

# **EXHIBIT 1**

1 2006-11-30 SCO v IBM Hearing.txt  
IN THE UNITED STATES DISTRICT Court  
2 FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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5 THE SCO GROUP, INC. )  
6 )  
7 Plaintiff/Counterclaim-Defendant, )  
8 vs. )

Case No.

9 )  
INTERNATIONAL BUSINESS MACHINES )  
10 CORPORATION, )  
11 )  
12 Defendant/Counterclaim-Plaintiff. )

2:03-CV-294 DAK

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16 BEFORE THE HONORABLE DALE A. KIMBALL  
17 DATE: NOVEMBER 30, 2006  
18 REPORTER'S TRANSCRIPT OF PROCEEDINGS  
19 MOTION HEARING

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Reporter: REBECCA JANKE, CSR, RMR

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3 FOR SCO GROUP:

A P P E A R A N C E S  
HATCH, JAMES & DODGE

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1 OCTOBER 24, 2006

SALT LAKE CITY, UTAH

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P R O C E E D I N G S

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2006-11-30 SCO v IBM Hearing.txt

5 THE COURT: Good afternoon, Ladies and  
6 gentlemen. We're here in the SCO Group, Inc. vs.  
7 International Business Machines Corporation on IBM's  
8 motion to confine SCO's claims and to strike allegations  
9 in excess of the final disclosures.

10 Counsel, I see some of the same players but  
11 others that are different. If you'd make appearances for  
12 the record, please.

13 MR. HATCH: Brent Hatch on behalf of SCO.

14 MS. BORUCHOW: Sashi Bach Boruchow from Boies,  
15 Schiller & Flexner for SCO.

16 MR. PADMANABHAN: Devan Padmanabhan for SCO  
17 group.

18 MR. TIBBITTS: Ryan Tibbitts. I'm the general  
19 counsel for SCO Group.

20 MR. SCHAUGHNESSY: Good afternoon, Your Honor.  
21 Tod Shaughnessy for IBM.

22 MR. MARRIOTT: David Marriott for IBM.

23 THE COURT: Thank you, Counsel. Counsel, I  
24 have reviewed all the submissions related to this motion  
25 and believe myself conversant with the issues. I am also

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1 apprised of Judge Kimball's order of yesterday affirming  
2 the Magistrate Judge's order of June 28, 2006. I'm not  
3 certain but would ask counsel to address specifically in  
4 their arguments how, if in any way, you believe that  
5 Judge Kimball's ruling may affect this motion.

6 So, with that having been said, and this is  
7 IBM's motion, Mr. Marriott.

8 MR. MARRIOTT: Thank you, Your Honor to answer  
Page 3

2006-11-30 SCO v IBM Hearing.txt

9 Your Honor's question, the disposition of the present  
10 motion is dictated, Your Honor, by yesterday's order by  
11 Judge Kimball as well as by the four prior related orders  
12 that preceded it. Those orders, we would respectfully  
13 submit, unequivocally compel the granting of IBM's motion  
14 in the present circumstance. In fact, Your Honor, the  
15 reasons for granting the present motion are far more  
16 compelling than were the reasons for granting IBM's prior  
17 preclusion motion.

18 The issues presented by the preclusion motion,  
19 Your Honor, were whether SCO could proceed with that  
20 allegedly misused material which was identified in its  
21 final disclosures but not identified in the final  
22 disclosures with the requisite particularity. And now  
23 both Your Honor and Judge Kimball have said they can not  
24 proceed with that allegedly misused material which was  
25 not identified with the requisite level of specificity.

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1 The issue presented by the present motion, Your  
2 Honor, is whether or not SCO may proceed with respect to  
3 material that is not identified at all in the final  
4 disclosures, let alone identified there with requisite  
5 specificity.

6 SCO's final disclosures, for example,  
7 identified 326 lines of allegedly infringing material in  
8 the Linux kernel, 326 lines. SCO's expert reports, Your  
9 Honor, expand that number to essentially every file and  
10 every line of code in the Linux kernel.

11 So, with Your Honor's permission, I would like  
12 to do three things: First, I would like to emphasize the  
Page 4

2006-11-30 SCO v IBM Hearing.txt

13 critical facts which, we submit, are undisputed and which  
14 are dispositive of the present motion.

15           Second, Your Honor. I would like to list for  
16 the Court, and I emphasize "list," the reasons in support  
17 of this motion. And I say "list," Judge, because since I  
18 believe the present motion is dictated by the prior  
19 orders, I believe Your Honor is familiar with the  
20 rationale that would underlie the ruling that I urge upon  
21 the Court.

22           And, finally, Your Honor, I would like to  
23 respond to the primary argument offered by the SCO group  
24 in response to IBM's present motion.

25           If I may approach, Your Honor, we have prepared

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♀           1 a little booklet which I hope will make it easy to follow  
2 our presentation.

3           First, the facts, Your Honor. I know Your  
4 Honor is familiar with the facts, but I would,  
5 nevertheless, ask your indulgence in at least some  
6 repetition for the sake of context here. If Your Honor  
7 takes a look at the first tab within the binder, you will  
8 see that SCO filed its Complaint in March of 2003. At  
9 the same time, it began what the Court has, at times,  
10 referred to as making a plethora of public statements  
11 about the scope of its evidence. And at tab 2, you will  
12 find reference to some of those statements with which I  
13 know Your Honor is familiar.

14           From the beginning, Judge, we have asked SCO to  
15 identify the allegedly misused information with  
16 specificity and in detail. And the requests that we

2006-11-30 SCO v IBM Hearing.txt

17 asked are, among others, included at tab 3 of the binder  
18 we have given Your Honor. We did that, Your Honor,  
19 because, as you know, I believe, SCO's claims implicate  
20 literally billions of lines of allegedly misused code,  
21 and you can see that at tab 4 of the binder.

22 We also did that, Your Honor, because the  
23 nature of these claims requires a line-by-line analysis  
24 of SCO's allegations, and if you look at tab 5 of the  
25 binder, you will see, in what we have already previously

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1 given Your Honor in connection with the preclusion  
2 motion, a list of related copyright principles and then,  
3 behind those principles, a set of the questions that  
4 naturally flow from them. And answering those questions  
5 is, by and large, a line-by-line exercise.

6 And it is for that reason that we asked, and I  
7 believe Your Honor ordered a line-by-line recitation by  
8 SCO. SCO declined. IBM moved to compel. Your Honor  
9 issued two orders requiring the disclosure of that  
10 information. I know they are familiar to you. They are  
11 excerpted at tab 6. SCO nevertheless failed to provide  
12 the information, Your Honor, and we moved for summary  
13 judgment. And as I think you also know, Judge Kimball  
14 denied IBM's motion for summary judgment with leave to  
15 refile at a later date, which we have done, but, in  
16 connection with that motion, observed that despite SCO's  
17 public statements and the passage of, by that time,  
18 nearly two years of litigation, it had adduced no  
19 competent evidence of the alleged infringement.

20 And Your Honor can see that from the chronology  
Page 6

2006-11-30 SCO v IBM Hearing.txt

21 which appears at tab 1 of the Your Honor's book.

22 Following Judge Kimball's order denying IBM's  
23 motion for summary judgment, we proposed to the Court  
24 that it set a final deadline for the disclosure of  
25 allegedly misused material, with an interim date

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1 preceding it. We proposed, Your Honor, that that be the  
2 end of the parties' ability to finally identify the  
3 allegedly misused information. And an excerpt from our  
4 proposal is found at tab 8 of the binder which Your Honor  
5 has.

6 We were clear in that proposal, Your Honor,  
7 that final meant final and that the parties were not to  
8 attempt to use expert reports as a means of end running  
9 the requirement to provide information finally in  
10 specificity. SCO opposed that motion and, interestingly,  
11 opposed it on the grounds that there was no need for such  
12 an order because the Court already had a full arsenal of  
13 power to cause a party not to be able to use information  
14 not properly disclosed. And, if you look at tab 9 of the  
15 book, you will see a quote from SCO's papers where it  
16 indicates there is no reason for the order because the  
17 Court already has that power.

18 On July 1, 2005 Judge Kimball effectively  
19 adopted SCO's proposal and set a deadline for interim and  
20 final disclosures. He made clear and the Court has  
21 subsequently made clear that what was required is a  
22 specific identification of that which is alleged to have  
23 been misused. And so clear was it, Your Honor, I would  
24 submit, that thereafter, as you will see on the



2006-11-30 SCO v IBM Hearing.txt

25 chronology, and at tab 11 of the book, IBM and SCO

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1 entered into a stipulation of a related discovery matter,  
2 and SCO stipulated that it would not disclose and that it  
3 would not seek to use information not identified with  
4 specificity within the final disclosures.

5 On the 22nd of December of 2005, the parties  
6 submitted, exchanged their final disclosures, and SCO  
7 identified, in its final disclosures, 294 items of  
8 allegedly misused information. Some of those items  
9 concern copyright infringement allegations. Some of them  
10 concern breaches of contract. Very few of those items,  
11 Your Honor -- and I emphasize this -- very few of them  
12 are at issue on the present motion.

13 I would refer Your Honor to tab 12, if I may,  
14 of the book. As to SCO's allegations of infringement  
15 within the Linux kernel, it identified 326 lines of code,  
16 the 326 I've mentioned previously. As to SCO's  
17 allegations of breach of contract, it identified a  
18 variety of alleged misused code, only two items of which  
19 are relevant to this motion. One concerns JFS, which  
20 stands for Journal File System. In that regard, SCO  
21 identified 17 lines of code. It also identified certain  
22 testing technology code and there identified  
23 approximately 9,000 lines of code.

24 Now, for simplicity, Your Honor, what I would  
25 like to do, with your permission, is focus you on the 326

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2006-11-30 SCO v IBM Hearing.txt  
1 lines of code because I think the point and the problem  
2 that this motion seeks to address is illustrated as well  
3 by the 326 as it is by reference to all. So, if you take  
4 a look at tab 13 within the book, you will see a little  
5 bit more detail about these 326 lines of code.

6 They fall into three categories: Certain  
7 header file code. The final disclosures identify 181  
8 lines of supposed header file code. Certain  
9 specifications, L. specifications. There are 121 lines  
10 identified. And then, finally, certain miscellaneous  
11 code, which concerns memory allocation, of which 24 lines  
12 were identified.

13 And Your Honor made clear, and I point you to  
14 tab 14 of the book, that the parties were only to use  
15 that information which was identified there with the  
16 requisite specificity.

17 Now we moved, Judge, as you well know, to  
18 preclude certain of the 294 items. The preclusion motion  
19 did not address, did not concern the 326 lines that are  
20 at issue here in the Linux kernel code. They didn't  
21 concern the testing technology code here, and they did  
22 not concern the JFS code.

23 Now, following the receipt of SCO's final  
24 disclosures, IBM undertook discovery with respect to  
25 these 326 lines of code. Now, Just to back up for a

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1 second, if you remember, Judge Kimball denies IBM's  
2 motion for summary judgment. The Court, in July, enters  
3 an order indicating the final disclosures will be  
4 required.

2006-11-30 SCO v IBM Hearing.txt

5 At that time, Your Honor, SCO identified no  
6 code, as Judge Kimball acknowledged, indicating supposed  
7 infringement. We believed then that roughly three months  
8 of discovery with respect to what SCO would identify  
9 would be sufficient, and we undertook, following the  
10 Court's -- following the submission by SCO of its final  
11 disclosures of discovery as those 326 lines of code, a  
12 line-by-line related analysis, and on May 19, as you will  
13 see from the chronology, the parties submitted their  
14 opening expert reports.

15 IBM's opening expert reports addressed the 326  
16 lines of codes which our experts had then spent five or  
17 so months evaluating, evaluating on a line-by-line basis.  
18 And I would refer you to tab 15, where you will see an  
19 excerpt from the report of two of our experts. That  
20 table, Judge, lists the files in which these 326 lines of  
21 code are found and some of the analyses, and I underscore  
22 "some," only some of the analyses that IBM's experts did.  
23 And if you flip further into that same tab you will see  
24 an excerpt from one of the Linux files, and you will see  
25 the highlighted code which SCO contends was --

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1 THE Court: What tab is that?

2 MR. MARRIOTT: This is tab 15, your Honor --  
3 14, I'm sorry. You will see a blue chart, and behind the  
4 blue chart you will see an excerpt from a file, and if  
5 you look in the left margin, you will see colored dots by  
6 each of the lines. Those colored dots reflect just some  
7 of the analyses that were done on a line-by-line basis by  
8 IBM's experts. If you look back at tab 5 and you look at

2006-11-30 SCO v IBM Hearing.txt

9 all of those questions, we asked those questions, and we  
10 undertook those analyses as to each of those 326 lines of  
11 code.

12 At the same time IBM submitted its expert  
13 reports, you received reports from SCO's experts,  
14 including the three reports that are at issue on this  
15 motion. Each of those three reports in some respects,  
16 not in all respects, exceeded the scope of SCO's final  
17 disclosures. And, if you look at tab 16, you will see  
18 that, Your Honor.

19 With respect to Linux, the final disclosures  
20 had identified 326 lines. SCO's expert reports  
21 effectively claim every file and every line of code in  
22 Linux.

23 With respect to JFS, the expert reports  
24 identified seven times the code identified in the final  
25 disclosures.

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1 Now, with respect to testing technologies,  
2 there were an additional 15 thousand lines of code  
3 identified.

4 Now let me point you to, if I may, to the 326  
5 lines specifically, so if you look at tab 17, those 326  
6 lines consisted of header files, specifications and  
7 certain miscellaneous code. With respect to the header  
8 files, Your Honor, no new additional code was identified.  
9 With respect to the specifications, we went from 121  
10 lines to essentially the entire ELF format which  
11 represents, certainly, thousands of lines of code. With  
12 respect to the miscellaneous category, we went from 24 to

2006-11-30 SCO v IBM Hearing.txt

13 a hundred.

14 Far more problematic, however, Judge, was not  
15 adding lines of code within an existing category, though  
16 that was clearly what is and was problematic; far more  
17 problematic was identifying entire new categories of  
18 alleged misused information.

19 The Cargill report, one of SCO's experts,  
20 claims as misused the entire structure of the Linux  
21 operating system as well as the entire file system of the  
22 Linux operating system, as well as roughly all of the  
23 system calls in Linux. That effectively amounts, Your  
24 Honor, to claiming every file and every line of code in  
25 the Linux kernel.

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1 Now, also identified was new streams material,  
2 which is a footnote here, Your Honor. That material is  
3 not in the Linux kernel. We don't emphasize it because  
4 our claim for a declaration of non-infringement is about  
5 the Linux kernel, but there was also material outside the  
6 kernel that was new for the first time in SCO's expert  
7 reports.

8 Now, IBM moved for summary judgment on  
9 September 25 of this year, and in November SCO filed its  
10 opposition papers, and in those opposition papers,  
11 opposition papers to IBM's motion seeking a declaration  
12 of non-infringement relating to Linux, SCO argues, in  
13 effect, that IBM's motion should be denied, and it should  
14 be denied because IBM fails even to address all of this  
15 new material identified by SCO for the first time in its  
16 expert reports.

2006-11-30 SCO v IBM Hearing.txt

17 Your Honor was, as I indicated before, clear.  
18 The parties were not to use, in connection with summary  
19 judgment filings, material not identified in their final  
20 disclosures. We promptly brought this motion to the  
21 Court's attention. We did not and could not have  
22 considered the code beyond the 326 lines in IBM's expert  
23 reports. We didn't do it, Your Honor, because we believe  
24 the Court has been clear from the beginning that that was  
25 not required, and we could not have done it, Your Honor,

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1 because it took us roughly six months, five, six months  
2 of evaluating the 326 lines, to do that analysis, and  
3 that was with the benefit of discovery.

4 It would take, to put it mildly, a very long  
5 time to evaluate all of this new, allegedly misused  
6 information. Going from 326 lines of allegedly  
7 infringing code to all Linux code files being supposedly  
8 infringing, is like going from an arena, Your Honor, of  
9 22,000 fans in which one is identified, to claiming that  
10 all are, in some sense, implicated. And you can see that  
11 at tab 18 of our binder.

12 And I would just remind you, Judge, as you  
13 think about these issues, that in opposing IBM's first  
14 motion for summary judgment, which SCO -- which Judge  
15 Kimball denied, SCO argued that the Court should not  
16 enter summary judgment because it would require roughly  
17 25,000 man years to compare just one version of Linux to  
18 one version of UNIX. And that is, effectively, now, what  
19 IBM is being asked do.

20 So, why should Your Honor grant these motions?

2006-11-30 SCO v IBM Hearing.txt

21 Your Honor, the reasons why the Court should grant these  
22 motions are on these facts I think familiar to the Court.  
23 They are set out in IBM's papers in support of this  
24 motion, and I will not belabor them here, Your Honor, and  
25 though it's IBM's motion, we didn't feel, as Your Honor

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1 may recall, that oral argument was even necessary in this  
2 motion.

3           But let me emphasize three points, if I may.  
4 First, Your Honor, the Court has been clear, I think  
5 crystal clear, that the parties were not and are not  
6 allowed to proceed in this litigation with respect to any  
7 material that is not specifically identified, as the  
8 Court has now laid out, in the parties' final  
9 disclosures. No exceptions were made for end runs based  
10 on information analyzed or discussed in expert reports  
11 which followed. Yesterday's order makes that clear. The  
12 preceding four related orders make that clear. The case  
13 law makes that clear as illustrated in tabs 19 and 20 of  
14 the book. Rule 37 makes that clear, and the parties'  
15 stipulation, I respectfully submit, ought, in this  
16 respect, to count for something.

17           Second, your Honor, the material that is at  
18 issue here was not identified by SCO in the final  
19 disclosures. And it certainly was not identified by SCO  
20 with the requisite specificity required by the Court, and  
21 I would refer you, in this regard, if I may, to tab 22 of  
22 the book, the last of the tabs. Here, Your Honor, we  
23 have indicated the material that is new, as a result of  
24 SCO's expert reports. And based on SCO's opposition

2006-11-30 SCO v IBM Hearing.txt  
25 papers, Your Honor, there is no link to this allegedly --

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1 to this allegedly new misused material to the final  
2 disclosures. This is taking SCO's opposition papers and  
3 looking at the citations they provide.

4 As I indicated, the Cargill report claims the  
5 entire overall structure of Linux. It is now identified  
6 as allegedly infringing material, the entire structure.  
7 Is there a citation in SCO's brief to the final  
8 disclosures for that? No. As to the overall file  
9 systems, there is no citation in SCO's papers to where in  
10 the final disclosures that's found. It's not there.

11 In SCO's opposition papers, there is likewise  
12 no indication of where, in the final disclosures, SCO  
13 claims system calls. The 76 new miscellaneous items,  
14 likewise, Your Honor, have no citation. What citation is  
15 there? If you look toward the bottom of this chart,  
16 SCO's expert is now claiming the entire ELF format is  
17 infringed by their alleged copyrights in UNIX. And, in  
18 support of that proposition, they point to item  
19 numbers -- and this is the item numbers in their final  
20 disclosures. They point, in their opposition papers to  
21 item 171, item 272, item 273 through 275.

22 Well, let's look at those, Your Honor. Item  
23 171, precluded by this Court in your order of 6/28/06,  
24 affirmed yesterday by Judge Kimball as lacking the  
25 requisite specificity. That could not support the claim

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1 that this material was identified previously. Item 273  
Page 15



2006-11-30 SCO v IBM Hearing.txt

2 through 275, abandoned by SCO in its summary judgment  
3 opposition papers as material not part of its claim, not  
4 material in which it claims copyright. Item 272, Your  
5 Honor, in fact makes only specific reference to certain  
6 lines of code. It does not claim the entire ELF format,  
7 which is what SCO's expert reports are now seeking to  
8 claim.

9           And, finally, and just parenthetically, Your  
10 Honor, the streams format, which, as I said, is not --  
11 the streams code is not in the Linux kernel. The SCO  
12 expert reports nevertheless identify new material  
13 relating to streams. The only citation is to items 165  
14 and 166 of SCO's final disclosures, which are also items  
15 that were precluded by Your Honor's June order.

16           Now, before I close, Your Honor, if I may just  
17 address the primary argument asserted by SCO as to why  
18 IBM's motion should be denied. SCO says that IBM's  
19 motion should be denied because the final disclosures  
20 were not supposed to be what it calls co-extensive with  
21 expert reports, and, Your Honor, I agree with SCO that  
22 final disclosures and expert reports are not the same  
23 thing. The final disclosures were, as has now been made  
24 perfectly clear, to define the bounds of the parties'  
25 claims. No material not identified with specificity in

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1 the final disclosures was to be used in the case as a  
2 supposed basis of liability.

3           The expert reports, Your Honor, are simply an  
4 expert's opinions with respect to material properly  
5 identified in the final disclosures. That does not mean,

2006-11-30 SCO v IBM Hearing.txt

6 however, that SCO may use its expert reports under the  
7 guise of simply offering argument or explanation or  
8 analysis. They may not identify entirely new categories  
9 of allegedly misused information. They may not identify  
10 any new allegedly misused information. That's what the  
11 Court's order provided, quite plainly.

12 In its papers, SCO suggests, Your Honor, that  
13 is no reason why the final disclosures should be held to  
14 preclude SCO from, by way of its expert reports, adding  
15 new information in support of its claims.

16 Your Honor, I would submit to you that there  
17 are at least ten such reasons: The numerous IBM  
18 discovery requests requesting that SCO specify its  
19 allegations; the December '03 order of this Court; the  
20 March '04 order of this Court; the July '05 order of this  
21 Court and the June '06 order of this Court, as well as  
22 Judge Kimball's order yesterday affirming that. There is  
23 also Rule 26(e) which requires the supplementation of  
24 interrogatory answers; Rule 37(c), which has,  
25 effectively, a self-executing provision precluding a

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1 party from using information that's not disclosed  
2 pursuant to Court order; the parties' agreement, Your  
3 Honor, and basic, basic fairness, I would submit.

4 If SCO's, what I would call, revisionist view,  
5 Your Honor, of what the final disclosures required were  
6 correct, then all of IBM's requests and all of the  
7 Courts' orders and the parties' stipulation were for not  
8 because SCO can now and could, with the submission of its  
9 expert reports, simply reinvent its case, which is,

2006-11-30 SCO v IBM Hearing.txt

10 respectfully, what we believe happened here.

11           Your Honor, to close, this motion is not simply  
12 about sandbagging. This motion is about sandbagging in  
13 the face of multiple Court orders requiring the party to  
14 disclose with specificity its allegations. And the issue  
15 presented, I would respectfully submit, is simple: Is  
16 SCO bound by the Court's prior orders and by its  
17 stipulation with IBM to confine its claims to the items  
18 identified with specificity in the final disclosures, or  
19 can it ignore the Courts' orders, renege on its agreement  
20 with IBM, and expand its case by way of its expert  
21 reports to add new material that it could have disclosed  
22 long ago, that wasn't the subject of fact discovery, that  
23 wasn't addressed by IBM's experts, was not part of the  
24 summary judgment filing and the introduction of which, in  
25 this case, would result in what we believe is incurable

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1 prejudice?

2           Thank you, Your Honor.

3           THE Court: Thank you, Mr. Marriott.

4           Mr. Hatch.

5           MR. HATCH: Good afternoon, Your Honor. We  
6 also have a few slides I may use during the course of the  
7 argument. Your Honor, put the way Mr. Marriott did, I  
8 understand how that makes this look a little more  
9 difficult than I think it really is. I think we have, in  
10 essence, two ships passing in the night here, because our  
11 arguments will be very much different than what  
12 Mr. Marriott has put forward before you just now. In  
13 large part, we believe that we have complied with the

2006-11-30 SCO v IBM Hearing.txt

14 Court's orders and that, in the case of misused material,  
15 we have indeed disclosed that as was required by the  
16 Court in the 2005 submission.

17 Now, what Mr. Marriott has done in their briefs  
18 and in their argument today is they have, in our view,  
19 commingled two concepts together; one being the misused  
20 material and the second being legal theories regarding  
21 structure and analysis involving the copyright,  
22 particularly as put forth by Dr. Cargill in his expert  
23 report.

24 Now, to give it in context, and I think that's  
25 really -- if we get to the core of what this hearing is

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1 about, it's about whether or not SCO's experts will be  
2 allowed to give the opinions, the complete opinions that  
3 they have issued. I want to make it very clear that IBM  
4 has not challenged all of their opinions but only as to  
5 things that relate, in their view, to undisclosed and  
6 misused information. Now, that was made fairly clear in  
7 the last briefing, and I will just -- I think it will be  
8 a little easier for Your Honor -- slide 2. This was  
9 something that was taken from IBM's reply memorandum in  
10 support of a proposed scheduling order when we were  
11 talking with Judge Kimball on setting the schedule and  
12 setting these interim and final deadlines for setting  
13 forth misused material.

14 And IBM, itself, said it proposes only that the  
15 Court impose deadlines for the parties to identify the  
16 alleged misused material. IBM's proposal requires  
17 neither that the parties rely on experts, nor that any

2006-11-30 SCO v IBM Hearing.txt

18 experts that might be used by parties finalize their  
19 expert reports before the close of all fact discovery.

20 Now, that was important to us at the time  
21 because it seemed contrary not only to the schedule that  
22 was being proposed but also to Rule 26 and the  
23 understanding of the parties that the experts would be  
24 required to do all their work, and, in essence, issue  
25 their opinions prior to that December 2005 deadline. So

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♀

1 it was made very clear that IBM -- and they are making  
2 the position where they are the one proposing the  
3 two-part deadline, that they weren't requiring that.

4 And it goes on to say: "Under IBM's proposal  
5 the parties' experts would need to reach final  
6 conclusions before the close of fact discovery only with  
7 respect to the identification of source code and other  
8 material that is at issue in this case."

9 And, as Your Honor required, the large fight  
10 that was going on at that period of time was over  
11 identifying, as Mr. Marriott put it, the version, file  
12 and line of source code that he had indicated that they  
13 were going to go through line-by-line and try to rebut.  
14 What is missed here -- and I think it's very, very  
15 important, because what has happened here, particularly  
16 if we go through with Dr. Cargill, is he simply is  
17 applying Tenth Circuit law.

18 If we go to the Gates Rubber Case, it sets  
19 forth an abstraction, filtration, comparison test for  
20 determining whether or not there is a copyright  
21 infringement. And, under that test -- and it's well

2006-11-30 SCO v IBM Hearing.txt

22 accepted Tenth Circuit law. As a matter of fact, I think  
23 an analysis of the various Circuits on copyright with  
24 regards to computer software, the Tenth Circuit is  
25 perhaps ahead of almost every other Circuit in

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♀

1 establishing the law in this area.

2           And it sets forth the test for dissecting a  
3 program at various levels of abstraction, starting with  
4 looking at the main purpose of the software. And one  
5 goes down through the list: The program structure or  
6 architecture. Three is the modules. Four is algorithms  
7 and data structures. And five -- we don't get source  
8 code until the fifth level. And the last is object code.

9           Now, it's not required to find copyright, and  
10 under the Tenth Circuit rules that you have to have all  
11 these things, but you go through this abstraction  
12 analysis, and that's exactly the test that Dr. Cargill  
13 applied. Now, what they are saying now is that he has --  
14 and I think he showed you his slide number 17, and I  
15 think this is kind of where we're passing in the night a  
16 little bit is that he indicated that, yes, we did in our  
17 final disclosures set forth header files, specifications  
18 and other miscellaneous lines, as he characterized it,  
19 and then he put the large -- and I think this is done so  
20 much for its dramatic effect. He has 5 million plus  
21 lines.

22           But those are largely from overall structure,  
23 overall file system and system calls. Well, that's  
24 because Dr. Cargill is applying Tenth Circuit law. He is  
25 applying his expert opinion, a structural analysis under

2006-11-30 SCO v IBM Hearing.txt

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1 the Gates Rubber test established by the Tenth Circuit  
2 and looking at the main purpose, the program structure,  
3 architecture, modules, algorithms, data structures to  
4 show that there is a copyright infringement here.

5 THE Court: Mr. Hatch, let me ask you this,  
6 though: If I accept your premise, then what is the force  
7 and effect of each of the previous orders which required  
8 SCO to answer with specificity?

9 MR. HATCH: Well, but we have, Your Honor,  
10 because, as he's pointed out, as to that particular  
11 copyright claim, it is -- for instance, we talked about  
12 JFS files. The entire JFS file was disclosed. I think  
13 that was lost a little bit in his argument. We say the  
14 entire JFS file was taken in the copyright infringement  
15 theory. When we were talking about that, specifically  
16 what the orders he was talking about is version, line and  
17 file.

18 Those are not required for making this  
19 particular expert opinion under the Gates Rubber test.  
20 The Gates Rubber test doesn't say you have to have that.  
21 Now, I understand that version, line and file,  
22 particularly with some of the contract claims in this  
23 case and some of the copyright claims, those would be  
24 required, particularly if you were going show a literal  
25 infringement, a literal copying.

25

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1 Now, if you're going claim a literal copying,

2006-11-30 SCO v IBM Hearing.txt

2 there is no question you have to show the version, line  
3 and file so you can do a side-by-side analysis, and we  
4 did that in our December disclosures.

5 THE Court: Let me get back to my question,  
6 though: If I accept your premise and were to deny IBM's  
7 motion, doesn't that render meaningless everything we've  
8 done up 'til now and every order that has been entered by  
9 the Court?

10 MR. HATCH: Absolutely not. I think it renders  
11 meaningless the Tenth Circuit's test for establishing it  
12 because we did set forth, with specificity, for instance,  
13 that we believe they infringed the copyrighted JFS files.  
14 Mr. Marriott, though, now wants -- says, "You should find  
15 against them and not allow them to do that because they  
16 haven't shown version, line and file."

17 What I am saying is that that's not the Tenth  
18 Circuit case in that instance. And that's why I don't  
19 want to mix up the contract claims and copyright claims  
20 because we have shown what you can do. And, as Rule 26  
21 requires, and the Court has nowhere said -- given an  
22 order saying Rule 26 doesn't apply in this case. Rule 26  
23 clearly sets forth that it's expected, particularly where  
24 the Court sets a scheduling order with an expert report  
25 deadline and an opportunity to depose experts, that that

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♀ 1 is the opportunity for that to be disclosed.

2 That issue is raised, I think, at length in  
3 their reply memorandum. In the reply memorandum, they,  
4 after we -- and I'll go back to the other experts to deal  
5 with some of these other issues with regards to



2006-11-30 SCO v IBM Hearing.txt  
6 particularly JFS and Dr. Ivey and Mr. Rochkind's expert  
7 opinions. They don't respond to that in their reply  
8 because I think if they had asked, they would have found  
9 out that there wasn't an issue there.

10 But as to Dr. Cargill, they say: Well, why  
11 weren't these copyright theories disclosed in Answers to  
12 Interrogatories? Well, Rule 26 -- and I think, Your  
13 Honor, I've put the relevant parts -- it's in a slide, I  
14 think 14 and 15 in your book. It says, "Rule 26(e)  
15 provides that a party is under a duty seasonably to amend  
16 a prior response to an interrogatory only if the  
17 additional or corrective information has not otherwise  
18 been made known to the other party during the discovery  
19 process."

20 And then, on the next page, Your Honor, we get  
21 to the advisory notes for interpreting that, and it says,  
22 "Where the Court has provided for and/or parties have  
23 agreed to a period of specific expert discovery,  
24 including expert reports and depositions, it is the  
25 specific period of expert discovery that serves as the

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1 means of interrogatory responses."

2 So, what the rule is essentially saying is --  
3 well, they have said that, well, you didn't disclose  
4 anymore detail. And Mr. Marriott got up and said that in  
5 his argument that -- why didn't you respond to the  
6 interrogatories? The rule is very clear, and that's what  
7 we applied, is that when an expert is going to address  
8 these types of issues; not the version, line and file,  
9 but the structure, selection, those types of arguments

2006-11-30 SCO v IBM Hearing.txt

10 that are under the Gates Rubber test under the Tenth  
11 Circuit, those have been disclosed. An expert report was  
12 given. The deposition was allowed to be taken, and it  
13 went forward.

14 Now, they, in response, in their brief, have  
15 indicated that they were somewhat -- I think they called  
16 it astonished that -- about these new claims that they --  
17 in the reply brief, I think they used the word, you know,  
18 it's completely changed the whole concept of this case  
19 and that somehow what Dr. Cargill, in particular, in  
20 making his analysis of the copyright claims, that this is  
21 somehow changing the whole case.

22 Well, that's just simply not true because if we  
23 go all the way back -- if we go back -- and I would refer  
24 Your Honor to pages 9 through 11 in the booklet I gave  
25 you. We can go back as far as March of 2004 where IBM

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1 clearly understood, and the first cite there is from  
2 their Second Amended Counterclaims, where they allege  
3 that SCO threatened to sue IBM for copyright infringement  
4 with respect to Linux.

5 And we go through each one. May 18, 2004. IBM  
6 asserted that one critical element that SCO must show is  
7 that Linux is substantially similar to the alleged  
8 copyrighted work. We're talking about a copyright claim.  
9 May 11 and July 9, they attach to their pleadings the  
10 2004 Fortune Magazine article called "Gunning for Linux,"  
11 which said SCO is complaining not just about verbatim  
12 copying -- now, that's version, line and file, remember,  
13 version, line and file -- but also about the purloining

2006-11-30 SCO v IBM Hearing.txt

14 of the code's structure, sequence and/or organization.

15 There's two different things there. And that is the  
16 subject of an expert opinion.

17 You can't show version, line and file for  
18 structure, sequence and/or organization. That's based on  
19 the Tenth Circuit case on an overall look of the factors  
20 that I stated to you out of the Gates Rubber case.  
21 That's not a version, line and file analysis. And so  
22 that's why I say, in essence, what IBM is doing here --  
23 and this is why I don't think Judge Kimball's order  
24 applies to the matters that we are talking about today.  
25 I understand they want to meld it into it. And he

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1 says -- you know, he says it's dispositive. Well, it's  
2 not dispositive because the analysis that Dr. Cargill is  
3 doing isn't a version, line and file analysis.

4 And they have known that since 2004. Now they  
5 talk about surprise. They talk about undue surprise.  
6 They talk about inability to cure, and yet they have  
7 known since 2004 what that theory is. The only thing  
8 they haven't had is one thing, until May of 2006,  
9 Dr. Cargill's report. Well, that wasn't due until then.  
10 And what they are trying to do now is kind of reverse the  
11 whole order. And even though in the -- from their brief  
12 that I read, where they said: "Oh, we understand you  
13 don't have to disclose your expert analysis and theories  
14 as of December of 2005," now, essentially, they are  
15 telling Your Honor you should, by this order, say that  
16 they should have done that by December of 2005, despite  
17 the fact that the Court order from Judge Kimball that

2006-11-30 SCO v IBM Hearing.txt

18 said you've got until May of 2006 to do it.

19 They knew about it in 2004. They knew it was  
20 coming. They prepared for it, and we disclosed it. Now  
21 they talk about undue -- I mean surprise. They talk  
22 about it's -- they can't cure now. I find that kind of  
23 interesting, too. And, by the way, I didn't go through  
24 all of these. Pages 9 through 11 give numerous examples  
25 of their not knowing about these copyright claims. But

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1 what they did here -- and I think this is what's, I  
2 think, a little not right -- and what -- and we heard  
3 Mr. Marriott talk about what's fair -- is IBM really  
4 created their own undue prejudice here because, despite  
5 the fact that since 2004, at least, and probably before  
6 that, they knew this copyright claim, based on structural  
7 analysis, was coming. And the only way it could come is  
8 through an expert report.

9 I'm not sure what they think we should have  
10 said in the December submission. That was for, remember,  
11 misused material, where you're talking about the entire  
12 structure being in. I think if we had put a line that  
13 said the entire structure, they would have been in  
14 saying, "Give us version, line and file, but, again, that  
15 wasn't the analysis."

16 But what did they do? They go -- and I'm on  
17 page 16 of the slides I gave you. They had an  
18 opportunity to ask Dr. Cargill and the other experts,  
19 when they deposed them, about these theories. And they  
20 intentionally chose not to do so.

21 In Dr. Cargill's deposition, for instance, IBM

2006-11-30 SCO v IBM Hearing.txt

22 asked no questions about his structural analysis or  
23 collective work analysis. And the collective work  
24 analysis he gave was under the Tenth Circuit's law in  
25 Transwestern. It wasn't, again, a version, file and

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1 line. It's under Tenth Circuit law that establishes that  
2 that be done under an expert analysis.

3 And then, in the Dr. Rochkind deposition,  
4 again, IBM asked no questions about the material they  
5 complain about here either. So, they purposely shut  
6 their eyes, even though since 2004 they knew it was  
7 coming, because they wanted to come here and make this  
8 kind of an argument, which is somewhat disingenuous,  
9 because they know it doesn't revolve around version, file  
10 and line.

11 Now I want to go back for a minute because I  
12 got a little bit ahead of myself. I want to talk about  
13 some of the other items that they -- that IBM has  
14 complained about here that we did not disclose in the  
15 December 2005 submission. And one of the other experts  
16 that they challenged his opinion, and they want you to  
17 limit his opinion by the course of their motion today, is  
18 Dr. Evan Ivey.

19 Now, Dr. Ivey is the expert who gave an opinion on  
20 on these journal file systems, the JFS systems that are  
21 at issue here. Now, in our December submission, we  
22 disclosed to IBM that we believed the entire JFS file  
23 system was misused material. Now, I don't think  
24 Mr. Marriott disputed that. I think what he said -- and  
25 certainly in his briefing -- but in his argument was,

2006-11-30 SCO v IBM Hearing.txt

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1 "Well, we wanted specific lines."

2           And, in this particular instance, we indicated  
3 the entire file was misused information. And we also  
4 identified the JFS system as a derivative of the UNIX  
5 System V. Now, SCO provided examples of that. Dr. Ivey  
6 concluded his report saying that the JFS was a derivative  
7 of the UNIX System V system and that IBM disclosed the  
8 entire file system of Linux. That's why we claim the  
9 entire thing. We believe IBM disclosed the entire file  
10 system into Linux.

11           Now, IBM's complaint is that Dr. Ivey  
12 references additional files in his JFS analysis that were  
13 not included in the December submission. That's just not  
14 true. SCO disclosed -- the JFS was a particular area of  
15 concern for us, and SCO disclosed, one, the entire  
16 system. The only additional files that were mentioned by  
17 Mr. Ivey are simply further examples of how IBM's JFS  
18 system derived from System V.

19           Those further examples were not discrete  
20 misused material. Now, the items also -- and part of the  
21 analysis here, since this is a discovery motion, has to  
22 be -- under Tenth Circuit law, has to be whether there's  
23 any undue prejudice, even if you were to find the facts  
24 are as IBM states they are.

25           And, in response to Dr. Ivey, our expert who

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1 gave this analysis, they put up a Dr. Davis. And he  
2 concluded, of course, that JFS was not derived from

2006-11-30 SCO v IBM Hearing.txt

3 System V, but he did it by a machine comparison. He  
4 didn't go line-by-line or any of the things that Dr. Ivey  
5 used. It was totally irrelevant to his analysis. He  
6 just did a machine comparison, and so they couldn't  
7 possibly be prejudiced because it had absolutely nothing  
8 to do with the way Dr. Davis looked at it. He didn't  
9 even -- he didn't evaluate or analyze any of the examples  
10 that we gave, even in December. And so -- and they have  
11 conceded we gave examples in December.

12 So, as to those items regarding Mr. Davis --  
13 Mr. Ivey's expert opinion, we disclosed all of them. We  
14 don't concede that we didn't disclose anything. We did.

15 The second category of material IBM challenged  
16 is the testing material cited by Mr. Rochkind, our  
17 expert, again, his opinions on testing technology. Now,  
18 he concluded in his report that IBM contributed certain  
19 valuable testing technology to Linux. IBM's complaint is  
20 that his analysis of the testing technology included,  
21 again, additional material not included in the December  
22 submission. Again, we don't believe that that is true.

23 The files that they are disputing were not  
24 material -- were not material that SCO claims was  
25 misused. These were additional testing files. And by

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1 that what I mean is what he was simply doing, in  
2 virtually every file that IBM is complaining about, is  
3 using files, not necessarily because they were misused,  
4 but to set a foundation to put, say, a particular IBM  
5 programmer in a particular -- set a foundation to put him  
6 in a particular time and place to show that he -- this

2006-11-30 SCO v IBM Hearing.txt

7 particular programmer was the one that was making  
8 contributions.

9 Now, that's not misused material, and that was  
10 what was required under the Court's order. It's just  
11 further support of Dr. Rochkind's opinion that IBM was in  
12 a position where they contributed material improperly  
13 into Linux.

14 He complains -- they complain -- IBM also  
15 complains about two documentation files. Now, that's  
16 also not relevant here either because the document files  
17 that they are talking about were simply used by  
18 Dr. Rochkind to explain that an SPIE test, which were  
19 disclosed in the December filing, and MPPIE tests, are  
20 two terms for the same thing. So, again, it's not a  
21 misused file, it's part of his expert analysis showing  
22 that the things that were disclosed were improperly used.

23 And so we don't believe in either the case of  
24 Mr. Ivey or Mr. Rochkind there's any analysis there, and  
25 that's why I said earlier that those two arguments --

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1 when we filed our opposition brief, in their reply they  
2 don't address those any further, and I think, in part,  
3 because there really is no other answer to those issues.

4 Now, the last thing you heard talked about --  
5 not the last thing but one you heard talked about, and,  
6 again, we're back to Dr. Cargill's report. Mr. Marriott  
7 talked about system calls. Now system calls are specific  
8 words that developers use to come up -- to come up with  
9 to talk to an operating system to get it to perform  
10 certain tasks.



2006-11-30 SCO v IBM Hearing.txt

11 Now, I think Mr. Marriott gave you a slide that  
12 indicated that we didn't disclose any system calls in  
13 December. That's just absolutely not true. I will tell  
14 Your Honor, we disclosed -- and I don't know the exact  
15 number -- but we disclosed a lot of those. And here is  
16 the one instance where there were additional materials  
17 disclosed; the only instance, I think, but I will explain  
18 to Your Honor why I don't think it's particularly  
19 relevant.

20 Dr. Cargill did disclose some additional system  
21 calls, okay? But those were part of his overall  
22 structural analysis, and they were not relied on  
23 specifically for them as a particular misuse. They were  
24 to show, as additional examples, as the ones that had  
25 already been disclosed, of the structural copyright

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1 problems, to show that this was an overreaching thing, to  
2 show that IBM also understood that. And they, through  
3 their expert, understood a structural analysis was being  
4 made.

5 IBM's expert, Dr. Kernagen -- I hope I'm  
6 pronouncing that right -- he didn't address system calls  
7 individually. He addressed it as an overall system,  
8 which is the way I have been stating we should be looking  
9 at it -- the Court will look at it at trial. In other  
10 words, there is no prejudice. There is nothing that they  
11 have to look at specifically regarding system calls to be  
12 able to understand SCO's legal analysis and theories  
13 regarding the copyright claim in that regard.

14 Mr. Marriott mentioned the stipulation. The

2006-11-30 SCO v IBM Hearing.txt

15 stipulation, I'm not sure why it's relevant here. It has  
16 very limited relevance. That was a reaffirmation, I  
17 think is the best way to describe it, of the December  
18 submission and, as I have argued, I don't think we have  
19 violated the December 2005 submission. It only addressed  
20 discovery issues, and it did not address -- it did not,  
21 as I don't think Mr. Marriott said, and I hope the Court  
22 didn't think that he was alluding to that somehow that  
23 stipulation changed the order -- the December -- the  
24 order for the submissions on December 2005, and it  
25 certainly did not say that expert reports giving legal

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1 analysis -- I mean expert opinion and analysis of  
2 structure were not going to be allowed in May of 2006 in  
3 amending Judge Kimball's scheduling order in that regard.

4 THE COURT: Mr. Hatch, why, if there are issues  
5 that remain unclear at the time an order is entered, a  
6 decision made, is that not brought back to the Court for  
7 consideration?

8 MR. HATCH: If the order is unclear?

9 THE COURT: If the order is unclear as to what  
10 the meaning of the December cutoff time is and what it  
11 includes, why do those matters remain for discussion at  
12 this late day?

13 MR. HATCH: Because I don't believe they were  
14 unclear. I believe they are being made -- they are being  
15 made -- there is being an attempt to make them unclear  
16 now. I don't think they are unclear. As my argument has  
17 made clear, we understood those, and we disclosed the  
18 misused information. The types of materials they are

2006-11-30 SCO v IBM Hearing.txt

19 complaining about now aren't part of that order is what  
20 I'm arguing, and I don't think it's unclear at all. And,  
21 as a matter of fact, that's why I have argued and set  
22 forth, one, from their brief, that they understood  
23 that the experts would come later and that the experts --  
24 and under Rule 26, it says that -- it understands that  
25 when a Court orders that period, that the experts are

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1 going to produce something later.

2 And so it would defy any logic --

3 THE COURT: Isn't there a difference between --  
4 that the experts would produce explanation later or give  
5 a more detailed opinion, isn't that something different  
6 from expanding the context of the information at all? If  
7 you were required, in order after order, to provide, with  
8 specificity, the information, how can you then order --  
9 or argue now that that should be totally expanded?

10 MR. HATCH: Because we did provide that, Your  
11 Honor. What the expert does is it puts meat on the  
12 claims. I mean, I don't want to get into a position  
13 where I say the expert, in giving his opinion -- I think  
14 there is a fine -- I don't even think it's a fine line.  
15 I don't think Your Honor is saying that an expert, to  
16 give specificity, has to give his whole opinion before  
17 its due under the Court's scheduling order.

18 THE COURT: No. But his whole opinion cannot  
19 be then used as a mechanism by which to expand what you  
20 couldn't get before.

21 MR. HATCH: I understand, but I don't -- what  
22 I'm saying is they didn't do that. Where did he do that?

2006-11-30 SCO v IBM Hearing.txt

23 I mean, what IBM hasn't got up and told you is -- what is  
24 it they would have had him say to disclose this structure  
25 analysis that, for instance, Dr. Cargill gave? Because

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1 they knew about it. We just read -- I gave you three  
2 slides that show they understood that since 2004, so I'm  
3 not sure what more specificity to let them know that  
4 there was a copyright claim, and they even used the  
5 words -- and remember, we read them -- "a structural  
6 claim."

7 That's what Dr. Cargill did. They knew that in  
8 2004. So, what more specificity would they need? They  
9 haven't identified that.

10 THE COURT: Well, then, let me go back to  
11 another question. You said earlier in your argument  
12 something to the effect that even if the Court were to  
13 find that there had been, in essence, a violation of the  
14 December cutoff date, that they weren't prejudiced. Are  
15 you conceding?

16 MR. HATCH: Oh, absolutely not. I made that as  
17 a matter of argument because, even if the Court -- and  
18 let me be very clear. I don't concede it at all. But  
19 even if the Court, for whatever reason, were to give  
20 credence to this, the Tenth Circuit -- and that's a very  
21 good point, Your Honor. I had my associate Mr. Douglas  
22 pull the Tenth Circuit cases regarding prejudice, and I  
23 was able to give him some guidance on that because I  
24 would like to think it's a seminal case in the Tenth  
25 Circuit that is one that I argued there. Probably not,

2006-11-30 SCO v IBM Hearing.txt

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1 but they -- the Tenth Circuit has been very clear. It  
2 has a four-part test.

3 But what it potentially boils down to is that  
4 even in a situation like this, even if Mr. Marriott was  
5 right, there has to be a prejudice to him, and the Court  
6 has been very clear that basically it would have to  
7 disrupt the trial. And there are no cases -- there are  
8 no cases where a Court has excluded, merely on a --  
9 excuse me, I read that wrong. Every one of the cases has  
10 said that the exclusion of evidence is disfavored because  
11 airing of all issues is the goal of our judicial system.  
12 And you get cases where even -- where this comes up where  
13 something new -- allegedly new -- we're saying here it's  
14 not new, it's just a theory that came and was produced  
15 in a timely fashion when Judge Kimball ordered it to be  
16 produced, i.e., in an expert opinion.

17 But there are even cases where those types of  
18 things are disclosed at trial, and if it can be cured  
19 there -- and I have been involved in those kind of trials  
20 where someone came up with something new and we objected,  
21 and the Judge said, "You can take the deposition tonight,  
22 and we'll start again tomorrow at nine."

23 THE COURT: This won't be cured by an overnight  
24 recess.

25 MR. HATCH: I understand that, but what I'm

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1 saying is: Here there's not even a cure because I've  
2 gone back and showed Your Honor, from their own briefs,

2006-11-30 SCO v IBM Hearing.txt

3 where it doesn't even have to be cured. They have been  
4 aware of it forever. And where Mr. Marriott says we'd  
5 have to go back -- the reason he -- remember why he's  
6 prejudiced? One. In his brief, he said the biggest  
7 prejudice was that we're coming up on the trial. Okay?

8 No mention of that today because we don't have  
9 a trial date anymore, and largely at the urging of IBM,  
10 who has now argued that the Novell case, which I think  
11 Your Honor is also aware of, should go first. And that's  
12 not even set for trial until September.

13 And my point is: The Tenth Circuit is very  
14 clear that where you have time before trial to cure an  
15 alleged problem, you -- the Court should always give it.  
16 But Mr. Marriott's next argument and the reason I think  
17 he gave the slide 17 is he put this 5 million plus lines  
18 of code, and he has indicated to you: Gee, that's going  
19 to be a huge prejudice because we're going to have to go  
20 through -- what did he say -- 21 man years to go through  
21 those lines of code.

22 Well, Your Honor, I've got one fairly simple  
23 answer for that. I think that is a complete red herring  
24 because, you know, we had an expert. What they are  
25 talking about is countering our expert, and that is

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♀ 1 Dr. Cargill. Dr. Cargill didn't spend 21 man years, did  
2 he? And the reason he didn't is because the Tenth  
3 Circuit doesn't require that under the Gates Rubber case.

4 Dr. Cargill followed Tenth Circuit law, and  
5 Tenth Circuit law has you look at the structure. It has  
6 you look at the items that are listed from that case. It

2006-11-30 SCO v IBM Hearing.txt

7 doesn't say -- and this is why I think we're kind of  
8 talking over each other and they are trying to get back  
9 to version, file and line. It isn't relevant. And  
10 Dr. Cargill was able to do it in a relatively short  
11 period of time. But they want Your Honor to say that,  
12 oh, Tenth Circuit law requires version, line and file.  
13 It does not.

14 And that 21 man years to do this is just not  
15 relevant. If Dr. Cargill can give the opinion in a  
16 period of months, certainly they can cross examine on it  
17 and do the same thing. And, indeed, they have. They  
18 have put in expert reports to contradict these people.

19 THE COURT: I can't help myself. It would  
20 probably, then, take only about seven woman years, right?

21 MR. HATCH: I'm not going there, Your Honor.

22 THE COURT: Go ahead.

23 MR. HATCH: But, you know, I have cited Tenth  
24 Circuit law, and the cases -- I would say the premier  
25 case on that really is Woodworkers, the case I argued,

43

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1 and this case called Jacobson vs. Deseret Book, both  
2 Tenth Circuit cases. The Jacobson case actually cites  
3 Woodworkers, which basically says the challenged behavior  
4 must substantially have interfered with the aggrieved  
5 party's ability to both prepare for and proceed at trial.  
6 We don't even have that date, and all those cases talk  
7 about the ability to cure.

8 Now, they cited one case. And it's pretty  
9 telling to me, the case they cited was a District Court  
10 in an unpublished opinion. And this is what they are

2006-11-30 SCO v IBM Hearing.txt

11 trying to get you to rule on, on prejudice, an  
12 unpublished District Court opinion out of the Northern  
13 District of Illinois. That is a Seventh Circuit case.  
14 Well, if you go to the published opinions in the Seventh  
15 Circuit, you get -- you get the exact same rule as in the  
16 Tenth Circuit.

17 And it's very interesting because if you go to  
18 a case called Keech vs. U.S. Trust, which is at 419 Fed  
19 3d, 626, and at page 640 -- this is a 2005 case out of  
20 the Seventh Circuit -- it sets forth the exact same test  
21 as the Tenth Circuit. And guess what it cites? The  
22 Woodworker case. It cites the Tenth Circuit case. It  
23 says you should only exclude the evidence if there is no  
24 ability to cure.

25 And that's certainly not the case here. It

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1 would be the case if Mr. Marriott is right and they have  
2 to go look at 5 million plus lines, but how did our  
3 expert do it? Our expert's theory is a structure theory,  
4 and that doesn't require that. And he ignored that.

5 THE COURT: Mr. Hatch, I'm going to give you  
6 five minutes to wrap up on this, and then I'll give you  
7 each ten, 15 minutes.

8 MR. HATCH: I think that's basically -- let me  
9 just real quick, because I kind of -- oh, they are  
10 pointing out that I may have misspoke, and it's a point  
11 that I think is important. The JFS -- and I'm sorry, I  
12 did do that. When we are talking about the JFS, those  
13 are contract claims as well. That's one of the  
14 reasons -- there we are looking -- in large part, we are



2006-11-30 SCO v IBM Hearing.txt

15 looking at specifically what was taken to show the  
16 contractual violations under version, line and file. The  
17 JFS is a contract -- is part of a contract claim.

18 When I'm talking about Dr. Cargill dealing with  
19 our copyright claims, that's dealing with the structure  
20 claims. I think that is what I have now.

21 THE COURT: Thank you, Mr. Hatch.

22 Mr. Marriott.

23 MR. MARRIOTT: That you, Your Honor. Nothing  
24 I heard, Your Honor, suggests or, I think, in any way  
25 recommends the right result here is to deny IBM's motion.

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1 Let me address, if I may, Mr. Hatch's arguments. First  
2 Mr. Hatch -- this is not in the order in which he made  
3 them. I will begin in somewhat reverse order. He  
4 suggests in closing, Your Honor, that the Court, in some  
5 respects, lacks the authority here and there isn't ample  
6 authority to permit the granting of IBM's motion. And he  
7 refers to several cases.

8 There is ample authority, Your Honor. I would  
9 cite the Court to the cases at pages 19 and 20 of the  
10 book that we provided Your Honor. I would cite the Court  
11 to its own decision of 6/28 and to Judge Kimball's  
12 decision of yesterday. The burden here is no more than  
13 the burden that IBM faced with respect to its preclusion  
14 motion, and as I indicated at the outset, this is a far  
15 more compelling case, notwithstanding Mr. Hatch's  
16 arguments, which simply cannot be squared with the facts  
17 as they exist in SCO's final disclosures.

18 Moreover, Your Honor, as to what the Court's

2006-11-30 SCO v IBM Hearing.txt  
19 authority scope previously itself acknowledged, it even  
20 invited the Court to not enter the order requiring the  
21 final disclosures because it said the Court had a full  
22 arsenal with which to deal with exactly this situation,  
23 and I refer you to tab 9, Your Honor, of our book for  
24 that.

25 Now, Mr. Hatch read from IBM's brief in

46

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1 connection with our request that Judge Kimball enter the  
2 deadline for final disclosures, and it's one of the  
3 slides in SCO's papers. And he suggested to Your Honor  
4 that IBM had said to Judge Kimball and to SCO that in  
5 entering the final disclosure deadline, the parties need  
6 not worry about experts because that's something we'll  
7 deal with later on. I would suggest, Your Honor, that  
8 you look at the brief that IBM attached to its reply  
9 papers and submitted to Judge Kimball in connection with  
10 this request, which says the opposite of what Mr. Hatch  
11 represents.

12 At page 4 of that brief we said, quote, "Unless  
13 the Court imposes a deadline by which the parties must  
14 identify the allegedly misused material then they may not  
15 learn the identity of the material they are alleged to  
16 have misused until after the close of fact discovery or  
17 potentially even expert discovery, when it would be too  
18 late to prepare a defense to claims related to the  
19 material."

20 At page 5. "No party could contend that  
21 another party --" this is IBM's proposal. "No party  
22 could contend that another party misused material not

2006-11-30 SCO v IBM Hearing.txt  
23 identified by the August 11 --" which was then the  
24 date -- "deadline. No expert could opine as to the  
25 misuse of material not identified by the deadline."

47

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1 We could not have been more clear that expert  
2 reports, as we proposed it, were not to be used as a  
3 means of adding, identifying new allegedly misused  
4 material.

5 And finally, on page 6, your Honor, of the same  
6 paper: "Moreover, requiring the parties to disclose the  
7 allegedly misused material before the close of all fact  
8 discovery will allow the parties to engage in meaningful  
9 expert discovery and refine the issues in dispute for  
10 summary adjudication. The parties may or may not require  
11 the assistance of experts to identify the material they  
12 contend one another misused. If they do, then their  
13 experts can assist them in making their disclosures."

14 "Expert discovery is not the time, however, for  
15 identifying the allegedly misused material. It should be  
16 done in advance of expert reports so that the parties'  
17 experts can focus on what is really in dispute. It would  
18 make no sense and would plainly be unfair to allow either  
19 party to identify the allegedly misused material for the  
20 first time by way of one of its experts," which is  
21 exactly what has happened, Your Honor, in this case.

22 Mr. Hatch waxes on, Your Honor, about the Gates  
23 Rubber case. Well, Gates Rubber was the law at the time  
24 this case began. This structure, sequence test to which  
25 Mr. Hatch refers is nothing new. If it were part of

2006-11-30 SCO v IBM Hearing.txt

48

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1 SCO's case then, as it claims by reference not to its  
2 discovery responses, Your Honor, but to a newspaper  
3 article and statements made to a reporter; if it were  
4 part of its case then, great. It should have disclosed  
5 the particulars of that claim pursuant to the Court's  
6 orders.

7           Mr. Hatch suggests that somehow the word  
8 "structure" tells IBM something particular about its  
9 allegations. It says essentially nothing, Your Honor.  
10 It's essentially like saying that because the party knows  
11 the party with whom it's in litigation has a contract  
12 claim or a claim for a breach of a disclosure provision,  
13 that somehow it's understood what it is precisely the  
14 case is about.

15           Mr. Hatch asked the question: What is it that  
16 IBM wants to know about the structure of Linux that it  
17 somehow didn't know from the beginning of the case? What  
18 we wanted to know, Your Honor, and what the Court  
19 required SCO to provide was a detailed, specific  
20 identification of SCO's theories. And I would refer you,  
21 if I may, to tab 6 of the book.

22           What we wanted, Your Honor, we set out in our  
23 discovery requests -- and I won't burden you with all of  
24 them -- the same discovery requests that Your Honor  
25 adopted, as written, into her orders, multiple orders,

49

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1 words with which Judge Kimball has now, as of yesterday,  
2 concurred.

3           And in Interrogatory No. 12 we said, "Please  
Page 43

2006-11-30 SCO v IBM Hearing.txt

4 identify with specificity all source code and other  
5 material in Linux to which it has rights."

6 And then in 13, "Describe in detail how IBM is  
7 alleged to have infringed plaintiffs' rights."

8 To tell IBM that it knew there was a -- that  
9 this was a structural related case is to tell us nothing,  
10 Your Honor. The statements that Mr. Hatch seizes on as  
11 somehow disclosing that IBM knew and that support  
12 Mr. Hatch's assertions that we have known all along  
13 precisely what this case was about, those statements were  
14 made prior to the Court's -- the Court's order requiring  
15 that SCO identify -- I'm sorry -- they were made prior to  
16 the summary judgment motion that IBM made and prior to  
17 Judge Kimball's order in which he recognized that SCO had  
18 not in fact offered any competent evidence of  
19 infringement.

20 So, apparently, Your Honor, the notion that  
21 that was known in particular is simply unsupportable by  
22 the facts here.

23 Now, Your Honor asked a question of Mr. Hatch  
24 of why it is that the position SCO takes here would not  
25 gut the Court's orders. And the answer you got, Your

50

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1 Honor, respectfully, was a non-answer. The answer you  
2 got was that JFS is an important part of SCO's case and  
3 that SCO identified the JFS file from the beginning of  
4 the case, and it's part of their copyright case,  
5 Mr. Hatch said. And then he stood and corrected himself  
6 and said it was both part of the contract and the  
7 copyright case.

2006-11-30 SCO v IBM Hearing.txt

8           It's part of -- according to the final  
9 disclosures, Your Honor, it's part of the contract case.  
10 It's only part of the contract case. Mr. Hatch suggested  
11 that there was a single file that was disclosed and that  
12 we have known that from the beginning. There was a JFS  
13 file that was disclosed. It was in the final  
14 disclosures, and this motion is not about that file.  
15 This motion is about the other files which are identified  
16 for the very first time in SCO's expert reports.

17           Mr. Hatch talks much, Your Honor, of this  
18 notion of non-literal infringement, and the suggestion  
19 seems to be that if your case is about non-literal  
20 infringement, you are free and clear of any order of the  
21 Court, of any discovery request, of any obligation  
22 whatever to tell your adversary what specifically the  
23 case is about. It's similar, Your Honor, but worse than,  
24 I would submit, SCO's methods and concepts argument.

25           The idea there was: This is about methods and

51

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1 concepts, so there is no version, file and line  
2 information to disclose. Well, that argument, Your  
3 Honor, as you well know, was rejected. It was rejected  
4 by Your Honor. It was rejected by Judge Kimball. And  
5 the allegations here about non-literal infringement  
6 somehow not being something that SCO was required to  
7 disclose, amount to saying, Judge, that the more vague  
8 the allegation, the more abstract it is up from the  
9 actual code, the less they have to tell us about it.

10           So, you know, if it's about specific source  
11 code, we can be told, but the more abstract they choose

2006-11-30 SCO v IBM Hearing.txt

12 to make their theory, the less we get to know about what  
13 the theory is. The opposite is true, Your Honor. As a  
14 case gets more abstract, more explanation, more  
15 particularity and more detail is required, which is why  
16 our order -- which is why our request of SCO and of the  
17 Court was that they be required to provide specificity  
18 and detail.

19 That doesn't mean less with respect to  
20 so-called non-literal elements, it means more. Saying,  
21 Your Honor, that they mentioned a couple of lines of code  
22 in the final disclosures, and, therefore, that was enough  
23 to tip us off to this notion of non-literal infringement,  
24 Your Honor, is like saying that the mere mention of a  
25 couple of lines of code in the final disclosures is

52

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1 enough to tell us that the entire system was claimed.  
2 It's like saying the use of a word is enough to disclose  
3 to us that the whole English language is being claimed or  
4 that the mention of a brick and mortar or of nails and  
5 wood somehow tells us the particulars of a structure.  
6 If structure is what SCO wishes to claim, and  
7 they are now citing their own public statements of having  
8 approached this theory years ago, then we should have  
9 been told what it is in its particulars. What it is it  
10 about the structure? What is it about the sequence?  
11 What is it about the organization? We have never been  
12 told that, Your Honor. The first suggestion of that was  
13 the Cargill report.

14 Mr. Hatch suggests there's no big deal here.  
15 Just go out and do a report like Cargill. The Cargill

2006-11-30 SCO v IBM Hearing.txt

16 report, Your Honor, is rife with generalities. IBM is  
17 accused of having, in a still abstract and ill-defined  
18 way, failed to disclose the structure, which we didn't  
19 hear about in any particular way, until SCO's expert  
20 reports.

21 Your Honor, what does IBM want? Again, what we  
22 want is the particulars of exactly what it was. That's  
23 what they were required to provide. That's what they  
24 didn't provide. Now, Mr. Hatch has suggested, again,  
25 Your Honor, that IBM knew all along. And I don't want to

53

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1 belabor this point too much, but, again, the suggestion  
2 of -- because the word "structure" was used, we knew, is,  
3 frankly, absurd.

4 I mean, the reason we asked discovery requests,  
5 the reason that the Court entered orders requiring  
6 particularity, the reason, I would submit, that Judge  
7 Kimball said what he said, is because merely mentioning  
8 the word "structure," like mentioning the word "breach of  
9 contract" or "breach of non-disclosure provision" tells a  
10 person nothing.

11 It's been suggested by SCO here today and in  
12 its briefs that IBM's experts have already looked at  
13 these questions. That's absolutely untrue, Your Honor.  
14 That assertion is -- has no support whatsoever. None is  
15 offered in SCO's papers, and the citations to which they  
16 refer do not show that, and Professor Kernagen and  
17 Professor Davis, who were mentioned here today, made  
18 perfectly clear in their papers that they didn't address  
19 this.



2006-11-30 SCO v IBM Hearing.txt

20 It simply wasn't and isn't possible, Your  
21 Honor, to go from a six-month analysis of 326 lines of  
22 code, which they labored over, to now be required to  
23 disclosure every version -- to be required to evaluate  
24 every line and every file of an operating system  
25 comprised of millions of lines of code. Mr. Hatch calls

54

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1 the 5-million-line-of-code number faulty, Your Honor.  
2 The number is not faulty. The number is the number that  
3 corresponds to that which is disclosed in SCO's expert  
4 reports.

5 Now, the suggestion further has been made that  
6 we failed here to demonstrate prejudice. I would suggest  
7 to you, Your Honor, that the prejudice here is  
8 self-evident. The Court previously found prejudice.  
9 Judge Kimball found prejudice, and it is far more extreme  
10 here. Here we are being asked to do an analysis as to  
11 something that has never been disclosed except, now, even  
12 in a general way, until SCO's expert reports.

13 326 lines took six months, Your Honor.  
14 Evaluating anything and everything would take an  
15 extraordinary amount of time. Mr. Hatch impunes the  
16 25,000-man-hour number, which he calls 21,000. It's not  
17 my number, Your Honor. It's the number of SCO's  
18 witnesses who submitted affidavits in support of SCO's  
19 opposition to IBM's summary judgment motion.

20 SCO suggested the fact that the trial has  
21 slipped is somehow immaterial, and now there's adequate  
22 time, and we can run out and knock off a few depositions  
23 and ask their guy a couple of questions and all will be

2006-11-30 SCO v IBM Hearing.txt

24 well. That's not the way, Your Honor, that one properly  
25 prepares a defense to allegations of copyright

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1 infringement.

2 And I would refer you to tab 5 of the book.

3 And if you look, if you would, please, at some of the  
4 copyright cases and the principles that are relevant  
5 there and the questions that correspond to them, and an  
6 enormous amount of effort is required to do a  
7 line-by-line, file-by-file analysis of this overall,  
8 still ill-defined structure to which Mr. Hatch refers.

9 Mr. Hatch mentions the JFS files and the  
10 testing technology files and says he doesn't understand  
11 what's happening here, we're like ships passing in the  
12 night, that there's really no issue there. Your Honor,  
13 in SCO's opposition papers, what they say, and why we  
14 made very little of it in our reply, is that that isn't  
15 actually allegedly misused material. Yes, they concede  
16 in their opposition brief, though Mr. Hatch suggests  
17 otherwise here today, that that material is in fact, you  
18 know, not new.

19 The material is absolutely, unquestionably new.  
20 It was not in the final disclosures, and they have not  
21 pointed you to a single line in the final disclosures  
22 where it's found. If they showed you the final  
23 disclosure item, Your Honor, what you would see is that  
24 it says "for example," and they mention the JFS file that  
25 was identified.

2006-11-30 SCO v IBM Hearing.txt

56

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1 So, the suggestion seems to be that it's enough  
2 in the final disclosures to have said "for example," and  
3 point to a line so that you can later come around and  
4 say, "Well, gee, we gave you an example, so now we can  
5 claim anything and everything related to JFS."

6 In SCO's opposition papers, what they say about  
7 JFS and the testing technology is, "Yes, this stuff  
8 wasn't mentioned specifically in the final disclosures,  
9 but it's no big deal because we aren't arguing that IBM  
10 misused it. So, what's the problem? We don't understand  
11 the disconnect."

12 I would say to SCO that, well, then, if that's  
13 right, Your Honor, they should have no problem  
14 stipulating that the JFS code and the testing technology  
15 code is not allegedly misused information. We read their  
16 opposition papers. We called -- picked up the phone and  
17 called them and said, "There seems to be a problem here.  
18 You're saying it's not misused. Why don't we just  
19 stipulate that this isn't misused?"

20 They declined. If the material is not  
21 allegedly misused as it relates to JFS and testing  
22 technology, then they ought to stipulate to that and not  
23 pretend, you know, Your Honor, otherwise.

24 THE COURT: Mr. Marriott, wrap up, please.

25 MR. MARRIOTT: Your Honor, with that, I will

57

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1 close.

2 THE COURT: All right.

3 MR. HATCH: A couple points, Your Honor, and

2006-11-30 SCO v IBM Hearing.txt

4 I'll try to be brief. One as to JFS. Their motion  
5 doesn't try to dispose of all JFS, just what they claim  
6 was improperly disclosed. The problem with that is: If  
7 you go to item 1 of the disclosures in December 2005, we  
8 disclosed the JFS system. So to sit here and say there  
9 is anything new that wasn't disclosed before is just not  
10 correct. Okay.

11 We have talked about other things, about other  
12 examples from System V, but that's another topic. That  
13 doesn't have anything to do with their trying to limit  
14 the expert talking about JFS. It was disclosed, every  
15 line. And he didn't dispute that. He talked around  
16 that, quickly, but I want to make it very clear that that  
17 is still there.

18 Now, when we get to Mr. -- Dr. Cargill's  
19 report, Mr. Marriott talked about the man hours and these  
20 kinds of things. I find that kind of interesting because  
21 the reason I find it so irrelevant every time I come to a  
22 hearing and we hear about the thousands of man hours of  
23 work that it would take to do something, is that what  
24 they are doing when they talk about that, particularly in  
25 the context of a copyright claim, is they are completely

58

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1 ignoring that that is the exact reason why the Tenth  
2 Circuit, in Gates Rubber, gave a test that didn't require  
3 any party to do that because the Tenth Circuit  
4 understood -- and that's why I think the Tenth Circuit is  
5 really the leading Circuit on dealing with copyright in  
6 the context of computer software -- they understand  
7 nobody can do that.

2006-11-30 SCO v IBM Hearing.txt

8 We can't do that. What makes them think we can  
9 do that any more than he can do that? But the Tenth  
10 Circuit recognized that, and that's why they allowed --  
11 they provide, in case law, a structural analysis so you  
12 wouldn't have to do that. So, for him to sit here and  
13 say they would have to do 25,000 man hours is just  
14 completely disingenuous because that's not the law. That  
15 is not how you do it. They would be doing it improperly  
16 under Tenth Circuit law, and it's a complete red herring.  
17 And it's made to kind of -- to scare up a  
18 prejudice that doesn't exist, and it shouldn't be looked  
19 at.

20 THE COURT: Don't you concede that Judge  
21 Kimball has already determined that IBM suffered  
22 prejudice? I recall reading that order.

23 MR. HATCH: But we're talking about -- in the  
24 last order?

25 THE COURT: I don't believe it was this last

59

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1 order.

2 MR. HATCH: Which order? Well, I mean, let's  
3 put it in context for that. In this particular instance,  
4 I'm saying they haven't suffered any prejudice because  
5 what I'm saying is: What they are trying to do is -- the  
6 only way to give them what they want is -- would have  
7 been to file Dr. Cargill's report in December of 2005  
8 instead of when Judge Kimball asked it to be filed.  
9 Bottom line, that's what this is about.

10 They are trying to keep out an expert report  
11 that doesn't rely on new information, it gives the legal

2006-11-30 SCO v IBM Hearing.txt

12 theories behind what they understood -- and, again, I  
13 read from their own briefs, from 2004 -- they understood  
14 was coming. He puts the meat on it. He wasn't required  
15 to do that prior to May of 2006, from Judge Kimball's own  
16 order, and so it makes no sense to sit here and argue  
17 that as to -- there were things that the Judge ordered  
18 and Your Honor ordered for us to do with specificity, but  
19 never was it put the expert theories in specificity at  
20 that -- at an earlier date than what was required by  
21 Judge Kimball's order.

22 Now, what they are essentially arguing here is,  
23 he says, "Well, what are we supposed to do with this  
24 Cargill report?"

25 We say -- they say it says all these

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1 generalities. Well, what I'm hearing is a totally  
2 different motion. That is not a motion to exclude  
3 evidence because we didn't disclose misused information  
4 because we say that's not true. What they are  
5 essentially saying is -- and I think the appropriate way  
6 for them to attack the Cargill report, given what  
7 Mr. Marriott just said -- if he says it's rife with  
8 generalities, it's not supportable, it's not good -- he's  
9 essentially saying it's not a good opinion.

10 Well, they've got plenty of opportunities to  
11 attack it, then. They can attack it by opposing it with  
12 another expert saying that he's full of -- he's full of  
13 it. He's wrong. It's a bad opinion. They have the  
14 right to do that through another expert, if they can.  
15 They have the right if, for some reason they think his

2006-11-30 SCO v IBM Hearing.txt

16 analysis is faulty, to challenge him under a Dauber  
17 challenge. It isn't to come in and try and get some  
18 technical way to throw the expert out.

19 It's isn't to come in and claim that he should  
20 have given his opinion in December, 2005, when it wasn't  
21 due until May of 2006.

22 He did not say -- and I said this in my opening  
23 argument. What is it that we should have said about  
24 Dr. Cargill before he gave an opinion? And he didn't get  
25 up and tell you what he should have said. The most he

61

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1 says is, "Gosh, if he had given us lines -- version,  
2 lines and file, then we would have had something to go  
3 on."

4 But that wasn't required. We would have never  
5 given him that because that's not the analysis that we  
6 were making.

7 He indicated the prejudice is self-evident.  
8 That's another way of saying that I don't have a  
9 prejudice that I can specifically speak to. Then he went  
10 back to the lines and code again. I just don't think  
11 that's it. He talked about the 25,000 man hours. That's  
12 not prejudice because that's not required here. No one  
13 is asking him to do that. We didn't do that. You can't  
14 talk about -- we're not facing a trial. He has the  
15 ability to enter an expert report.

16 I would say, Your Honor, and I think -- the  
17 remedy I have seen Courts give, and I don't think it's  
18 particularly appropriate here, but the remedy I have seen  
19 is -- and the reason I don't think it's appropriate -- is

2006-11-30 SCO v IBM Hearing.txt  
20 giving them another shot to depose, for instance,  
21 Dr. Cargill, is because they refused to ask him about his  
22 opinion on these things. It was sitting there in front  
23 of their face, and they didn't ask -- they had the right  
24 to ask about and then argue later that it's not relevant,  
25 argue later that it's a bad opinion, but they didn't do

62

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1 that.

2 So, I think they had that, but if there was  
3 even a slightest bit of prejudice, because somehow Mr. --  
4 that IBM doesn't understand Dr. Cargill at this point,  
5 then they would be -- the appropriate remedy would be to  
6 give them an opportunity to retake his deposition for a  
7 limited period of time on that specific subject and then  
8 their expert can -- their expert can rebut that.

9 But he hasn't asked for that here. He has  
10 asked for an extraordinary remedy that Tenth Circuit law,  
11 Seventh Circuit law, virtually every Circuit in this  
12 country says is the disfavored one, which is: He wants  
13 to exclude evidence because he wants to avoid seeing the  
14 merits.

15 If the merits are so bad, as he says, then  
16 counter it. Counter it with an expert. Counter it  
17 with a Dauber petition. Counter it with something, but  
18 don't come in and make technical arguments and try to get  
19 out of substantive claims that way.

20 Thank you, Your Honor.

21 THE COURT: Thank you, Mr. Hatch.

22 Counsel, I'm prepared to rule. The Court  
23 orders as follows: That, as provided in this Court's



2006-11-30 SCO v IBM Hearing.txt  
24 order of July 1 of 2005, agreed to by the parties through  
25 stipulation, reaffirmed by this Court's subsequent order

63

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1 of June 28 of '06 and in yesterday's order by Judge  
2 Kimball, SCO may not challenge as misused, by expert  
3 report or otherwise, any material not specifically  
4 identified as misused by IBM in the final disclosures.

5 And, Mr. Marriott, if you or Mr. Schaughnessy  
6 will prepare that order.

7 MR. MARRIOTT: Yes, Your Honor.

8 THE COURT: All right. Anything further?

9 MR. HATCH: I would only ask: Is the Court  
10 going to give clarifications on what it views as not  
11 specified as misused, or are we leaving that for another  
12 day?

13 THE COURT: We'll leave that for another  
14 time.

15 MR. HATCH: Okay. And that would be included  
16 in the order, too, I suppose?

17 THE COURT: What is counsel for IBM's response  
18 to that? I think it's fairly clear based upon the  
19 arguments. I don't see why we need to do that,  
20 Mr. Hatch. I think it's all encompassed in the previous  
21 orders of this Court and stipulations that, if it wasn't  
22 disclosed by -- let's see, what is it -- October 28,  
23 2005, the interim deadline, and the final deadline  
24 December 22 of 2005, then it's out.

25 MR. MARRIOTT: And, Your Honor, I think -- my

64

2006-11-30 SCO v IBM Hearing.txt

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1 difficulty is: I think it is as plain as day what the  
2 Court's orders previously said, and I believe I  
3 understand this order. I am, at the same time, a hundred  
4 percent confident that my friends at SCO take the  
5 position that there is absolutely nothing that wasn't  
6 disclosed with specificity, Your Honor. I don't think  
7 that can be reconciled with the facts in any, way, shape  
8 or form, but I am happy, Your Honor, as a solution to  
9 today's problem to have Your Honor's reaffirmed order  
10 that material not identified with specificity in the  
11 final disclosures, which I take to include structure,  
12 sequence and anything else that they want to claim as  
13 part of their case, is out.

14 And this very issue is, of course, raised in  
15 connection with IBM's summary judgment papers because we  
16 asked for summary judgment as to the 326 lines of code.  
17 And the answer back is: Ah, but you're forgetting  
18 everything else.

19 THE COURT: Well, that is my intent. That is  
20 the intention of this order. All right. I adopt IBM's  
21 reasoning in this regard.

22 MR. MARRIOTT: Thank you, Your Honor.

23 THE COURT: And you can take that up with Judge  
24 Kimball, again, if you wish to do that. All right.  
25 Anything further?

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1 MR. MARRIOTT: Not here, Your Honor.

2 THE COURT: All right. We'll be in informal  
3 recess.

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2006-11-30 SCO v IBM Hearing.txt

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(Whereupon the proceedings were concluded.)

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REPORTER'S CERTIFICATE

STATE OF UTAH )  
 ) ss.  
COUNTY OF SALT LAKE )

I, REBECCA JANKE, do hereby certify that I am a  
Certified Court Reporter for the State of Utah;

2006-11-30 SCO v IBM Hearing.txt

9           That as such Reporter I attended the hearing of  
10 the foregoing matter on November 30, 2006, and thereat  
11 reported in Stenotype all of the testimony and  
12 proceedings had, and caused said notes to be transcribed  
13 into typewriting, and the foregoing pages numbered 1  
14 through 66 constitute a full, true and correct record of  
15 the proceedings transcribed.

16           That I am not of kin to any of the parties and  
17 have no interests in the outcome of the matter;

18           And hereby set my hand and seal this 2nd day of  
19 February, 2007.

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REBECCA JANKE, CSR, RPR, RMR

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