (Ex. 251 ¶¶ 3-8.) Disputed in that the cited material does not support the proposition that counsel for SCO made the quoted statement. Disputed to the extent the statement suggests that SCO did not proceed in discovery in good faith (¶¶ 234-93) and to the extent the statement suggests that SCO chose not to disclose its evidence for any reason other than to protect what SCO regarded as confidential material (Ex. 165 ¶ 38). Disputed in that the fact that SCO would not discuss the substance of SCO's claims with a reporter no more evinces a design to obfuscate than does IBM's spokesperson's refusal "to spell out what steps it was taking to monitor the technology it contributes to open-source projects like Linux and to ensure that its Linux development does not violate the intellectual property rights or licenses of others," even though in the article "I.B.M. contends that these matters will be evidence if the SCO suit goes to trial." (Ex. 170.)

188.   Further, SCO Vice President Gregory Blepp stated in a published interview in April 2004 that "you don't put everything on the table at the start, but instead you bring out arguments and evidence piece by piece". (Ex. 375.)

Disputed in that the statement misquotes the quotation attributed to Mr. Blepp, which is

quoted as follows: "There you don't put everything on the table at the start, but instead you

bring out arguments and evidence piece by piece." Disputed to the extent the statement suggests

that Mr. Blepp did not make his statement in the context of explaining the procedures that govern

"legal actions in the United States" and the role of confidentiality ("non-disclosure") agreements

in preventing certain information from being released publicly. Disputed to the extent the

statement suggests that SCO did not proceed in discovery in good faith. (¶¶ 234-93.) Disputed

in that the fact that SCO would not discuss the substance of SCO's claims with a reporter no

more evinces a design to obfuscate than does IBM's spokesperson's refusal "to spell out what

steps it was taking to monitor the technology it contributes to open-source projects like Linux

and to ensure that its Linux development does not violate the intellectual property rights or

licenses of others," even though in the article "I.B.M. contends that these matters will be

evidence if the SCO suit goes to trial." (Ex. 170.) Disputed in that, if said at, Mr. Blepp's

statement is not consistent with anything he was instructed by anyone at SCO to say and does not

reflect SCO's position or strategy; and in that Mr. Blepp is from Munich, and was a SCO sales

person in Germany, and was not familiar with the American legal system. (Ex. 9 ¶¶ 13-16.)

S.   Novell's Waiver of any Purported Breaches.

189.   After SCO filed suit, Novell sent a series of letters to SCO that explicitly waived
the purported breaches of contract SCO has asserted IBM committed. (See Ex. 135; Ex. 136; Ex.
137; Ex. 138; Ex. 240 ¶ 29.)

Disputed to the extent the statement draws a legal conclusion and, disputed in that Novell

does not have the right or authority to "waive the purported breaches of contract SCO has

asserted IBM committed." (¶¶ 279-93.)

190.   On October 7, 2003, in a letter from Joseph A. LaSala, Jr. to Ryan Tibbitts, Novell directed SCO to waive any purported right to assert a breach of the IBM Software Agreement based on IBM's use or disclosure of code that does not contain any UNIX System V source code. (Ex. 135; Ex. 240 ¶ 30.) The letter states:

> [P]ursuant to Section 4.16(b) of the Asset Purchase Agreement, Novell hereby directs SCO to waive any purported right SCO may claim to require IBM to treat IBM Code itself as subject to the confidentiality obligations or use restrictions of the Agreements. Novell directs SCO to take this action by noon, MST, on October 10, 2003, and to notify Novell that it has done so by that time.

(Ex. 135; Ex. 240 ¶ 32.)

Disputed to the extent the statement draws a legal conclusion and, disputed in that Novell

does not have the right or authority to "direct SCO to waive any purported right to assert a

breach of the IBM Software Agreement." (¶¶ 279-93.)

191.   In the letter, Novell informed SCO that its position that IBM's own homegrown code "must be maintained as confidential and subject to use restrictions is contrary to the agreements between AT&T and IBM, including Amendment X, to which Novell is a party". (Ex. 135; Ex. 240 ¶ 33.)

Disputed to the extent the statement purports to describe the scope of the agreements

between AT&T and IBM or Amendment No. X. (¶¶ 63-163.)

192.   According to Novell, the agreements between AT&T and IBM provide "a

straightforward allocation of rights":

> (1) AT&T retained ownership of its code from the Software Products ('AT&T Code'), and the Agreements' restrictions on confidentiality and use apply to the AT&T Code, whether in its original form or as incorporated in a modification or derivative work, but (2) IBM retained ownership of its own code, and the Agreements' restrictions on confidentiality and use do not apply to that code so long as it does not embody any AT&T Code.

(Ex. 135; Ex. 240 ¶ 33.) Novell concluded that any other interpretation "would defy logic as

well as the intent of the parties". (Ex. 135; Ex. 240 ¶ 31.)

Disputed to the extent the statement purports to describe the scope of the agreements

between AT&T and IBM or Amendment No. X. (¶¶ 63-163.)

193.   After SCO failed to follow Novell's instruction, on October 10, 2003, Novell
expressly waived any purported right of SCO's to assert a breach of the IBM Software
Agreement based on IBM's use or disclosure of code that does not contain any UNIX System V
source code. (Ex. 136; Ex. 240 ¶ 34.) Novell states in its letter to SCO:

> Accordingly, pursuant to Section 4.16(b) of the Asset Purchase Agreement,
> Novell, on behalf of The SCO Group, hereby waives any purported right SCO
> may claim to require IBM to treat IBM Code, that is code developed by IBM, or
> licensed by IBM from a third party, which IBM incorporated in AIX but which
> itself does not contain proprietary UNIX code supplied by AT&T under the
> license agreements between AT&T and IBM, itself as subject to the
> confidentiality obligations or use restrictions of the Agreements.

(Ex. 136; Ex. 240 ¶ 34.)

Disputed to the extent the statement draws a legal conclusion. Disputed in that Novell

does not have the right or authority to "expressly waive any purported right of SCO's to assert a

breach of the IBM Software Agreement." (¶¶ 279-93.) Disputed to the extent the statement

purports to describe the scope of the agreements between AT&T and IBM or Amendment No. X.

(¶¶ 63-163.)

> [P]ursuant to Section 4.16(b) of the Asset Purchase Agreement, Novell hereby
> directs SCO to waive any purported right SCO may claim to require Sequent (or
> IBM as its successor) to treat Sequent Code as subject to the confidentiality
> obligations or use restrictions of Sequent's SVRX license.
>
> Novell directs SCO to take this action by noon, MDT, on February 11, 2004, and
> to notify Novell that it has done so by that time.

(Ex. 137.)

Disputed to the extent the statement draws a legal conclusion. Disputed in that Novell

does not have the right or authority to "waive any purported right to assert a breach of the

Sequent Software Agreement." (¶¶ 279-93.) Disputed to the extent the statement purports to

describe the scope of the agreements between AT&T and Sequent. (¶¶ 63-163.)

194.   In the letter, Novell reiterated that SCO's reliance on Section 2.01 of the Software
Agreement was misplaced, and stated that "SCO's interpretation of Section 2.01 is plainly
contrary to the position taken by AT&T, as author of and party to the SVRX licenses". (Ex.
137.)

Disputed to the extent the statement purports to describe the scope of the agreements

between AT&T and Sequent. (¶¶ 63-163.)

195.   After SCO failed to follow Novell's instruction, on February 11, 2004, Novell
expressly waived any purported right of SCO to assert a breach of the Sequent Software
Agreement based on IBM's use or disclosure of code that does not contain any UNIX System V
source code. (Ex. 138; Ex. 240 ¶ 36.) Novell states in its letter to SCO:

> Accordingly, pursuant to Section 4.16(b) of the Asset Purchase Agreement,
> Novell, on behalf of The SCO Group, hereby waives any purported right SCO
> may claim to require Sequent (or IBM as its successor) to treat Sequent Code as
> subject to the confidentiality obligations or use restrictions of Sequent's SVRX
> license.

(Id.)

Disputed to the extent the statement draws a legal conclusion. Disputed in that Novell

does not have the right or authority to "expressly waive any purported right of SCO to assert a

breach of the Sequent Software Agreement." (¶¶ 279-93.) Disputed to the extent the statement

purports to describe the scope of the agreements between AT&T and Sequent. (¶¶ 63-163.)

196.   Novell also waived any purported right of SCO to terminate the IBM
Sublicensing Agreement. (See Ex. 139; Ex. 140; Ex. 240 ¶¶ 37-39.)

Disputed to the extent the statement draws a legal conclusion. Disputed in that Novell

does not have the right or authority to "waive any purported right of SCO to terminate the IBM

Sublicensing Agreement." (¶¶ 279-93.)

197.   On June 9, 2003, in a letter from Jack L. Messman to Darl McBride, Novell
informed SCO that under the terms of Amendment No. X, SCO did not have the right to
terminate any of IBM's rights under the Sublicensing Agreement to distribute its AIX software
program. (Ex. 139; Ex. 240 ¶ 37.) The letter states:

> Pursuant to Amendment No. X, however, Novell and SCO granted IBM the
> "irrevocable, fully paid-up, perpetual right" to exercise all of the rights under the
> IBM SVRX Licenses that IBM then held. IBM paid $10,125,000 for the rights
> under Amendment No. X. Novell believes, therefore, that SCO has no right to
> terminate IBM's SVRX Licenses, and that it is inappropriate, at best, for SCO to
> be threatening to do so.

(Ex. 139; Ex. 240 ¶ 7.)

Disputed to the extent the statement draws a legal conclusion. Disputed to the extent the

statement purports to describe the scope of Amendment No. X. (See SCO's Memorandum in

Opposition to IBM's "Motion for Summary Judgment on SCO's Copyright Claim (Fifth Cause

of Action).")

198.   Novell further directed SCO to waive any purported right under its SVRX
Licenses with IBM to terminate IBM's right to distribute AIX under the IBM Sublicensing
Agreement:

> [P]ursuant to Section 4.16(b) of the Asset Purchase Agreement, Novell hereby
> directs SCO to waive any purported right SCO may claim to terminate IBM's
> SVRX Licenses enumerated in Amendment X or to revoke any rights thereunder,
> including any purported rights to terminate asserted in SCO's letter of March 6,
> 2003 to IBM. Novell directs SCO to take this action by noon, MDT, June 12,
> 2003, and to notify Novell that it has done so by that time.

(Ex. 139; Ex. 240 ¶ 38.)

Disputed to the extent the statement draws a legal conclusion. Disputed in that Novell

does not have the right or authority to "direct SCO to waive any purported right under its SVRX

Licenses with IBM to terminate IBM's right to distribute AIX under the IBM Sublicensing

Agreement." (¶¶ 279-93.)

199.   After SCO failed to follow Novell's instruction, on June 12, 2003, Novell
expressly waived any purported right of SCO to terminate IBM's rights under the IBM
Sublicensing Agreement. (Ex. 140; Ex. 240 ¶ 39.) Novell states in its letter to SCO:

> Accordingly, pursuant to Section 4.16(b) of the Asset Purchase Agreement,
> Novell, on behalf of The SCO Group, hereby waives any purported right SCO
> may claim to terminate IBM's SVRX Licenses enumerated in Amendment X or to
> revoke any rights thereunder, including any purported rights to terminate asserted
> in SCO's letter of March 6, 2003 to IBM.

(Ex. 140; Ex. 240 ¶ 39.)

Disputed to the extent the statement draws a legal conclusion. Disputed in that Novell

does not have the right or authority to "expressly waive any purported right of SCO to terminate

IBM's rights under the IBM Sublicensing Agreement." (¶¶ 279-93.)

T.   SCO's Failure to Substantiate Its Claims.

200.   Following SCO's refusal to disclose the nature of its claims or its alleged
evidence, IBM served interrogatories on SCO asking it to describe in detail its allegations and
alleged evidence of misconduct by IBM. (Ex. 11.)

Disputed to the extent the statement suggests that SCO did not proceed in discovery in

good faith or could have provided the requested information without precedent production of

material by IBM (¶¶ 234-69), and to the extent the statement suggests that IBM was unable to

identify those instances in which its employees contributed technology to Linux from the AIX or

Dynix/ptx operating systems (IBM Statement of Fact No. 238 and material cited therein.)

201.   For example, IBM asked SCO to: "[p]lease identify, with specificity (by product,
file and line of code, where appropriate) . . . any confidential or proprietary information that
plaintiff alleges or contends IBM misappropriated or misused". (Ex. 11 at Interrogatory No. 1.)

Disputed to the extent the statement suggests that SCO did not proceed in discovery in good faith or could have provided the requested information without precedent production of material by IBM (¶¶ 234-69), and to the extent the statement suggests that IBM was unable to identify those instances in which its employees contributed technology to Linux from the AIX or Dynix/ptx operating systems (IBM Statement of Fact No. 238 and material cited therein.)

202. IBM asked SCO: "For . . . any confidential or proprietary information identified in response to Interrogatory No. 1, [to] please identify . . . (b) the nature and source of [SCO's] rights". (See Ex. 11 at Interrogatory No. 2.)

Disputed to the extent the statement suggests that SCO did not proceed in discovery in good faith or could have provided the requested information without precedent production of material by IBM (¶¶ 234-69), and to the extent the statement suggests that IBM was unable to identify those instances in which its employees contributed technology to Linux from the AIX or Dynix/ptx operating systems (IBM Statement of Fact No. 238 and material cited therein.)

203. At the same time, IBM also asked SCO to identify how IBM is alleged to have violated SCO's rights. IBM asked SCO: "For . . .any confidential or proprietary information identified in response to Interrogatory No. 1 , [to] please describe, in detail . . . (a) the date of the alleged misuse or misappropriation; (b) all persons involved in any way in the alleged misuse or misappropriation; (c) the specific manner in which IBM is alleged to have engaged in misuse or misappropriation; and (d) with respect to any code or method . . . the location of each portion of such code or method in any product, such as AIX, in Linux, in open source, or in the public domain." (Ex. 11 at Interrogatory No. 4.)

Disputed to the extent the statement suggests that SCO did not proceed in discovery in good faith or could have provided the requested information without precedent production of material by IBM (¶¶ 234-69), and to the extent the statement suggests that IBM was unable to identify those instances in which its employees contributed technology to Linux from the AIX or Dynix/ptx operating systems (IBM Statement of Fact No. 238 and material cited therein.)

204. Moreover, IBM asked SCO to: "(1) identify with specificity all the material in Linux to which it claims rights; (2) detail the nature of its alleged rights, such as whether and how the material in which SCO claims rights derives from UNIX; and (3) state whether IBM has infringed SCO's rights and, if so, detail how IBM infringes SCO's alleged rights. (See Ex. 12 at Interrogatory No. 12.)

Disputed to the extent the statement suggests that SCO did not proceed in discovery in good faith or could have provided the requested information without precedent production of material by IBM (¶¶ 234-69), and to the extent the statement suggests that IBM was unable to identify those instances in which its employees contributed technology to Linux from the AIX or Dynix/ptx operating systems (IBM Statement of Fact No. 238 and material cited therein.)

205. Further, IBM asked SCO: "For each line of code and other material identified in response to Interrogatory No. 12, [to] please state whether (a) IBM has infringed plaintiffs rights, and for any rights IBM is alleged to have infringed, describe in detail how IBM is alleged to have infringed plaintiffs rights". (Ex. 12 at Interrogatory No. 13.)

Disputed to the extent the statement suggests that SCO did not proceed in discovery in good faith or could have provided the requested information without precedent production of material by IBM (¶¶ 234-69), and to the extent the statement suggests that IBM was unable to identify those instances in which its employees contributed technology to Linux from the AIX or Dynix/ptx operating systems (IBM Statement of Fact No. 238 and material cited therein.)

206. SCO did not provide IBM with all of the information it requested, and IBM twice moved to compel meaningful responses on October 1, 2003 and November 6, 2003. (Ex. 62; Ex. 63.)

Disputed to the extent the statement suggests that SCO did not proceed in discovery in good faith or could have provided the requested information without precedent production of material by IBM (¶¶ 234-69), and to the extent the statement suggests that IBM was unable to identify those instances in which its employees contributed technology to Linux from the AIX or Dynix/ptx operating systems (IBM Statement of Fact No. 238 and material cited therein.)

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207. Specifically, IBM asked the Court to require SCO to specify (1) all the material in Linux to which SCO claims rights (i.e. by kernel version *X*, file *Y*, and lines *1-2-3*); (2) the nature of SCO's alleged rights, including whether and, if so, how the material derives from the UNIX software (i.e. if SCO asserts contract, copyright or some other right to the identified code, and how the Linux code identified derives from UNIX version *A*, file *B*, lines *4-5-6)*; and (3) whether IBM has infringed material to which SCO claims rights, and if so, the details of the alleged infringement (i.e. by copying Linux kernel version *X*, file *Y*, lines *1-2-3*, which are copied or derived from UNIX version *A*, file *B*, lines *4-5-6*; or by distributing Linux kernel version *X*, file *Y*, lines *1-2-3*, the structure and sequence of which was copied from UNIX version *A*, file *B*, lines *7-8-9*; or by inducing others to copy (or distribute) Linux kernel version, file *Y*, lines *1-2-3*, which are copied or derived from UNIX version *A*, file *B*, lines *4-5-6*). (See Ex. 63.)

Disputed to the extent the statement suggests that SCO did not proceed in discovery in good faith or could have provided the requested information without precedent production of material by IBM (¶¶ 234-69), and to the extent the statement suggests that IBM was unable to identify those instances in which its employees contributed technology to Linux from the AIX or Dynix/ptx operating systems (IBM Statement of Fact No. 238 and material cited therein.)

208. On December 12, 2003, the Court ordered SCO to provide this information on or before January 12, 2004. (See Ex. 55.) The Court ordered SCO to "identify and state with specificity the source code(s) that SCO is claiming form the basis of their action against IBM". (Ex. 55.)

Disputed to the extent the statement suggests that the Court found that SCO had not proceeded in discovery in good faith, to the extent the statement suggests that the Court had concluded that IBM was unable to identify those instances in which its employees contributed technology to Linux from the AIX or Dynix/ptx operating systems, and to the extent the statement suggests that the Court's Order adopted the requests for relief set forth in IBM's underlying motion. (¶¶ 239-42.)

209. In an order dated March 3, 2004, the Court reiterated its December 2003 order, compelling SCO again to provide meaningful responses to IBM's interrogatories, this time on or before April 19, 2004. (See Ex. 56.) Specifically, the Court required SCO to "fully comply within 45 days of the entry of this order with the Court's previous order dated December 12, 2003". (Ex. 56.) Thus the Court required SCO to "respond fully and in detail to Interrogatory

Nos. 12 and 13 as stated in IBM's Second Set of Interrogatories [which require SCO to specify (1) the material in Linux to which SCO claims rights; (2) the nature of SCO's alleged rights including whether and, if so, how the material derives from UNIX; and (3) whether IBM has infringed material to which SCO claims rights and, if so, the details of the alleged infringement]." (Ex. 55.)

Disputed to the extent the statement suggests that the Court found that SCO had not proceeded in discovery in good faith, to the extent the statement suggests that the Court had concluded that IBM was unable to identify those instances in which its employees contributed technology to Linux from the AIX or Dynix/ptx operating systems, and to the extent the statement suggests that the Court's Order adopted the requests for relief set forth in IBM's underlying motion. (¶¶ 243-51.)

210. Despite the Court's orders, SCO again did not produce the information requested by IBM. (See Ex. 132.) While SCO identified more materials in Linux to which it claimed rights (albeit without the particularity ordered by the Court and without an adequate explanation as to why it did not provide all of these materials in response to the Court's first order), SCO still did not detail the nature of its alleged rights or describe in detail how IBM was alleged to have infringed SCO's rights. (See Ex. 132.)

Disputed to the extent the statement suggests that SCO did not proceed in discovery in good faith (¶¶ 234-93), to the extent the statement suggests that the Court had concluded that IBM was unable to identify those instances in which its employees contributed technology to Linux from the AIX or Dynix/ptx operating systems and to the extent the statement suggests that the Court's Order adopted the requests for relief set forth in IBM's underlying motion (¶¶ 239-51).

211. Despite the Court's order, SCO did not identify a single version, file, or line of System V code, methods, or concepts allegedly misused by IBM. SCO did not identify a single version, file, or line of AIX or Dynix code, methods or concepts allegedly misused by IBM. And, SCO did not link a single line of allegedly misused Linux code to any version, file, or line of AIX, Dynix or System V code. (See Ex. 132.)

Disputed to the extent the statement suggests that SCO did not proceed in discovery in good faith or could have provided the requested information without precedent production of material by IBM (¶¶ 234-69), to the extent the statement suggests that IBM was unable to identify those instances in which its employees contributed technology to Linux from the AIX or Dynix/ptx operating systems (IBM Statement of Fact No. 238 and material cited therein), to the extent the statement suggests that the Court had concluded that IBM was unable to identify those instances in which its employees contributed technology to Linux from the AIX or Dynix/ptx operating systems and to the extent the statement suggests that the Court's Order adopted the requests for relief set forth in IBM's underlying motion (¶¶ 239-51).

212. Based on SCO's continued failure to comply, IBM moved on May 18, 2004 for partial summary judgment. (Ex. 65 at 27.)

Disputed to the extent the statement suggests that SCO did not proceed in discovery in good faith or could have provided the requested information without precedent production of material by IBM (¶¶ 234-69), and to the extent the statement suggests that IBM was unable to identify those instances in which its employees contributed technology to Linux from the AIX or Dynix/ptx operating systems, to the extent the statement suggests that the Court had concluded that IBM was unable to identify those instances in which its employees contributed technology to Linux from the AIX or Dynix/ptx operating systems (IBM Statement of Fact No. 238 and material cited therein), and to the extent the statement suggests that the Court's Order adopted the requests for relief set forth in IBM's underlying motion (¶¶ 239-51).

213. On February 8, 2005, the Court expressed astonishment at SCO's failure of proof, but deferred a decision on the merits of IBM's summary judgment motion until after the close of discovery. (Ex. 57 at 10.)

Depending on the meaning of the term "failure of proof," disputed to the extent the

statement suggests that the Court concluded that SCO had failed to or would be unable upon full

discovery to adduce proof to support its claims, which statement the cited material does not

support.

214.   The Court set October 28, 2005 as the "Interim Deadline for Parties to Disclose
with Specificity All Allegedly Misused Material" and December 22, 2005 as the "Final Deadline
for Parties to Identify with Specificity All Allegedly Misused Material". (Ex. 58 at 4.) The
Court required SCO "to Update Interrogatory Responses Accordingly". (Ex. 58 at 4; Ex. 418 at
56.)

Undisputed.

U.   SCO's Interim and Final Disclosures.

215.   On October 28, 2005, pursuant to the Court's July 1, 2005, scheduling Order,
SCO served its Interim Disclosures. Like its prior discovery responses concerning the allegedly
misused materials, SCO failed to describe all of the allegedly misused materials by version, file,
and line of code. (Ex. 53.)

Disputed to the extent the statement suggests that the Court had ordered, clearly or

otherwise, SCO "to describe all of the allegedly misused materials by version, file, and line of

code." (Docket No. 643.)

216.   Upon review of SCO's Interim Disclosures, IBM immediately notified SCO that
it failed "to identify the allegedly misused material by version, file and line of code", "to identify
and match up the allegedly infringing and allegedly infringed material by version, file and line of
code", "to identify the material alleged to have been contributed improperly by version, file and
line of code", and to identify, "to the extent the allegedly contributed material is not UNIX
System V code, but is in any sense alleged to have been based on or resulted from UNIX System
V code, the version, file and line of UNIX System V code from which the allegedly contributed
material is alleged to derive or result." (Ex. 151 at 1.)

Depending on the meaning of the word "immediately," disputed to the extent the

statement suggests that IBM provided such notice as soon as it had reached its conclusions, and

which statement the cited material does not support, disputed to the extent the statement suggests

that the Court had ordered, clearly or otherwise, SCO "to describe all of the allegedly misused

materials by version, file, and line of code." (Docket No. 643.)

217.   IBM notified SCO that unless SCO complied with the specificity required by the Court's many orders, "IBM intends to ask the Court to preclude SCO from pursuing any claims regarding allegedly misused material not properly disclosed on or before December 22, 2005". (Ex. 151 at 2.)

Disputed to the extent the statement suggests that the Court had ordered, clearly or

otherwise, SCO "to describe all of the allegedly misused materials by version, file, and line of

code." (Docket No. 643.)

218.   Thereafter SCO expressly stipulated and agreed with IBM that its claims would not exceed the Final Disclosures. In a Stipulation Re Scheduling Order filed with the Court on December 7, 2005, the parties stipulated and agreed as follows:

> 1. Both parties are required to identify with specificity any and all material that each party contends the other has misused no later than December 22, 2005; ...

> (c) Neither party shall be permitted to use [the period for discovery relating to the Final Disclosures] for the purpose of identifying additional misused material not disclosed by the December 22, 2005, deadline.

(Ex. 481.)

Disputed to the extent the statement purports to summarize the terms of the parties'

stipulation. (Ex. 481.)

219.   On December 22, 2005, SCO served its Final Disclosures, again largely failing to describe all of the allegedly misused materials by version, file, and line of code and to update its interrogatory responses. (Ex. 54.)

Disputed to the extent the statement suggests that the Court had ordered, clearly or

otherwise, SCO "to describe all of the allegedly misused materials by version, file, and line of

code." (Docket No. 643.) Disputed to the extent the statement purports to characterize the final

disclosures. (Ex. 144.)

220. Based on SCO's failure to follow the court's orders requiring it to identify all of the allegedly misused materials by version, file, and line of code, IBM moved on February 13, 2006 to preclude certain of SCO's claims. (Ex. 66.)

Disputed to the extent the statement suggests that the Court had ordered, clearly or otherwise, SCO "to describe all of the allegedly misused materials by version, file, and line of code." (Docket No. 643.) Disputed to the extent the statement purports to characterize the final disclosures. (Ex. 144.)

221. Pending the disposition of IBM's motion, SCO served several expert reports seeking to challenge additional allegedly misused materials that were not identified in its Final Disclosures. IBM then made another motion (which has been fully briefed but not yet argued) to confine and limit the scope of SCO's claims to those materials identified in its Final Disclosures. (Ex. 67.)

Disputed to the extent the statement suggests that the content of the referenced expert reports included material that the Court had ordered SCO to produce by its Final Disclosures but that SCO had not included in its Final Disclosures. (Docket No. 707.)

222. In an order dated June 28, 2006, the Court granted, in part, IBM's February 13, 2006 motion to preclude certain of SCO's claims -- striking from the case SCO's Final Disclosure Item Nos.: 3-22, 24-42, 44-89, 91-93, 95-112, 143-49, 165-82, 193, 232-71, 279-93. (Ex. 59 at 36-38.)

Disputed to the extent the statement suggests that the District Court granted IBM's motion, to the extent the statement suggests that the order at issue was one "striking from the case" the material cited in the referenced Item Nos., and to the extent the statement suggests that the District Court has passed judgment on the content of the order, which statements the cited material does not support.

223. In granting IBM's motion in part, the Court held that "SCO should have supplied not only line but version and file information for whatever claims form the basis of SCO's case against IBM". (Ex. 59 at 28.)

Disputed to the extent the statement suggests that the District Court granted IBM's

motion, to the extent the statement suggests that the Magistrate Court found that SCO had acted

in bad faith in discovery, to the extent the statement suggests that SCO had acted in bad faith in

discovery, and to the extent the statement suggests that the District Court has passed judgment on

the content of the order, which statements the cited material does not support.

224.   The Court held further that "SCO has had ample opportunity to articulate, identify
and substantiate its claims against [IBM]. [SCO's] failure was intentional and therefore willful
based on SCO's disregard of the court's orders and failure to seek clarification. In the view of
the court it is almost like SCO sought to hide its case until the ninth inning in hopes of gaining an
unfair advantage despite being repeatedly told to put 'all evidence . . . on the table.'" (Ex. 59 at
32.)

Disputed to the extent the statement suggests that the District Court granted IBM's

motion, to the extent the statement suggests that the Magistrate Court found that SCO had acted

in bad faith in discovery, and to the extent the statement suggests that the District Court has

passed judgment on the content of the order, which statements the cited material does not

support.

225.   Finally, the Court held that SCO's conduct prejudiced IBM in that "[requiring
IBM to engage in an analysis of millions of lines of code to figure out which code is at issue in
hopes of answering such questions is patently unfair given the fact that it was SCO's duty to
provide more detailed code in the first place." (Ex. 59 at 35.)

Disputed to the extent the statement suggests that the District Court granted IBM's

motion, to the extent the statement suggests that the Magistrate Court found that SCO had acted

in bad faith in discovery, and to the extent the statement suggests that the District Court has

passed judgment on the content of the order, which statements the cited material does not

support.

226. Following the Court's order the following "Items" relating to SCO's allegations of IBM's breach of contract relating to the AIX and Dynix operating systems remain in the case: Items 1, 2, 23, 43, 90, 94, 113-42, and 186-92.

Disputed to the extent the statement suggests that the District Court granted IBM's

motion, to the extent the statement suggests that the order at issue was one "striking from the

case" the material cited in the previously referenced Item Nos., and to the extent the statement

suggests that the District Court has passed judgment on the content of the order, which

statements the cited material does not support.

V.   SCO's Failure of Proof.

227. Despite three orders of the Court, SCO has not adduced any evidence that IBM breached the Agreements. (See Ex. 54.)

Disputed to the extent the statement draws a legal conclusion, and in that the cited

material does not support the statement.

228. SCO's Final Disclosures identify 294 Items of allegedly misused material. However, only a subset of these Items concerns SCO's claims of breach of contract. (Ex. 54.)

Undisputed.

229. As a result of the Court's order of June 28, 2006, only 43 of the Items relating to SCO's contract claims remain in the case. (Items 1, 2, 23, 43, 90, 94, 113-42 and 186-92.) These Items concern allegations of misuse relating to AIX and Dynix. (See Ex. 54; Ex. 59.)

Disputed to the extent the statement suggests that the District Court granted IBM's

motion, to the extent the statement suggests that the order at issue was one "striking from the

case" the material cited in the previously referenced Item Nos., and to the extent the statement

suggests that the District Court has passed judgment on the content of the order, which

statements the cited material does not support.

230. Only one of the remaining 43 Items, Item 1, concerns allegations of misuse relating to AIX. Item 1 concerns IBM's Journaled File System (JFS). (Ex. 54; Ex. 291 ¶ 6.)

Disputed to the extent the statement suggests that the order at issue was one "striking

from the case" the material cited in the previously referenced Item Nos., which statements the

cited material does not support.

231.   The remaining 42 Items concern allegations of misuse relating to Dynix. Item 2
concerns Read-Copy Update (RCU); Items 113-42 concern testing technologies; and Items 23,
43, 90, 94 and 186-92 concern "negative know-how" or "exposure" to Dynix. (Ex. 54; Ex. 291 ¶
7.)

Disputed to the extent the statement suggests that the order at issue was one "striking

from the case" the material cited in the previously referenced Item Nos., which statement the

cited material does not support.

232.   Only one of the remaining 43 Items (Item 1) identifies any UNIX System V
source code. That Item identifies 17 lines of code from one version of a UNIX System V file.
(See Ex. 54 Item 1, Tab 425; Ex. 291 ¶ 8.) SCO's experts do not address this file in their expert
reports. (See generally Ex. 285; Ex. 286 ¶¶ 84-122.) SCO does not allege that IBM publicly
disclosed this file to Linux or otherwise. (See Ex. 54.)

Disputed to the extent the statement suggests that JFS is not derived from UNIX System

V. (Ex. 277 ¶¶ 95-114 & Exs. C-H.)

233.   Only two of the remaining 43 Items (Items 1 and 2) identify any AIX or Dynix
source code. Thirty of the remaining 43 Items (Items 113-42) identify code from Sequent's SPIE
Test Suites as well as code from the Linux Test Project. (See Ex. 54.) None of that testing code
is part of either the Dynix or Linux operating systems. (Ex. 287 ¶ 41; Ex. 288 ¶¶ 25, 29; Ex. 291
¶ 9.)

Disputed in that the SPIE Test Suites are part of the Dynix operating system. (Ex. 164 at

253-57.)

234.   While the remaining 43 Items do identity Linux kernel source code files or Linux
Test Project files 11, of those Items (Items 23, 43, 90, 94, and 186-92) do not identify any
versions or lines of code in the Linux kernel or any versions, files or lines of source code from
UNIX System V, AIX or Dynix. SCO simply lists a number of Linux kernel files (without
version or line information) for each of those Items and does not offer any evidence (expert or

otherwise) that these files contain any code methods or concepts from UNIX System V, AIX, or Dynix. (See Ex. 54; Ex. 291 ¶ 10.)

Disputed to the extent the statement suggests that SCO was obligated to provide

"versions, files or lines of source code" with respect to all of IBM's allegedly misused material.

(Docket No. 643.)

235.   SCO has not specifically identified, in the Final Disclosures or elsewhere, a single line of UNIX System V material that IBM is alleged to have misused in violation of its contractual obligations. Nor has it specifically identified any evidence that IBM misused any UNIX System V code. (Ex. 54; Ex. 291 ¶ 5.) When IBM raised with SCO its failure to disclose UNIX System V material, SCO stated that "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". (Ex. 134 at 2.)

Disputed to the extent the statement suggests that SCO has not shown that Linux versions

2.4 and 2.6 are derivative works of UNIX System V, release 4 under the copyright law. (Ex.

274.) Disputed to the extent the statement suggests that SCO has not shown that AIX is a

derivative work of UNIX System V, release 4 under the copyright law. (See SCO's

Memorandum in Opposition to IBM's "Motion for Summary Judgment on SCO's Copyright

Claim (Fifth cause of Action).")

236.   None of the material IBM is alleged to have misused is, or contains, UNIX System V code, methods or concepts, or is, or contains, a modification or derivative work of UNIX System V. (See Ex. 54; Ex. 291 ¶ 11; Ex. 181 ¶¶ 11-50.)

Disputed to the extent the statement suggests that SCO has not shown that Linux versions

2.4 and 2.6 are derivative works of UNIX System V, release 4 within the meaning of the

copyright laws. (Ex. 274.) Disputed to the extent the statement suggests that SCO has not

shown that AIX is a derivative work of UNIX System V, release 4 under the copyright law, or

that SCO has not alleged that IBM's distribution of its AIX operating system post-termination of

its UNIX System V licenses constitutes a violation of SCO's copyrights. (See SCO's

Memorandum in Opposition to IBM's "Motion for Summary Judgment on SCO's Copyright

Claim and Fifth Cause of Action).")

237. All of the material IBM is alleged to have misused in the remaining Items (Items 1-2, 23, 43, 90, 94, 113-42, and 186-92) is original IBM work or the work of third parties other than SCO and independent of System V. (Ex. 162 ¶ 15; Ex. 248 ¶ 5; Ex. 218 ¶ 5; Ex. 243 ¶ 5; Ex. 168 ¶ 6; Ex. 258 ¶¶ 4-5; Ex. 231 ¶¶ 7-8; Ex. 292 ¶ 4; Ex. 507 at 40, 57, 199-200, 225-26, 228; Ex. 293 ¶ 4; Ex. 173 ¶ 4; Ex. 196 ¶ 5; Ex. 235 ¶ 5; Ex. 237 ¶ 5; Ex. 211 ¶ 5; Ex. 216 ¶ 5; Ex. 246 ¶ 4; Ex. 210 ¶ 6; Ex. 263 ¶ 5; Ex. 222 ¶ 5; Ex. 206 ¶¶ 4-5; Ex. 274 ¶ 4; Ex. 161 ¶ 74; Ex. 225 ¶ 5; Ex. 188 ¶ 5.)

REDACTED

238. None of the AIX or Dynix material that IBM is alleged to have misused was written by referencing UNIX System V. (Ex. 291 ¶ 11.)

Disputed for the reasons set forth in response to IBM Paragraphs 243-276 below.

239. SCO has identified 25 persons as having been involved with the allegedly improper disclosures: Barry Arndt, Ben Rafanello, Dave Kleikamp, Mark Peloquin, Steve Best, Dipankar Sarma, Paul McKenney, Martin Bligh, Tim Wright, Pat Gaughen, Wayne Boyer, John George, Haren Babu Myneni, Hien Nguyen, Jim Keniston, Larry Kessler, Hal Porter, Vivek Kashyap, Nivedita Singhvi, Shirley Ma, Venkata Jagana, Jay Vosburgh, Mike Anderson, Mike Mason, Ruth Forester. (Ex. 291 ¶ 12.)

Disputed for the reasons set forth in response to IBM Paragraphs 243-276 below.

240. None of these individuals referred to or otherwise used non-public UNIX System V source code, methods, or concepts in making the challenged Linux contributions. (Ex. 291 ¶ 13; Ex. 162 ¶ 5; Ex. 248 ¶ 5; Ex. 218 ¶ 5; Ex. 243 ¶ 5; Ex. 168 ¶ 6; Ex. 258 ¶¶ 4-5; Ex. 231 ¶¶ 7-8; Ex. 292 ¶ 4; Ex. 507 at 40, 57, 199-200, 225-26, 228; Ex. 293 ¶ 4; Ex. 173 ¶ 4; Ex. 196 ¶ 5; Ex. 235 ¶ 5; Ex. 237 ¶ 5; Ex. 211 ¶ 5; Ex. 216 ¶ 5; Ex. 246 ¶ 4; Ex. 210 ¶ 6; Ex. 263 ¶ 5; Ex. 222 ¶ 5; Ex. 206 ¶¶ 4-5; Ex. 274 ¶ 4; Ex. 161 ¶ 4; Ex. 225 ¶ 5; Ex. 188 ¶ 5.)

Disputed for the reasons set forth in response to IBM Paragraphs 243-276 below.

Disputed in that Exhibit 507 does not support the statement.

241. In making the challenged contributions, the alleged wrongdoers identified by SCO relied on their own creativity and general experience. (Ex. 291 ¶ 13; Ex. 162 ¶ 5; Ex. 248 ¶ 5; Ex. 218 ¶ 5; Ex. 243 ¶ 5; Ex. 168 ¶ 6; Ex. 258 ¶¶ 4-5; Ex. 231 ¶ 7; Ex. 292 ¶ 4; Ex. 507 at 109-10; Ex. 294 ¶ 4; Ex. 173 ¶ 6; Ex. 196 ¶ 5; Ex. 235 ¶ 5; Ex. 237 ¶ 5; Ex. 211 ¶ 5; Ex. 216 ¶ 5; Ex. 246 ¶ 4; Ex. 210 ¶ 6; Ex. 263 ¶ 5; Ex. 222 ¶ 5; Ex. 206 ¶ 5; Ex. 274 ¶ 4; Ex. 161 ¶ 5; Ex. 225 ¶ 5; Ex. 188 ¶ 5.)

Disputed for the reasons set forth in response to IBM Paragraphs 243-276 below.

Disputed in that Exhibit 507 does not support the statement.

W. Specific Items of Alleged Misuse.

242. The remaining Items of allegedly misused material all concern original IBM works that can be described in four categories: (1) IBM's Journaled File System (JFS) contribution; (2) IBM's Read Copy-Update (RCU) contribution; (3) IBM's Linux Test Project (LTP) contributions; and (4) general operating system experience or "negative know how". (Ex. 291 ¶ 14.)

Depending on the meaning of the phrase "original IBM works," disputed in that the referenced Items include technology taken from and developed based on modifications and derivative works based on the licensed UNIX System V software product (¶ 192), and JFS is a derivative work of UNIX System V (Ex. 277 ¶¶ 95-114 & Exs. C-H.).

1. Journaled File System (JFS).

243.

REDACTED

Undisputed.

244. The allegedly misused JFS material does not concern or include any UNIX System V code, methods, or concepts; it is not a modification or derivative work of UNIX System V; and it was not based on or created with reference to UNIX System V. (Ex. 291 ¶ 16.)

Disputed. The misused JFS material is a modification or derivative work of UNIX System V. (Ex. 277 ¶¶ 95-114 & Exs. C-H.)

245. SCO has not specifically identified any UNIX System V material (by version, file or line of code, or otherwise) that it alleges is contained in the allegedly misused JFS material. (Ex. 291 ¶ 171; see also Ex. 54, Item 1.) UNIX System V does not have journaling capability in its file system. (Ex. 286 ¶ 94; Ex. 186 ¶ 100; Ex. 291 ¶ 17.)

Disputed in that the misused JFS material is a modification or derivative works of UNIX System V. (Ex. 277 ¶¶ 95-114 & Exs. C-H.) Disputed in that the cited material does not support the statement. Paragraph 100 of IBM Exhibit 186 makes the unsupported statement that "JFS is

REDACTED

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246.

The allegedly misused JFS material did not contain any UNIX System V code and none of these individuals identified by SCO used or referred to UNIX System V source code in developing JFS. (Ex. 291 ¶ 18; Ex. 168 ¶ 6; Ex. 218 ¶ 5; Ex. 243 ¶ 5; Ex. 248 ¶ 5; Ex. 162 ¶ 5.)

Disputed in that as IBM has itself admitted, UNIX System V source code was used in the development of JFS. (Ex. 277 ¶¶ 95-114 & n.55 & Exs. C-H.)

247.   The JFS code that IBM contributed to the Linux JFS was originally ported from IBM's OS/2 operating system, not AIX, or was written specifically for the Linux JFS. (Ex. 291 ¶ 19; Ex. 168 ¶¶ 4-5.)

Disputed in that the JFS code that IBM contributed to Linux came from AIX (and previously UNIX System V). (Ex. 277 ¶¶ 95-114 & n.55 & Exs. C-H.) Disputed in that the misused JFS material is a modification or derivative works of UNIX System V. (Ex. 277 ¶¶ 95-114 & Exs. C-H.)

248.   OS/2 did not include any UNIX System V code, and was not based on UNIX System V. (Ex. 291 ¶ 19; Ex. 168 ¶ 7.)

Disputed in that the cited material is neither admissible nor sufficient to support the proposition in the statement, and in that the JFS in OS/2 is derived from and based on UNIX System V. (Ex. 277 ¶¶ 95-114 & Exs. C-H.)

249. Some OS/2 based JFS material was later shipped in IBM's AIX product. For this reason, the JFS material that IBM contributed to Linux is sometimes mistaken as having originated from AIX. (Ex. 291 ¶ 20; Ex. 168 ¶ 5.)

Disputed in that the JFS code that IBM contributed to Linux came from AIX (and previously UNIX System V). (Ex. 277 ¶¶ 95-114 & n.55 & Exs. C-H.) Disputed in that the misused JFS material is a modification or derivative works of UNIX System V. (Ex. 277 ¶¶ 95-114 & Exs. C-H.)

250.   REDACTED

Disputed in that the JFS code that IBM contributed to Linux came from AIX (and previously UNIX System V). (Ex. 277 ¶¶ 95-114 & n.55 & Exs. C-H.) Disputed in that SCO did not assign any intellectual property rights in the JFS source code pursuant to the UnitedLinux Joint Development Agreement. (See SCO's Memorandum in Opposition to IBM's Motion for Summary Judgment on Its Claim for Declaratory Judgment of Non-Infringement (IBM's Tenth Counterclaim).)

251.   REDACTED

Disputed. The cited material does not support the statement.

REDACTED

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REDACTED

252.   SCO has identified thirty files in AIX that contain "origin codes" which, SCO claims, indicate that the files were based on UNIX System V, Release 2 or earlier. (Ex. 54; Ex. 286 ¶ 95; Ex. 291 ¶ 21.) For these files, the Final Disclosures do not identify a single line of source code in AIX that is alleged to be identical to or substantially similar to any source code in UNIX System V. (Ex. 291 ¶ 21.) In any event, origin codes are not necessarily indicators of whether a file contains System V material. (Ex. 291 ¶ 21; Ex. 181 ¶¶ 61, n.12.)

Disputed in that SCO has identified 179 files in AIX that contain origin codes for UNIX

System V. (Exs. 287 & 288.) Disputed in that the evidence shows (and easily permits the

inference) that origin codes are reliable indicators of whether a file contains System V material

and/or is based on or derived from such material. (Ex. 139 ¶¶ 34.)

253.   The Final Disclosures draw no connection with any lines of code in UNIX System V and the JFS code that IBM contributed.   REDACTED

Depending on the meaning of the phrase "draw no connection," disputed in that the JFS

code that IBM contributed to Linux is derived from UNIX System V. (Ex. 277 ¶¶ 95-114 & n.55

& Exs. C-H.)   REDACTED

254.

2.   Read-Copy Update (RCU).

255.

Disputed to the extent the statement suggests that the above-quoted language constitutes

the entire scope of SCO's allegations in Item 2. (See Ex. 144 Item 2 and the referenced Tabs.)

256.   IBM's Linux RCU contributions, and the earlier Sequent implementation of RCU
in Dynix, do not include any UNIX System V code; they are not modifications or derivative
works of UNIX System V; and they were not based on or created with reference to UNIX
System V. They are original IBM work created independent of UNIX System V. (Ex. 231 ¶ 8;
Ex. 258 ¶ 5; Ex. 291 ¶ 124.)

REDACTED

257.   SCO has not specifically identified any UNIX System V material (by version, file, or line of code, or otherwise) that it alleges is contained in RCU. (See Ex. 54 Item 2.)
REDACTED

REDACTED

258.   REDACTED

Disputed in that the cited material does not properly support the second statement. In

IBM Exhibit 258, the declarant does not deny that his RCU was a modification or derived from

UNIX System V. Depending on the meaning of the phrase "did not use," disputed in that the

RCUs at issue were based on or created with reference to UNIX System V. (Ex. 139 ¶¶ 27-30.)

259.   REDACTED

Disputed in that   REDACTED   conclusions are unsupported, given his exclusive

reliance on the two comparison programs he used. (Ex. 287 ¶¶ 116-129 & Ex. A.)

260.   Sequent engineers Paul McKenney and John Slingwine filed a patent application
for RCU on July 19, 1993, and the patent was granted on August 15, 1995. (Ex. 231 ¶ 5; See Ex.
498.) The implementation of RCU in Dynix and the challenged implementation of RCU in
Linux are implementations of the same general concept that is embodied in U.S. Patent #
5,442,758. (Ex. 231 ¶¶ 4-5; Ex. 291 ¶ 27; Ex. 268 at 117-21.)

Disputed to the extent that the statement suggests that AT&T or USL knew or should

have known about the substance of IBM's patent applications. (See Argument at ___.)

    3.   Testing Technologies.

261.   REDACTED

Undisputed.

262.   The allegedly misused testing technology material does not include any UNIX
System V code; it is not a modification or derivative work of UNIX System V; and it was not
based on or created with reference to UNIX System V. It was original Sequent work created
independent of UNIX System V. (Ex. 196 ¶ 5; Ex. 173 ¶ 4; Ex. 291 ¶ 29.)

    REDACTED

263.   REDACTED

Disputed to the extent the statement suggests that SCO was obligated to provide

"versions, files or lines of source code" with respect to all of IBM's allegedly misused material.

(Docket No. 643.) Disputed in that the cited material does not support the statement.

REDACTED

264.   SCO fails to identify anyone at IBM or Sequent as involved in misconduct
relating to the SPIE Test Suits.   REDACTED

REDACTED

Disputed in that the cited material does not support the second and

third statements.

265.   SCO identifies no UNIX System V code, methods, or concepts in connection with
Items 113-142. (Ex. 291 ¶ 30.)

Disputed to the extent the statement suggests that SCO was obligated to provide

"versions, files or lines of source code" with respect to all of IBM's allegedly misused material.

(Docket No. 643.) Disputed in that the cited material does not support the statement. Disputed

REDACTED

266.   The SPIE tests were not part of the Dynix or Dynix/ptx operating systems. (Ex.
208 ¶ 102; Ex. 288 ¶¶ 25, 29; Ex. 173 ¶ 3; Ex. 196 ¶ 4; Ex. 291 ¶ 30.)

REDACTED   at

150-51; Ex. 164 at 256-58.) Disputed in that the cited material does not support the statement.

4. General Operating System Experience.

267. REDACTED

Undisputed.

268. REDACTED

Disputed in that the cited material does not support the statement that none of the IBM

contributors to Linux based their work on experience and know-how gained from their exposure

to UNIX System V source code, methods, or concepts, or the statement that all of the materials

that were in fact contributed by the named programmers were original IBM works created

independent of UNIX System V.

269. SCO identifies no UNIX System V code, methods or concepts (by version, file or line of code or otherwise) in connection with these Items. SCO identifies no Dynix/ptx code, methods, or concepts (by version, file, or line of code) in connection with these Items. (See Ex. 54; Ex. 291 ¶ 34.)

Disputed to the extent the statement suggests that SCO was obligated to provide

"versions, files or lines of source code" with respect to all of IBM's allegedly misused material.

(Docket No. 643.)

270. SCO lists Linux files in connection with these Items, but does not identify which versions or which lines of code in these files contain the allegedly misused material. SCO also lists whole directories in Linux without providing any version, file, and line information. (See Ex. 54; Ex. 291 ¶ 35.)

Disputed to the extent the statement suggests that SCO was obligated to provide

"versions, files or lines of source code" with respect to all of IBM's allegedly misused material.

(Docket No. 643.)

271.   REDACTED

Undisputed.

272.   For all of these Items, the programmers allegedly making the disclosure either (a) did not make any contributions to the files or directories listed or (b) did not base their contributions to the listed files or directories on UNIX System V or refer to UNIX System V in making the challenged contributions. (Ex. 291 ¶ 37; Ex. 292 ¶ 4; Ex. 507 at 40, 57, 199-200, 225-26, 228; Ex. 293 ¶ 4; Ex. 235 ¶¶ 3-5; Ex. 237 ¶¶ 4-5; Ex. 211 ¶¶ 3-5; Ex. 216 ¶¶ 3-5; Ex. 246 ¶¶ 4-6; Ex. 210 ¶¶ 4-7; Ex. 263 ¶¶ 4-6; Ex. 222 ¶¶ 4-6; Ex. 206 ¶¶ 4-5; Ex. 274 ¶¶ 3-4; Ex. 161 ¶¶ 4-5; Ex. 225 ¶¶ 4-5; Ex. 188 ¶¶ 4-5.)

Disputed in that the cited material does not support the statement that none of the IBM

contributors to Linux based their work on experience and know-how gained from their exposure

to UNIX System V source code, methods, or concepts, in that Dynix/ptx is a derivative work

based on UNIX System V and contains source code, methods, and concepts from UNIX System

V (¶ 192), and declarants acknowledge their direct experience with Dynix/ptx.

273.   In some cases (Items 186, 187, 190 and 191), the programmers allegedly making the disclosure did not have experience in Dynix in the particular technology area cited by SCO. (Ex. 291 ¶ 38; Ex. 235 ¶ 3; Ex. 237 ¶ 4 ; Ex. 211 ¶ 3; Ex. 274 ¶ 3; Ex. 188 ¶ 4; Ex. 225 ¶ 4.)

Undisputed.

274.   In some cases (Items 187, 188) the cited technology did not even exist in Dynix. (Ex. 291 ¶ 38; Ex. 246 ¶ 6; Ex. 210 ¶ 7; Ex. 263 ¶ 6; Ex. 222 ¶ 6; Ex. 206 ¶ 6.)

Undisputed.

275.   REDACTED

Undisputed.

X.   Implications of SCO's Theory.

276.   In a nutshell, SCO claims the right to control the code, methods and concepts of any modification or derivative work of System V, even where the code, methods, or concepts do not include or reveal any System V material or were not written or created by SCO or any of its predecessors in interest. (Ex. 43 at 7-8.)   REDACTED

Disputed to the extent the statement refers to all UNIX System V licensees, in that the

cited material does not support such a statement. Depending on the meaning of the term

"control," disputed to the extent the statement suggests that IBM and Sequent did not enter into a

written agreement requiring IBM and Sequent to hold in confidence all parts of their

modifications and derivative works based on the licensed UNIX System V software product (¶¶

13-29, 82-686), and to the extent the statement suggests that AIX and Dynix/ptx are not

derivative works based on UNIX System V (¶ 192). Disputed to the extent the statement

suggests that SCO challenges the employability of programmers as such, which SCO does not

and which statement the cited material does not support. (See Argument at __.)

277.   SCO's claim depends on the proposition that SCO's alleged predecessor (AT&T) acquired the right to control modifications and derivatives of System V pursuant to its System V licensing agreements. The argument appears to be that SCO has the right to control not only System V, but also the code, methods and concepts of other flavors of UNIX, like AIX and Dynix. In fact, SCO seems to claim that it has the right to control any code, methods, and concepts ever associated with System V. (Ex. 181 ¶ 52.)

Disputed to the extent the statement refers to all UNIX System V licensees, in that the

cited material does not support such a statement. Depending on the meaning of the term

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"control" and "associated with," disputed to the extent the statement suggests that IBM and

Sequent did not enter into a written agreement requiring IBM and Sequent to hold in confidence

all parts of its modifications and derivative works based on the licensed UNIX System V

software product. (¶¶ 13-29, 82-86.)

278.   When informed of the interpretation of the IBM and Sequent Software
Agreements that SCO is advancing in this case, the individuals from AT&T who were involved
in negotiating the agreements state unequivocally that SCO is wrong. (Ex. 217 ¶ 24; Ex. 189 ¶¶
27-28; Ex. 281 ¶ 28; Ex. 182 ¶ 31; Ex. 275 ¶ 30.)

Disputed to the extent the statement suggests that the cited declarants had the authority to

modify the terms of AT&T's standard form UNIX license agreements, to the extent the

statement suggests that the cited declarants were the only individuals under whose direction

AT&T licensed its UNIX source code, and to the extent the statement suggests that the cited

declarants have not offered conflicting and contradictory sworn testimony and taken conflicting

and contradictory actions. (¶¶ 63-163.) Disputed in that other substantial evidence shows (and

easily permits the inference) that the cited declarants did not have such a view during their tenure

at AT&T. (¶¶ 63-163.)

279.   According to Mr. Wilson, 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 Mr. Wilson and others at AT&T not
intend the agreements to be read that way, but they also went out of their way to assure AT&T's
licensees that that is not what the agreements meant. (Ex. 282 ¶ 30.)

Disputed to the extent the statement suggests that Mr. Wilson had the authority to modify

the terms of AT&T's standard UNIX license agreements or was the only individual under whose

direction AT&T licensed its UNIX source code. (¶¶ 76-96.) Disputed in that substantial

evidence shows (and easily permits the inference) that Mr. Wilson did not have such a view

during his tenure at AT&T. (¶¶ 163-63.) Disputed to the extent the statement suggests that Mr.

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Wilson has not offered conflicting and contradictory sworn testimony and taken conflicting and contradictory actions. (¶¶ 63-163.) Disputed to the extent the statement suggests that IBM and Sequent did not enter into a written agreement requiring IBM and Sequent to hold in confidence all parts of its modifications and derivative works based on the licensed UNIX System V software product. (¶¶ 13-29, 82-86.) Disputed to the extent that the statement suggests that, upon entering into their written agreement, the parties did not intend to exclude any previous oral discussion from the agreement the parties had reached. (¶¶ 18, 91-92.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.)

280. SCO's interpretation of the Agreements is impossible to reconcile with what Mr. Frasure (and, he believes, others at AT&T) understood the Software Agreements to mean. Mr. Frasure never suggested, nor would have thought to suggest, to AT&T's 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, Mr. Frasure did not believe that AT&T's customers (particularly large ones like IBM) would have entered into agreements that placed restrictions of the kind SCO seeks to impose on their use of code that they developed. In fact, some, including IBM, specifically said so. (Ex. 189 ¶¶ 18-26.)

Disputed to the extent the statement suggests that Mr. Frasure had the authority to modify the terms of AT&T's standard UNIX license agreements or was the only individual under whose direction AT&T licensed its UNIX source code. (¶¶ 76-96.) Disputed in that substantial evidence shows (and easily permits the inference) that Mr. Frasure did not have such a view during his tenure at AT&T. (¶¶ 63-163.) Disputed to the extent the statement suggests that Mr. Frasure has not offered conflicting and contradictory sworn testimony. (¶¶ 125-37.) Disputed to the extent the statement suggests that IBM and Sequent did not enter into a written agreement requiring IBM and Sequent to hold in confidence all parts of its modifications and derivative

works based on the licensed UNIX System V software product. (¶¶ 13-29, 82-86.) Disputed to the extent that the statement suggests that, upon entering into their written agreement, the parties did not intend to exclude any previous oral discussion from the agreement the parties had reached. (¶¶ 18, 91-92.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.)

281. According to Mr. DeFazio, SCO's claims are inconsistent with the provisions of the Agreements. He does not believe that anyone at AT&T, USL, or Novell intended the Agreements to be construed as SCO construes them. In all cases, according to Mr. DeFazio, modifications and licensees' contributions to 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 actually included therein) because they are owned by the licensees. (Ex. 182 ¶ 31.)

Disputed to the extent the statement suggests that Mr. DeFazio had the authority to modify the terms of AT&T's standard UNIX license agreements or was the only individual under whose direction AT&T licensed its UNIX source code. (¶¶ 76-96.) Disputed in that substantial evidence shows (and easily permits the inference) that Mr. DeFazio did not have such a view during his tenure at AT&T. (¶¶ 63-163.) Disputed to the extent the statement suggests that IBM and Sequent did not enter into a written agreement requiring IBM and Sequent to hold in confidence all parts of its modifications and derivative works based on the licensed UNIX System V software product. (¶¶ 13-29, 82-86.) Disputed to the extent that the statement suggests that, upon entering into their written agreement, the parties did not intend to exclude any previous oral discussion from the agreement the parties had reached. (¶¶ 18, 91-92.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the

terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.)

282.   Despite the fact that SCO's theory is contrary to the plain language of the Agreements and the intent of the individual who negotiated them, it would, if accepted, have far-reaching, negative implications. (Ex. 181 ¶ 51.)

Disputed to the extent the statement suggests that IBM and Sequent did not enter into a written agreement requiring IBM and Sequent to hold in confidence all parts of its modifications and derivative works based on the licensed UNIX System V software product. (¶¶ 13-29, 82-86.) Disputed to the extent that the statement suggests that, upon entering into their written agreement, the parties did not intend to exclude any previous oral discussion from the agreement the parties had reached. (¶¶ 18, 91-92.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.) Depending on the meaning of the phrase "far-reaching, negative implications," disputed in that prior to deciding to license the UNIX source code, any company could have decided instead to try to develop its own operating system, including its own UNIX-like operating system, and thereby be free of any control over their "homegrown" material reserved to the UNIX licensor. (¶ 42.) AT&T's capacity to negotiate and obtain partial control over its licensees UNIX flavors was a function of the many years that AT&T and its predecessors had invested in developing UNIX, and that prospective licensees recognized they would have to spend if they wanted to try to develop their own UNIX-like operating system from scratch. (¶¶ 32-47.) The subsequent prevalence of UNIX flavors in

the industry – the fact that so many companies decided instead to license the UNIX head-start –

serves to reinforce the reasonableness of the terms of the UNIX licenses. (¶¶ 32-47.) Disputed

to the extent the statement suggests that the IBM and Sequent Agreements set forth unreasonable

term or are void on grounds of public policy. (See Argument at __.) Disputed to the extent the

statement suggests that all or even a significant amount of the UNIX System V methods or

concepts have been made publicly available without restriction. (Ex. 139 ¶¶ 23-26; Ex. 278 ¶

86.)

283.   If SCO had such a right to control modifications and derivative works of System
V, then it would have extraordinary -- indeed, seemingly limitless -- control over the software
industry. AT&T and its successors widely disseminated information about the code, methods,
and concepts of System V. System V alone has been licensed for redistribution to thousands of
entities worldwide. These licensees have combined the code, methods, and concepts of System
V software with hundreds of millions of lines of original non-AT&T code and many thousands
of original, non-AT&T methods and concepts. For example, certain versions of AIX include
more than 100 million lines of non-AT&T code, methods and concepts. Thus, if SCO had the
right to control modifications and derivative works of System V, then it would control vast
quantities of others' property. (Ex. 181 ¶ 53.)

Depending on the meaning of the terms "original" and "control," disputed on the same

bases as set forth in response to IBM Statement of Fact Paragraph 283.

284.   The viral quality of SCO's claim would give it control rights well beyond the life
of the System V rights that the "control rights" are purported to protect. The apparent purpose of
the "control rights" claimed by SCO seems to be to ensure, among other things, the
confidentiality of AT&T System V code, methods, and concepts. The argument seems to be
prophylactic in nature: by retaining control of its licensees' code, methods, and concepts, SCO
can retain control of any System V code, methods, and concepts that might be included therein.
Even where the code, methods, and concepts of System V are no longer confidential, SCO would
have the right to control the original works of its licensees, System V could become freely
available and SCO's right to control others' works would (under its theory) persist. (Ex. 181 ¶
54.)

Depending on the meaning of the term "viral quality," disputed to the extent the

statement suggests that it is inappropriate for a contract to cover the derivative works of a

program, in that the very contract that Linux is distributed under also controls the derivative

works of Linux (Ex. 278 ¶ 84), and IBM's own AIX source-code licenses require that AIX

licensees treat all parts of derivative works of AIX as confidential (Ex. 278 ¶ 85; Exs. 348, 349,

350). The UNIX license agreements cannot be interpreted to have a lesser scope simply because

AT&T and its successors were successful in a licensing a product pursuant to licenses whose

terms the licensees evidently found reasonable. (¶¶ 30-62.) Disputed to the extent the statement

suggests that the IBM and Sequent Agreements set forth unreasonable terms or are void on

grounds of public policy. (See Argument at I.) Disputed to the extent the statement suggests that

all or even a significant amount of the UNIX System V methods or concepts have been made

publicly available without restriction. (Ex. 139 ¶¶ 23-26; Ex. 278 ¶ 86.)

285. From a practical standpoint, if SCO had the right to control the code, methods, and concepts of all flavors of UNIX, the owners of those products would be limited in their ability to support or even market them. To support and market an operating system, it is often necessary to reference and disclose the code, methods, and concepts of the operating system. If SCO, as opposed to IBM, had the right to control what IBM could say publicly about the non-System V code, methods and concepts of AIX, for example, then IBM could not provide installation and technical assistance without the cooperation of SCO (an IBM competitor). (Ex. 181 ¶ 55.)

Disputed to the extent the statement refers to all UNIX System V licensees, in that the

cited material does not support such a statement. Disputed in that the statement ignores the

"material breach" component of the UNIX System V license agreements, and bear no

comparison to the wholesale disclosures IBM undertook in the course of its Linux-development

efforts. (Ex. 139 ¶¶ 2-22.) Disputed to the extent the statement suggests that the IBM and

Sequent Agreements set forth unreasonable terms or are void on grounds of public policy. (See

Argument at I.)

286.   Moreover, if, as it contends, SCO's "control rights" extend to experience and know-how (positive or negative), then it could control the employment of a significant sector of the computer industry. Many hundreds of thousands of people have been exposed to the code, methods, and concepts of System V and other flavors of UNIX. SCO and its predecessors have disseminated such information to many, many, thousands of persons and entities. Assuming the truth of SCO's claims about the scope of its control rights, it would appear to have the ability to control the employability of these persons. (Ex. 181 ¶ 56.)

Disputed to the extent the statement refers to all UNIX System V licensees, in that the

cited material does not support such a statement. Disputed to the extent the statement suggests

that SCO interprets the Agreements to impose restrictions on employment or employability as

such. SCO does not base any claim of breach on the mere fact that IBM employed former

Sequent employees. Disputed to the extent the statement suggests that the IBM and Sequent

Agreements set forth unreasonable terms or are void on grounds of public policy. (See

Argument at I.) Disputed to the extent the statement suggests that all or even a significant

amount of the UNIX System V methods or concepts have been made publicly available without

restriction. (Ex. 139 ¶¶ 23-26.)

287.   At the same time, SCO would have little information about the scope of its rights. It could not, as a practical matter, know to what extent its licensees have associated their own original code, methods, and concepts with System V code, methods, and concepts. It could know even less about the extent to which software developers have relied upon public information about the code, methods, and concepts of System V. Thus, if SCO had the right to control modifications and derivative works, there would be widespread uncertainty about the scope of SCO's rights, including the identity of the persons whose employability it claims to have controlled. (Ex. 181 ¶ 57.)

Disputed to the extent the statement suggests that SCO interprets the Agreements to

impose restrictions on employment or employability as such. SCO does not base any claim of

breach on the mere fact that IBM employed former Sequent employees. Disputed to the extent

the statement suggests that the IBM and Sequent Agreements set forth unreasonable terms or are

void on grounds of public policy. (See Argument at I.)

288.   Based in part on the assurances of AT&T and its successors about what UNIX licensees could do with their original works, IBM and Sequent invested heavily in the development of AIX and Dynix. (Ex. 257 ¶¶ 3-5; Ex. 310 at 29:8-31:5, 56:11-57:5, 62:20-63: 17, 119:16-120:2, 127:15-128:1 (Ex. 257 ¶¶ 3-5, 10; Ex. 283 ¶ 87.) IBM assigned thousands of people to AIX projects. (Ex. 257 ¶¶ 3-5, 10; Ex. 283 ¶ 87.)   REDACTED

Sequent devoted hundreds of person-years to developing Dynix. (Ex. 596 ¶ 4.) Both companies invested at least tens of millions of dollars in developing their businesses around AIX and Dynix. (Ex. 257 ¶ 7, 10; Ex. 283 ¶ 87; Ex. 596 ¶¶ 3-4.)

Disputed in that substantial evidence shows (and easily permits the inference) that no

such assurances were given (¶¶ 63-163), and in that IBM and Sequent otherwise had compelling

reasons to agree to the terms of the contracts they did (¶¶ 30-62.) Disputed to the extent the

statement suggests that IBM and Sequent did not enter into agreements requiring them to hold in

confidence all parts of their modifications and derivative works based on the licensed UNIX

System V software product. (¶¶ 13-29, 82-86.) Disputed to the extent that the statement

suggests that, upon entering into their written agreements, the parties did not intend to exclude

any previous or subsequent oral discussions from the agreement the parties had reached. (¶¶ 18,

91-92.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set

forth the terms under which UNIX System V could be used and disclosed by them and under

which they could distribute software programs "based on" UNIX System V." (IBM Statement of

Undisputed Facts ¶ 50.) Disputed to the extent the statement suggests that SCO interprets the

Agreements to impose restrictions on employment or employability as such. SCO does not base

any claim of breach on the mere fact that IBM employed former Sequent employees. Disputed

to the extent the statement suggests that the IBM and Sequent Agreements set forth unreasonable

terms or are void on grounds of public policy. (See Argument at ___.)

289.   Both companies added significant quantities of original code to the operating systems. To give an example, the original AT&T SVR2.0 source code totaled 896,204 lines of

code. (Ex. 181 Ex. G.) The AIX Version 5.1.G for Power contains 160,198,865 lines of code. (Id.) SCO does not and could not allege that AIX or Dynix incorporate all of any version of System V. (See Ex. 285 at 22-25.)

Depending on the meaning of the term "original" and "significant quantities," disputed to the extent the statement suggests that some specific amount of the quoted number of lines of code in AIX were written without reference to, reliance on, or exposure to the licensed UNIX System V software product, in that the cited material does not support such an assertion.

290. Since the initial introduction of the original versions of AIX in 1987, IBM has incorporated new technology and improvements, including Virtual Resource Manager, a Journaled File System, a Logical Volume Manager, an Object Data Manager, a System Management Interface Tool and a Network Install Manager, and others. (Ex. 257 ¶ 8; Ex. 283 ¶¶ 81-85.) Subsequent AIX versions integrated even more enhancements, including a Web-based System Manager, an IBM Java Development Kit, an AIX Workload Manager, and many other developments. (Ex. 257 ¶ 8; Ex. 283 ¶¶ 81-85.)

Depending on the meaning of the term "new technology," disputed in that the cited material does not support the statement, where the declarant in IBM Exhibit 257 acknowledges that "Each of these developments . . . are comprised primarily of non-UNIX source code," which means that they contain UNIX source code, which in turn means that they are modifications and derivative works of UNIX.

291. AIX code has been employed in other IBM products, including servers, printers, and multi-protocol routers. (Ex. 257 ¶ 9; Ex. 283 ¶ 89.)

Disputed in that the cited material in IBM Exhibit 283 is inadmissible evidence based solely on an expert's description of the unsubstantiated recollections of an IBM employee.

292. Each of these developments stands on its own right and is comprised of non-UNIX source code. Some of them can even be considered stand-alone products. If IBM had believed that these additions to UNIX would have subjected the code to the confidentiality provisions of the licensing agreements, it would not have packaged them with AIX. Similarly, AIX code has been employed in other IBM products, including servers, printers, and multiprotocol routers. If IBM ever believed that the IBM code included with AIX in these IBM

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products would be subject to the confidentiality provisions of the licensing agreements, AIX would not have been used in these products. (Ex. 257 ¶ 9.)

Disputed in that the cited material does not support the statement, where the declarant in IBM Exhibit 257 acknowledges that "Each of these developments . . . are comprised primarily of non-UNIX source code," which means that they contain UNIX source code, which in turn means that they are modifications and derivative works of UNIX. Disputed to the extent the statement suggests that licensees did not enter into agreements requiring them to hold in confidence all parts of their modifications and derivative works based on the licensed UNIX System V software product. (¶¶ 13-29, 82-86.) Disputed to the extent that the statement suggests that, upon entering into their written agreements, the parties did not intend to exclude any previous or subsequent oral discussions from the agreement the parties had reached. (¶¶ 18, 91-92.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.) Disputed in that IBM otherwise had compelling reasons for improving AIX as it did. (¶¶ 30-62.)

293. In sum, if AT&T or its successors had ever expressed the position SCO asserts in this lawsuit, IBM and Sequent would have directed the vast amount of financial and human resources they spent on AIX and Dynix quite differently. (Ex. 257 ¶¶ 6, 9; Ex. 596 ¶¶ 3-4.)

Disputed in that substantial evidence shows (and easily permits the inference) that AT&T and its successors-in-interest ever stated, orally or in writing, that its UNIX System V licensees were not obligated to hold in confidence all parts of their modifications and derivative works based on the licensed UNIX System V software product. (¶¶ 13-29, 82-86.) Disputed to the extent the statement suggests that licensees did not enter into agreements requiring them to hold

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in confidence all parts of their modifications and derivative works based on the licensed UNIX System V software product. (¶¶ 13-29, 82-86.) Disputed to the extent that the statement suggests that, upon entering into their written agreements, the parties did not intend to exclude any previous or subsequent oral discussions from the agreement the parties had reached. (¶¶ 18, 91-92.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.) Disputed to the extent the statement suggests that IBM or Sequent had compelling business reasons to insist on the "control" as described by IBM herein. (¶¶ 30-62.)

CERTIFICATE OF SERVICE

Plaintiff/Counterclaim-Defendant, The SCO Group, Inc., hereby certifies that a true and correct copy of the foregoing was served on Defendant/Counterclaim-Plaintiff, International Business Machines Corporation, on this 16th day of February 2007, via CM/ECF to the following:

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