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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

CENTRAL DIVISION

THE SCO GROUP, )

Plaintiff, )

vs. ) CASE NO. 2:03-CV-294DAK

INTERNATIONAL BUSINESS )

MACHINES CORPORATION, )

Defendant. )

\_\_\_\_\_ )

BEFORE THE HONORABLE DALE A. KIMBALL

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March 1, 2007

Motion Hearing

Ed Young  
Court Reporter  
247 U.S. Courthouse  
350 South Main Street  
Salt Lake City, Utah

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A P P E A R A N C E S

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1 March 1, 2007

2:30 p.m.

2

P R O C E E D I N G S

3

4

THE COURT: We're here this afternoon in the matter  
of SCO v. IBM, 2:03-CV-294.

6

For plaintiff Mr. Brent Hatch and Mr. Edward Normand  
and Mr. Stuart Singer.

8

MR. SINGER: Good afternoon, Your Honor.

9

THE COURT: Good afternoon.

10

For defendant, Mr. David Marriott and --

11

MR. MARRIOTT: Good afternoon.

12

THE COURT: -- Ms. Amy Sorenson, Mr. Michael Burke  
and Mr. Todd Shaughnessy.

14

MR. SHAUGHNESSY: Good afternoon, Your Honor.

15

THE COURT: I understand that you want more time on  
Wednesday. We can start at 2:00 on Wednesday, so you have the  
extra 20 minutes that somebody is asking for.

18

MR. SINGER: We appreciate that, Your Honor.

19

MR. MARRIOTT: Thank you, Your Honor.

20

THE COURT: 2:00 on Wednesday.

21

I have a jury out, and if a verdict comes in, then  
you can all go somewhere else while we get the jury back in to  
take the verdict. That has to take precedence. Sorry about  
that.

25

First we have IBM's motion on summary judgment on

1 SCO's contract claims, and SCO's motion for partial summary  
2 judgment or SCO's third cause of action for breach of contract.  
3 45 minutes per side.

4 Who is going first?

5 MR. MARRIOTT: I believe that is me, Your Honor.

6 THE COURT: Go ahead.

7 No one is required to take all of the time asked for,  
8 but --

9 MR. MARRIOTT: Thank you.

10 THE COURT: You, of course, can.

11 MR. MARRIOTT: We have prepared a book of exhibits,  
12 if I may approach for the Court's convenience?

13 THE COURT: Sure.

14 MR. MARRIOTT: We have a copy for counsel.

15 THE COURT: Thank you.

16 MR. MARRIOTT: Referring Your Honor to tab one, if I  
17 may, of the book, there are four contracts that underlie SCO's  
18 claims for breach of contract: The IBM software agreement, the  
19 IBM sublicensing agreement, the Sequent software agreement, and  
20 the Sequent sublicensing agreement. And SCO has a separate  
21 claim or count with respect to each of those four contracts.  
22 IBM is, we respectfully submit, entitled to summary judgement  
23 with respect to each of those counts for at least four reasons  
24 which are set out at tab two of our book.

25 THE COURT: And they are also in your briefs.

1 MR. MARRIOTT: And they are also in our briefs.

2 What we would like to do, with the Court's  
3 permission, is focus in the few minutes that we have on the  
4 first three of those reasons. And then I would like to focus,  
5 Your Honor, on the particular technologies which are at issue  
6 on this motion, those things which SCO contends were  
7 contributed improperly by IBM to Linux. Those appear, Your  
8 Honor, at tab four of the book.

9 Let me make clear, if I may, from the outset,  
10 something about those four items of technology. First is the  
11 JFS contribution, which is a contribution SCO contends was made  
12 by IBM to Linux in violation of the IBM agreements. That is  
13 the first category.

14 The next three categories are the RCU contribution,  
15 the LTP contribution, and certain negative know-how and  
16 experience. The allegation by SCO is that those contributions  
17 were contributed by IBM to Linux in violation of the Sequent  
18 agreements. Now, we'll come back to those technologies in  
19 detail, but let me make a few things absolutely clear about  
20 those technologies from the outset. None of that material,  
21 Your Honor, is UNIX System V source code, methods or concepts.  
22 None of that material is a modification or a derivative work of  
23 Unix System V. None of it was contributed to Linux by  
24 reference to UNIX System V, which this is original IBM work  
25 created independent of UNIX System V. That brings me, Judge,

1 to the first of the four points I would like to underscore.

2 First, Your Honor, is that SCO can't establish a  
3 breach of contract and that is true for three reasons. The  
4 first reason is the plain language of these agreements  
5 forecloses SCO's theory. Second is that the parol evidence,  
6 the overwhelming parol evidence forecloses the theory. The  
7 third is that SCO's theory is patently unreasonable, as I  
8 intend to demonstrate and, therefore, untenable under the  
9 controlling cases.

10 As I said, there are four contracts at issue. Two of  
11 those are the sublicensing agreements. SCO has not offered in  
12 its papers a shred of evidence to demonstrate that IBM breached  
13 the sublicensing agreement. It has not identified which  
14 provision it breached. It has not identified any evidence of  
15 breach and it has not explained a breach. For that reason  
16 alone, the two counts related to those contracts, counts two  
17 and four, are disposed of without further analysis.

18 That leaves the remaining two claims concerning the  
19 software agreements. Your Honor, let me take the three points  
20 as to why summary judgment is appropriate as to each of those.  
21 First, the plain language. There is no dispute here that the  
22 contracts at issue concern software product, AT&T's UNIX System  
23 V material. There is also no dispute that IBM has not  
24 contributed to Linux any UNIX System V material. The entire  
25 case as it concerns SCO's contracts turns on the so-called

1 Section 2.01 of the agreement, the resulting material  
2 provision.

3 That section, however, Your Honor, speaks about the  
4 licensee having the right to prepare modifications and  
5 derivative works, provided the resulting materials are treated  
6 under the contract as confidential. You'll see that language  
7 at tab nine of the book. It is undisputed, as I said at the  
8 outset, that none of the four categories of material at issue  
9 is resulting material. None of it is a modification and  
10 derivative work of System V. For that reason alone the claim  
11 fails.

12 Now, faced, Your Honor, with that fact, SCO contends  
13 that Section 2.01 not only gives it rights with respect to UNIX  
14 System V, and modifications and derivative works, but anything  
15 that ever touches or is in any way associated with the  
16 modification and derivative works of UNIX System V. That we  
17 respectfully submit stretches the meaning and the language of  
18 Section 2.01 to an absurd degree.

19 If I may illustrate, Your Honor. If you imagine and  
20 if you look at the demonstrative to Your Honor's left and to my  
21 right, that is a depiction of the Linux operating system.  
22 You'll see a series of circles with particular chunks or pieces  
23 in it. Imagine you have a product, Your Honor, with 1,000  
24 different pieces to it. Those pieces represent various  
25 components of the system. So imagine you have this and this is

1 Your Honor's product and you have 990 of these pieces, if there  
2 are 1,000, and they are Your Honor's. They are your own  
3 original work.

4 Well, imagine that you want to license from others  
5 additional material and to add them to your product, and you  
6 take the additional ten that make up the 1,000 and you license  
7 them to party A and party B and party C. Let's just assume  
8 that one of the items that Your Honor licenses from a third  
9 party is licensed from SCO. It is AT&T's UNIX System V  
10 software. Let's assume that the contracts mean what SCO says  
11 they mean. Your Honor, under SCO's theory of the case, not  
12 only is Your Honor -- this is your product which you have  
13 licensed other people's materials in part, ten of the 990,  
14 under SCO's theory, Your Honor, not only are you required to  
15 keep confidential the one part of the 1,000 that you licensed  
16 from SCO, you're required to keep confidential the entirety of  
17 the product, so as to keep confidential the one.

18 That does not make SCO's case, Your Honor, because  
19 IBM has neither disclosed the one, nor has it disclosed in  
20 entirety of the product. So SCO's theory goes to another  
21 level. It says you are required, owner of this product, the  
22 1,000 items, to keep confidential anything and everything that  
23 is in it, even if you take it out, and even if you license it  
24 from a third party who says to you you can do with it what you  
25 want, and even if you take out the one item, Judge, and put it



1 on the shelf, that material and those 1,000 items, 990 of which  
2 are your original work under SCO's theory are controlled by  
3 them. You might own them, they say, but they control them.

4 If you take it out, take out your one and you put it  
5 in another product, under their theory they also control the  
6 other product, and whatever the other components are in that  
7 product. That, Your Honor, we would respectfully submit is not  
8 a reasonable construction of Section 2.01 of the agreement.

9 The second point I want to make concerns the parol  
10 evidence. The overwhelming parol evidence here, Your Honor,  
11 compels the conclusion that SCO's theory is not a reasonable  
12 construction of the agreement. By the plain language, Your  
13 Honor, parol evidence ought not to be considered. In the event  
14 that Your Honor considers it, we would submit, and it is  
15 overwhelmingly in favor of IBM's construction, there are ten  
16 individuals, and we called them involved persons in our papers,  
17 who were involved in the execution and the negotiations of  
18 these agreements, five of them from AT&T, three of them from  
19 IBM, two of them from Sequent. They appear on the scene before  
20 Your Honor. Those individuals have offered specific, and we  
21 believe undisputed testimony, that refutes SCO's theory of the  
22 case. If we may share with Your Honor some clips from their  
23 depositions.

24 Mr. Wilson.

25 (WHEREUPON, the following deposition clips were

1 played.)

2 MR. WILSON: The only part of the derivative work  
3 that would have to be protected under the software agreement  
4 would be that portion of the software product that would be  
5 contained in a derivative work.

6 To the extent that modifications of derivative work  
7 contained portions of the software product, they were to  
8 protect the software product portion under the terms of the  
9 license agreement, that portion which was theirs, whatever,  
10 they can do whatever.

11 The intent was to make sure that we protected the  
12 software product. To the extent that they used that software  
13 product and created works which were original works, that was  
14 up to them to do what they pleased with those things.

15 When you say those things, you mean that portion of a  
16 derivative work that they had developed and that in your view  
17 they owned; is that correct?

18 That's correct.

19 MR. MARRIOTT: That was the head of AT&T's licensing  
20 business.

21 (WHEREUPON, the following deposition clips were  
22 played.)

23 Mr. Wilson.

24 If they created a derivative work and the derivative  
25 work contained zero content of the software product, then they

1 could do as they wish. If that contained portions of the  
2 software product, then they had to abide by the terms and  
3 conditions of the agreement with regard to that portion that  
4 contained the derivative work, contained the software product.  
5 Our agreements only went to the software product itself, not to  
6 their original created works.

7 MR. MARRIOTT: This is the man for AT&T that  
8 signed --

9 (WHEREUPON, the following deposition clips were  
10 played.)

11 David Frasure.

12 With respect to the agreements that IBM entered into  
13 with AT&T, is it your understanding that AT&T through those  
14 agreements had any right to control IBM's use of source code  
15 that it developed on its own?

16 They had no right to control that software that was  
17 developed by IBM.

18 With respect to the agreements that Sequent entered  
19 into with AT&T, is it your understanding that AT&T through  
20 those agreements, gained any right to control Sequent's use of  
21 the source code that it developed on its own?

22 They did not gain any rights to control the software  
23 developed by Sequent.

24 Was it the case that from AT&T Technologies'  
25 perspective that the licensee could do whatever it wanted with

1 the source code it developed?

2 Yes.

3 Michael DeFazio.

4 The basic idea is that the AT&T USL, Novell code was  
5 owned and protected by Novell. The code developed by our  
6 licensees was owned and controlled by them. When the two went  
7 together to market our rules prevailed. When the two were  
8 separate our rules prevailed on ours, and their rules prevailed  
9 on theirs.

10 Would you agree, Mr. DeFazio, that the agreements did  
11 not and do not give AT&T, USL and Novell or any of their  
12 successors or assigns the right to assert ownership or control  
13 over modifications and derivative works prepared by its  
14 licensees, except to the extent of the original UNIX System V  
15 source code included in such modifications and derivative  
16 works?

17 That's correct.

18 Stephen Vukasonvich.

19 And any code that IBM modified, in your view, under  
20 this provision, IBM thereafter owned?

21 They owned any modification. They owned their code  
22 that they developed, and we owned our code.

23 Ira Kistenberg.

24 By the terms of Section 2.01, did AT&T intend to  
25 restrict Sequent's rights to disclose code that Sequent

1 developed on its own?

2 If Sequent developed it on its own, AT&T had no  
3 rights to it.

4 My question is simply whether it was AT&T's  
5 understanding that Sequent would own the modifications and the  
6 derivative works that they prepared based on UNIX System V.

7 They owned it to do what they want with it, yes.

8 Were licensees of AT&T free to use and to disclose  
9 the modifications or derivative works they created provided  
10 they did not use or disclose any portion of licensed UNIX  
11 System V source code?

12 Yes.

13 Thomas Cronan.

14 In my discussions with AT&T what they were trying to  
15 protect were several derivative works. They were trying to  
16 protect their own System V code. They felt like they had to  
17 protect anything that was shipped around with their code in it.  
18 If we separated out our code from their code they didn't need  
19 to protect it. That was our discussion.

20 Richard McDonough.

21 Another huge issue for us was ownership of whatever  
22 we developed, and we wanted to make it clear that whatever we  
23 developed we owned. We weren't making any claim to the code  
24 that AT&T owned and developed itself, but we wanted to make  
25 certain that anything we or our subcontractors or anybody

1 working for us developed, we owned and had the right to use and  
2 license.

3 I would just say that there is no way on God's green  
4 earth that I would have entered into an agreement where  
5 somebody else owned what IBM was investing tens of millions of  
6 dollars in developing. An agreement never would have happened.  
7 So we had to make it clear that whatever IBM developed IBM  
8 owned.

9 Jeffrey Mobley.

10 My understanding was that we were free to do whatever  
11 we wanted to do with the products we were developing.

12 David Rodgers.

13 My understanding of the license is that the UNIX  
14 System V code had to be maintained as the AT&T private property  
15 and withheld from disclosure, but if there were other elements  
16 of the software product created by Sequent, that those were  
17 Sequent's to dispose of as it chose.

18 Roger Swanson.

19 Those parts of the source code that we wrote were not  
20 required to be kept confidential under the terms of the  
21 agreement, but we could do with them as we saw fit.

22 The aspects of the derivative works that we  
23 developed, we could choose to disclose or not disclose. We had  
24 the ownership, we had the control. That was my understanding.

25 Once, again, that's precisely what our understanding

1 was, that once we had made modifications, we still had an  
2 obligation to protect that part of the UNIX System V material,  
3 according to the restrictions of the agreement, but that work  
4 that we had developed ourselves, the source code that we  
5 developed, was not included as a part of those confidentiality  
6 restrictions.

7 (WHEREUPON, the deposition clips were concluded.)

8 MR. MARRIOTT: These witnesses, Your Honor, have  
9 offered substantial additional testimony, and it is in the  
10 papers, and we have provided CD's in the book, and we have  
11 provided Your Honor with three hours of the same, should you  
12 feel like you need to see that.

13 THE COURT: I appreciate that.

14 MR. MARRIOTT: I thought you might.

15 In an attempt to avoid summary judgment, Your Honor,  
16 SCO has pointed to the declarations of a number of witnesses.  
17 They appear at tab 13 of the book. These people have the use  
18 of the contracts, which they never communicated to IBM as they  
19 were not a part of the negotiations, and a number of them were  
20 not employed by AT&T at the time the agreement were executed.  
21 Their testimony, we submit, is no impediment to the entry of  
22 summary judgment. As overwhelming parol evidence, the  
23 testimony of those who negotiated and executed these  
24 agreements, who communicated their views to IBM, is we submit  
25 overwhelming in favor of IBM and against SCO's theory.

1           You looked like you had a question.

2           THE COURT: I don't.

3           MR. MARRIOTT: The third reason, Your Honor, why the  
4 contract claims fail is that SCO's theory is, as we show in the  
5 book at tabs 19 through 23, we think unreasonable as a matter  
6 of law. It is inconsistent with IBM's ownership rights, it is  
7 contrary to copyright law, it is against public policy, and it  
8 leaves in circumstances I'll explore later, an absurd result.

9           The second point, Your Honor, independent of what we  
10 believe is the undisputed evidence of no breach, that I want to  
11 emphasize here is that SCO is estopped from pursuing its theory  
12 of the case. For almost two decades following the execution of  
13 these agreements, some of these representatives of AT&T and USL  
14 and Novell and others, told IBM and other licensees that they  
15 could do as they wished with their own original works, so long  
16 as they protected AT&T's UNIX System V software.

17           Mr. Wilson, the head of the licensing business, said  
18 he on numerous occasions did that. Mr. Frasure, who executed  
19 the agreement on behalf of IBM, as you'll see at tabs 25 and 26  
20 of your book, said, quote, that he personally, quote, assured  
21 licensees in no uncertain terms that they could do as they  
22 wished with their original works. He, quote, often told people  
23 that UNIX licensees could freely use and disclose their  
24 original or homegrown UNIX method, code and concepts.

25           Mr. Green, another AT&T representative, also at USL



1 and Novell, has testified that, quote, more times than I could  
2 remember, close quote, licensees were told that they could do  
3 as they wished with their original works.

4 Ms. Tilley of AT&T, then USL, then Novell, said that  
5 representatives of AT&T and USL and Novell, quote, consistently  
6 informed licensees that they owned their code and that they  
7 could do with it as they wished.

8 Mr. Crab, formerly of Santa Cruz and then of Caldera,  
9 said that while at Santa Cruz, Santa Cruz told licensees that  
10 they were free to do as they wished with their own code,  
11 modifications and derivative works, so long as they protected  
12 AT&T's System V source code.

13 AT&T and its licensees, Your Honor, took AT&T's  
14 licensees like IBM and Sequent, took AT&T at their word. They  
15 publicly disclosed their own original works in the time  
16 following the execution of these agreements. Examples of those  
17 disclosures are in the papers we have provided. There is a  
18 cart with books in front of Your Honor in which repeated  
19 disclosures were made over decades of the code and the methods  
20 and the concepts of AT&T's UNIX System V software. And, Your  
21 Honor, of the modifications and supposed derivative works of  
22 that. Hundreds of books have been written on the subject.  
23 Those disclosures are no different, Your Honor, than the kinds  
24 of disclosures that SCO has included in its final disclosures.

25 Neither AT&T nor its successors raised any objection

1 to those disclosures until this lawsuit became a glimmer in the  
2 eye of current management. SCO's former CEO, Ransom Love, has  
3 testified that, quote, after Caldera acquired ownership of UNIX  
4 code, and this is at tab 29, even though we were aware that IBM  
5 was disclosing homegrown code, we made a conscious decision to  
6 take no action against such disclosures. IBM, Sequent and  
7 other licensees no doubt reasonably relied on the repeated  
8 statements by AT&T and its successors that they could do as  
9 they wished with their own works so long as they protected  
10 AT&T. IBM and Sequent built businesses, Your Honor, on that  
11 proposition and invested hundreds of millions of dollars in the  
12 idea that they would actually control their own stuff.

13 Estoppel can, no question, be in certain  
14 circumstances a fact intensive inquiry. It is not always  
15 appropriate for summary judgment. Courts can and they do enter  
16 summary judgment on grounds of estoppel, and I would  
17 respectfully submit, Your Honor, that if there is a case for  
18 it, this is it.

19 Third point, Your Honor, the alleged breaches here  
20 have been waived. They have been waived for three reasons.  
21 They have been waived because the repeated statements of AT&T  
22 and its successors over nearly two decades not only amount to  
23 estoppel but they amount to waiver. I won't repeat that  
24 ground.

25 The second reason why there is waiver here, Your

1 Honor, is that Novell, the supposed predecessor interest to  
2 SCO, exercised its rights under an asset purchase agreement  
3 with the Santa Cruz Operation, Inc. to waive the alleged  
4 breaches here. I will come back to that.

5 The second item I would like to focus on, Your Honor,  
6 is SCO's own conduct which we believe results in a waiver of  
7 alleged breaches here.

8 First, Your Honor, with respect to Novell. Section  
9 4.16B. If you look at tab 36 of the book, Your Honor, after  
10 the commencement of this case Novell exercised its rights under  
11 Section 4.16B of the asset purchase agreement to cause a waiver  
12 of the alleged breaches here. The asset purchase agreement  
13 says that seller, in this case it was Novell, shall amend -- in  
14 addition, seller in its sole discretion, buyer shall amend,  
15 supplement, modify or waive any rights under, or shall assign  
16 any rights to any SVRX license to the extent so directed in any  
17 manner or respect by seller, Novell.

18 In the event that the buyer fails to take such  
19 action, the seller, Novell, shall be authorized and is granted  
20 the right to take that action on the buyer's behalf. Well, it  
21 is undisputed here that Novell, following the commencement of  
22 this case, exercised its rights under 4.16B. In the dissent  
23 letter it asked SCO to waive, and SCO declined to waive and  
24 Novell took that action. The only issue is whether Novell has  
25 the right to do that.

1 I respectfully submit, Your Honor, that the plain  
2 language of Section 4.16B gives Novell that right. SCO has  
3 raised a number of arguments in opposition, some as to the  
4 parol evidence, and some as to the plain language of the  
5 agreement. We deal with those arguments in our papers and at  
6 tabs 38 and 39 of the book. Time won't allow me to repeat them  
7 here.

8 Let me just say this about SCO's argument. SCO's  
9 reliance on the parol evidence is we submit impermissible, Your  
10 Honor, because the plain language controls, and the parol  
11 evidence cannot be used to alter the plain language of the  
12 agreement. As to the plain language of the agreement, what SCO  
13 says in effect, Your Honor, is that Novell had waiver rights,  
14 but it doesn't have waiver rights to the agreement that are at  
15 issue in this case, the agreements that IBM is supposed to have  
16 breached. The waiver rights by the terms of Section 4.16B  
17 relate to SVRX licenses. The question is, are the agreements  
18 at issue here SVRX licenses? As we show at tab 40 in Your  
19 Honor's book, I submit there is no question that they are.  
20 SVRX stands, Your Honor, simply for System Y release. There is  
21 no question that the agreements IBM is supposed to have  
22 breached are SVRX licenses. They are agreements licensing  
23 System V releases.

24 In a letter from SCO's CEO to the CEO of Novell,  
25 following Novell's exercise of its rights under 4.16B,

1 Mr. McBride acknowledged that the agreements at issue in this  
2 case are SVRX licenses. He said, and I quote, in your June 9  
3 letter, you, referring to Novell, attempt to assert claims on  
4 behalf of IBM and with respect to its SVRX licenses with SCO.  
5 In SCO's opposition papers, Your Honor, in connection with this  
6 exact motion, at paragraph 201, SCO acknowledges that the  
7 agreements at issue are SVRX licenses. It says, quote,  
8 effective June 13, 2003, SCO terminated IBM's SVRX license.  
9 Effective July 30, 2003, SCO terminated the Sequent SVRX  
10 license. Novell has waived the alleged breaches at issue.

11 The next waiver issue I would like to discuss, Your  
12 Honor, concerns SCO's conduct. This is summarized at tab 41.  
13 SCO shipped the exact four categories of code material we're  
14 talking about, Your Honor, in its own product. It shipped it  
15 in its United Linux product, and it shipped it in that United  
16 Linux product pursuant to the terms of the General Public  
17 License or the GPL. Each of those acts resulted in a waiver of  
18 the alleged breaches. Let me tell you why.

19 First, United Linux. If you look at tab 43 of the  
20 book, Your Honor, SCO was part of an initiative known as United  
21 Linux. As a part of that initiative SCO and its partners  
22 assigned any intellectual property rights they had, with the  
23 exception that is not relevant here, to the material that ended  
24 up in United Linux product. The material at issue here is in  
25 the United Linux product. If you take a look at, Your Honor,

1 tab 44 of the book, you'll see the language of the United Linux  
2 agreements. The United Linux Joint Development Contract says  
3 that all intellectual property rights in the software developed  
4 pursuant to the JDC, other than the preexisting technology and  
5 enhancements, shall be assigned by the members, which SCO is  
6 one, and any individual member to the LLC and shall be owned by  
7 the LLC.

8 Well, SCO's Linux IV product was, Your Honor,  
9 software developed pursuant to the JDC. We show that at tabs  
10 44 and 46 of the book. Again, the items of information that is  
11 supposedly misused here was in that product. Any rights SCO  
12 had to the material at issue, Your Honor, and we respectfully  
13 submit they had none, but any rights they had were assigned by  
14 them to the United Linux LLC, and they are in no position now  
15 to assert any claim of breach with respect to it.

16 With respect to the GPL, the General Public License,  
17 again, SCO shipped the material at issue in products that were  
18 licensed under the GPL. What does the GPL say? The GPL says,  
19 among other things, that if you distribute copies of the  
20 program covered by the GPL product or for a fee you must give  
21 the recipients all the rights that you have. You must make  
22 sure that they too receive and can get the source code. You  
23 give them the right to make copies and to distribute verbatim  
24 copies. So the very material that supposedly represents the  
25 breach was put by them in a United Linux product and shipped

1 under the General Public License under those terms. That, too,  
2 Your Honor, represents a waiver.

3 Now, if I may, as time is short, with respect to the  
4 technology items at issue, and let me say this again, there are  
5 four of them. I would point you to tab 53 of the book where  
6 they are listed. The facts related to these four technology  
7 area are at tab 54 of the book. These four items of technology  
8 have one thing in common. That one thing is dispositive of  
9 SCO's claims. That one thing is that none of those four  
10 categories of material is resulting material. Under their  
11 theory of the case, Judge, IBM's liability depends at a minimum  
12 on it being resulting material. They are not, therefore, the  
13 claims fail. None of the four categories include System V  
14 methods or concepts, none of them are modifications and  
15 derivative works of UNIX System V. They are original IBM  
16 works, just as in my example of the 990 original works of Your  
17 Honor, and SCO has under the plain language of the agreement,  
18 we submit, no right to control them.

19 There are four, as I said, Your Honor. The JFS  
20 contribution is at issue in the next motion, and with Your  
21 Honor's permission, I will argue that in that connection. Let  
22 me just focus on the three remaining ones, the RCU  
23 contribution, the LTP contribution, and the negative know-how  
24 experience. The RCU contribution is at tab 58. Putting aside  
25 the fact that it is not resulting material, and putting aside

1 the fact that SCO has waived any right to pursue it, SCO's  
2 claim with respect to the RCU contribution is barred by the  
3 statute of limitation. The statute of limitations under New  
4 York law, which controls, is six years. RCU was disclosed in a  
5 patent application in 1993 and the patent issued in 1995.

6 Under SCO's mistaken theory of the contract, Your  
7 Honor, IBM's filing of the patent application amounts to a  
8 disclosure. The statute of limitations ran before the  
9 commencement of this claim and the claim is barred.

10 In any event, the witnesses, the only individuals  
11 identified by SCO as having anything to do with that, and whose  
12 pictures and testimony appear at tab 60, have debunked SCO's  
13 claims.

14 The LTP contribution. Again, putting aside the fact  
15 that it is not resulting material, putting aside the fact of  
16 waiver and estoppel, SCO's claim with respect to the LTP  
17 contribution fails, Your Honor, because it depends on the  
18 proposition that the LTP contribution came from the DYNIX  
19 operating system, which SCO contends is a modification and  
20 derivative work. It didn't.

21 The LTP contribution was not part of the DYNIX  
22 operating system. The evidence, which we set out at tab 62 of  
23 the book, makes that perfectly clear. It was not a part of it  
24 and under their own theory it fails.

25 Lastly, Your Honor, the negative know-how category.



1 This is a category of 11 items of supposedly misused  
2 information. We lay this out at tab 64. There are two basic  
3 brands of claim as it relate to these 11 items. One of them  
4 concerns experience. Here is what SCO's claim is as it relates  
5 to the experience. It says, as we show at tab 65, Judge, it  
6 says IBM has breached its contract by permitting IBM developers  
7 exposed to DYNIX PTX methods and concepts to contribute to  
8 Linux in the same area for each developer's work. So anybody  
9 that had any exposure to DYNIX can't work in connection with  
10 any other operating system in that area. That is the claim.

11 With respect to the negative know-how, which also  
12 appears at 65, the gist of the claim is that people who had  
13 some knowledge about DYNIX told people who were working on  
14 Linux not to do certain things in DYNIX that they don't think  
15 worked. SCO has identified 16 supposed wrongdoers as it  
16 relates to these 11 categories.

17 Those individuals, Your Honor, as I will come to,  
18 have offered undisputed testimony that debunks SCO's claim.  
19 The claims as to these 11, Your Honor, fail for three quick  
20 reasons, and I will sit down.

21 First, Your Honor, the agreements which SCO contends  
22 were breached, Your Honor, do not contain any provision which  
23 would allow it to preclude IBM employees from using their  
24 experience and their general know-how in working on projects  
25 other than the one on which they are presently working. There

1 is no connection drawn in SCO's interrogatory answers or in its  
2 paper between the contract and this claimed notion of misuse of  
3 experience.

4 Second, Your Honor, though Magistrate Judge Wells  
5 allowed SCO to pursue, and declined to throw out in the  
6 discovery phase SCO's claim as to these 11 items, she made it  
7 perfectly clear in her order, which we have set out in your  
8 Honor's binder, that these claims were subject to being, in her  
9 judgment, at least, disposed of on summary judgment.

10 Your Honor ordered SCO to provide particularity as to  
11 these claims as did Magistrate Judge Wells. That has never  
12 been provided, and for that reason alone they are out.

13 Finally, careful consideration of these items shows  
14 that the claim falls apart. If you look at tab 70, Your Honor,  
15 you will see the pictures of each of the 16 individuals who are  
16 at issue and what it is they said in testimony that is  
17 un rebutted by SCO. Here is what they said. They didn't make  
18 any contributions to the files or the directories listed, or  
19 they didn't base their contributions to the list of files on  
20 UNIX System V in making the contributions.

21 You will want to look item by item. Your Honor, look  
22 at tab 71. For two of these items, and, again, this is  
23 undisputed, for two of these items, Your Honor, 188 and 187,  
24 the technology which SCO alleges was misused didn't even exist  
25 in DYNIX. For another two of the items, 43 and 94, the

1 material had nothing to do with DYNIX PTX. It was discoverable  
2 outside of IBM. For five of the items there is absolutely no  
3 evidence that the alleged wrongdoers had any experience in the  
4 technology area where they were supposed to have misused it in  
5 some other area. SCO admits that with respect to four of them.  
6 With respect to items 23 and 90, Your Honor, for two of the  
7 items the material was disclosed in marketing materials, and in  
8 footnote ten of SCO's opposition papers, it says that any such  
9 disclosure -- if the material is inactionable anyway. Finally,  
10 item 189, Your Honor, was based on knowledge available in  
11 public literature.

12 As is summarized in tab 72 of the book, SCO's  
13 negative know-how claims and its experience claims we think  
14 underscore the absurdity of the position. If SCO's theory is  
15 correct that anybody with any experience, not just with UNIX  
16 System V, but any modification or derivative work of UNIX  
17 System V, is severely constrained in their employment, and that  
18 is contrary to public policy as the cases in our papers make  
19 clear.

20 The only conceivable reason, the only conceivable  
21 reason why AT&T could have wanted to protect IBM, and in my  
22 example Your Honor's original works, was to protect the one  
23 item that you put in your product. SCO has acknowledged, Your  
24 Honor, and it did it early in the case, that there are no  
25 secrets in UNIX System V. They said that in open court and

1 they withdrew their trade secrets claim.

2           SCO's theory is, finally, inconsistent with IBM's  
3 rights of ownership. It admits that IBM owns the material at  
4 issue. It admits that ownership carries with it the exclusive  
5 right to distribute, and yet they take the position, Your  
6 Honor, that would nullify as a practical matter IBM's rights of  
7 ownership.

8           Thank you.

9           THE COURT: Thank you.

10          Mr. Singer.

11          MR. SINGER: Thank you, Your Honor. We also have  
12 arguments books, if I might approach?

13          THE COURT: Please.

14          MR. SINGER: Your Honor, I would like to begin with  
15 why these contract claims matter. The UNIX operating system  
16 developed by AT&T was its crown jewel. It is the operating  
17 system of choice for mission critical application, and it  
18 became in the 1990s the leading operating system worldwide.

19          Now, major computer companies like IBM wanted to  
20 adopt that system for their own hardware. They had a choice.  
21 They could come up with their own operating system. In fact,  
22 IBM tried. It is called OS2. It failed. IBM, like others,  
23 struck a deal with AT&T. Give us access to your source code so  
24 that we can develop our own flavor of UNIX that will run better  
25 on our hardware. AT&T agreed but subject to very strong

1 restrictions, and not just on the original System V code, but  
2 on what they knew IBM and others would do with it, the  
3 so-called modified and derivative works.

4 They required that those modified and derivative  
5 works be treated just like the original software code in  
6 language that is as plain as can be in the relative agreements  
7 that are enforceable today. That is why we are here.

8 AT&T preserved its head start in developing UNIX  
9 while allowing companies to, for a royalty, develop their own  
10 systems that were UNIX systems that, of course, would pay  
11 royalties for the object code that would run the various  
12 machines. What they could not do is exactly what IBM has done  
13 here, give away that head start by open sourcing of derivative  
14 technology that they would never have had if it weren't for  
15 access in the first place to System V, and to allow a  
16 jump-start to Linux, which has had a tremendous effect on SCO's  
17 business. SCO was the inheritor of AT&T's UNIX business. SCO  
18 dominated with UNIX on the Intel chip platform market, and it  
19 had 80 percent of the market in the late 1990s.

20 It did ventures with IBM, as you'll hear more about  
21 this on Monday when we have our unfair competition argument,  
22 but a joint venture project, Monte Ray, to use SCO's know-how  
23 in that field to develop joint products. IBM then decided to  
24 abandon project Monte Ray, and instead to devote technology to  
25 Linux and to disclose proprietary UNIX technology. At tab one

1 we just touch on a little bit of that, which is the experts',  
2 Mr. Rochkind's and Mr. Ivie's conclusions that IBM's  
3 disclosures is what turned Linux into a strong enterprise  
4 system.

5           If you turn to the third page, in tab one you see a  
6 graphic where IBM's own document shows it directed the strength  
7 of AIX and PTX, which is DYNIX, into Linux as their proposed  
8 UNIX strategy. You have a summary of the vast amount of  
9 technology just on the issues which are still subject to the  
10 Court's order in the case, substantial amounts of technology  
11 that have been contributed. You have Mr. McKenney, who is an  
12 IBM secret programmer, who expressly stated in a document that  
13 we will mine key ideas from AIX and DYNIX PTX, and that this  
14 will make Linux more disruptive to proprietary operating  
15 systems like SCO's business. And the reason they can do this  
16 is because they have access to DYNIX PTX source code and access  
17 to top operating system experts in AIX and DYNIX.

18           The result, which is depicted graphically on the last  
19 slide in section one, is the rapid decline in SCO's open server  
20 UNIX new license revenue following those technologies being  
21 distributed in early 2000. That is why these contract claims  
22 matter a great deal.

23           I would like to address at the outset why a trial is  
24 needed, and why this is not a matter for summary judgment. One  
25 might think that that is obvious just from IBM's presentation.

1 There are hundreds of pages of briefs, reply papers and  
2 addendum that are longer, I think, than War and Peace. 40,000  
3 pages of exhibits. We counted 100 plus new cases just cited in  
4 their reply brief. That does not sound like a summary judgment  
5 case to us, Your Honor. It does not sound like a case where  
6 you can look at the plain language and you can say SCO does not  
7 have a contract claim.

8 I think that it is also clear when we look at the  
9 extrinsic evidence that IBM is so heavily relying upon, and  
10 because you're talking about both things that occurred over two  
11 decades ago, in part, and because you're talking about terms  
12 that are not clearly defined, like what does someone mean when  
13 they say an original IBM work? What do they mean when they  
14 say, as you heard on the screen, that it was developed without  
15 relying on System V?

16 Let's take a look at some of those witnesses just at  
17 the front end, and their changes of opinion at different points  
18 in the case. If you look at tab two, the first slide is Otis  
19 Wilson. He says, as you heard, his beliefs as set forth in a  
20 declaration that IBM and Sequent are free to open source all of  
21 AIX and DYNIX except the original System V code. 14 years ago,  
22 however, he gave strikingly different and contradictory  
23 testimony in a case, USL versus Berkeley, where he said that  
24 anything that that university created with the exposure to  
25 licensed software based on, contained a part of, was a

1 derivative work and had to be treated as a licensed software,  
2 which is, of course, what the plain language of the agreement  
3 says.

4 He also wrote that in a 1987 document. He also  
5 confirmed that that testimony was correct at his deposition,  
6 and he acknowledged it was no different in intent between a  
7 standard operating license and the educational license at issue  
8 in that case.

9 On the next page we talk about Mr. Kistenberg,  
10 another one of the IBM acknowledged involved persons. He  
11 negotiated the Sequent deal on behalf of Sequent. They have a  
12 declaration from Mr. Kistenberg that said no one at AT&T had  
13 intended to assert control over the portion of derivative work  
14 that did not contain System V code. He told a different story  
15 in his deposition.

16 In fact, he said in his deposition that he told IBM's  
17 counsel that his understanding was that the UNIX software given  
18 to any of the licensees, that any time they used the source  
19 code to develop derivative products, that that was a part of  
20 the System V source code, and that they could not turn around  
21 and give it to X, Y, Z companies. He states that clearly at  
22 various places in his deposition. He says in his deposition  
23 that he would never have signed that declaration if he knew the  
24 use that IBM would try to interpret his words to mean.

25 Mr. Chatlos, in fact, did exactly that. When he was



1 confronted with a proposed IBM declaration following the  
2 meeting, he said he would sign one that actually reflected what  
3 he had discussed, but that the ones presented to him didn't do  
4 that and he refused to sign.

5 Mr. Bouffard had his declaration submitted by IBM  
6 and, again on the key point we're talking about, these are not  
7 collateral points, but it is the key points that IBM wants you  
8 to overturn the plain language of the agreement and go with  
9 extrinsic evidence on. They have a declaration from Mr.  
10 Bouffard. He gives a later declaration to SCO which clarifies  
11 that when he said there was no right to control or own the  
12 modifications, he meant that AT&T couldn't appropriate such  
13 material, and said to IBM give us the AIX and we want to sell  
14 it for our benefit. And that he did not mean that IBM had the  
15 right to disclose the protected added on material and other  
16 code that was in the derivative product. That is directly  
17 contrary to his declaration and the position that IBM takes in  
18 this case.

19 Just recently in the Novell case, he gave a  
20 deposition and that is the next page which is excerpted here,  
21 where he was asked by Novell's counsel as to how it came to be  
22 that he signed the declaration that said that ownership and  
23 control was with IBM, and he explained that his IBM declaration  
24 wasn't written by him, that they went around and around in  
25 negotiating the language, and that finally he was worn down.

1 He said it wound up being a negotiation of my words rather than  
2 a document of my words.

3 Your Honor, this and the other extrinsic evidence is  
4 exactly why we have trials. We want to subject these witnesses  
5 to the crucible of cross-examination, and then the truth we  
6 believe will emerge. That cannot be shortcut in this case.

7 I would also like to talk about the assertion that  
8 was made that the particular derivative works at issue in this  
9 case are just things that were dropped in and had no basis  
10 related to System V. That is manifestly not the case. I would  
11 like to move all the way to tab 50, if you would, in the binder  
12 which we provided.

13 This deals with AIX. It is an excerpt from the  
14 report of Mr. Evan Ivie, who was formerly the head of the  
15 computer science department at Brigham Young. He has worked on  
16 UNIX all the way back to AT&T. He is a distinguished expert in  
17 the field. He has studied this, and as his report and  
18 underlying testimony show, half of the JFS files were based on  
19 System V source code. If you turn to the second page there we  
20 go into a little more detail. Mr. Hatch in the argument later  
21 this afternoon will even have even more detail on this. He  
22 points out that in 1990 or 1991 the first JFS was based on the  
23 preexisting system that was derived from UNIX source code  
24 licensed from AT&T, and that approximately half of those files  
25 were based on UNIX System V source code. How does he know

1 that? Because if you go back into the discovery of that, they  
2 have origin codes where IBM is included within AIX indicating  
3 that those came from System V.

4 Now, there is a dispute as to whether or not IBM  
5 created the JFS system that was contributed to Linux in a clean  
6 room environment from OS2, their own operating system.

7 THE COURT: Hang on a second.

8 MR. SINGER: Do you need a moment?

9 THE COURT: Go ahead, Mr. Singer.

10 MR. SINGER: Your Honor, that is a disputed fact as  
11 to whether or not it came out of OS2 because we have competent  
12 expert testimony saying it came from System V.

13 In addition, we have admissions, such as an IBM  
14 programmer, who said, and this is also at tab 50, that the  
15 System V file system is where this stuff, referring to JFS,  
16 where this originated. It couldn't be more black and white  
17 than that.

18 Mr. Davidson's declaration is also further support of  
19 the fact that JFS is not some system that just was dropped into  
20 AIX and had no relationship to System V and now they are  
21 seeking protection over it. It itself was derived from System  
22 V.

23 At tabs 51 and 52 we have a similar analysis with  
24 respect to the origins and the relationship of DYNIX RCU.  
25 These are not things that were just dropped in and that were

1 extracted to give to Linux. These were interwoven with the  
2 DYNIX operating system. DYNIX wouldn't operate without them,  
3 and those were operating in a DYNIX environment, and they are  
4 by every meaning of the word derivatives.

5 Now, Your Honor, I would like to go back now to the  
6 legal argument and begin with the fact that there are four  
7 claims. We disagree with IBM on the issue regarding  
8 sublicensing contracts. They had no separate agreement about  
9 it in their initial brief. They said, which we agreed, that  
10 they depend on the original underlying primary source code  
11 agreement and, therefore, if there is a breach of the software  
12 agreement, there is also a breach of the sublicensing agreement  
13 for distributing material in violation of the software  
14 agreement, and Section 3.03 of the sublicensing agreement makes  
15 that clear.

16 Now, there are four and only four legal arguments  
17 made by IBM in their summary judgment briefing, their initial  
18 briefing, not their reply brief. I will deal with those here.  
19 We urge the Court to disregard all the new and additional  
20 arguments put into the reply papers that were not raised in the  
21 initial papers.

22 Turning to the plain language, Section 2.01 says that  
23 the right being given to IBM includes the right to modify the  
24 software product and to prepare derivative works based on such  
25 software product provided the resulting material, which we

1 submit are the derivative works, are treated hereunder as a  
2 part of the original software product. That means treated just  
3 like the System V code.

4 What does that language not say? It does not say  
5 what IBM suggests. It does not say that IBM is free to take  
6 any part of this and distribute it to whomever they wish in  
7 source code form. The contract between what IBM's position in  
8 this case is, and what the agreement says, could not be clearer  
9 than just contrasting the two. In IBM's brief they say that  
10 IBM owns and is free to disclose any material that Sequent  
11 created so long as it does not contain UNIX System V material,  
12 and, as we have seen, that is simply not what 2.01 says.

13 Section 7.06, another part of that agreement, also  
14 makes it clear that the licensee has to hold all parts of the  
15 software product subject to this agreement and in confidence  
16 for AT&T, that it may distribute products only to third parties  
17 having licenses of equivalent scope, and that the licensee may  
18 obtain materials based on the software products subject to this  
19 agreement from such a third party, and use such materials,  
20 provided that the licensee treats such materials as if they  
21 were a part of the software product. Think about what that  
22 means. IBM is restricting itself to use materials based on a  
23 software product, not the software product as they say just  
24 System V, but just based on that from a third party, but can  
25 only use those materials if they treat them as part of the

1 software product itself. That is just like 2.01 suggests.

2 Now, what IBM does not spend any time on are the side  
3 letter and amendment X, which clarified and modified in certain  
4 respects the IBM AT&T agreement but not the Sequent agreement.  
5 We have dealt with that in our briefs because those support our  
6 position. They gave ownership rights over derivative works to  
7 IBM, but did not give them a release from the control rights  
8 and they could not disclose the source code to others. That  
9 was clear under 706(a) which appears in the '85 letter. These  
10 are by way of tab 8 in the book. The 1987 letter continues to  
11 protect all parts of derivative works. It indicated that a  
12 third-party breach of derivative works cannot do so if it is  
13 based on all or any portion of such a derivative work, which is  
14 inconsistent with the position IBM takes here today.

15 In 1996 they had an amendment X which had an  
16 illustration attached at 3.7, and that illustration was that if  
17 company A, a sublicensee, is a general computer system  
18 manufacturing system, and it said IBM may not distribute source  
19 copies to that company for purposes of making modifications to  
20 adapt the sublicensed product as a general operating system for  
21 the company's general computer hardware system. But yet they  
22 maintain here that they can open source that to the world to  
23 come up with competing operating systems. Their position  
24 simply cannot be squared with the plain language of the  
25 agreement.

1           There would be no purpose for the language we saw in  
2    2.01 talking about the derivative works if all that was  
3    protected was the original course code. You wouldn't need  
4    that. The source code would then have its own protection. The  
5    only sense that makes is if the derivative works, the resulting  
6    work is protected.

7           Now, Your Honor, there is no factual dispute that AIX  
8    and DYNIX PTX are derivative works within the meaning of  
9    Section 2.01. At tab 10 in the binder we provide the expert  
10   testimony on that point, and admissions from both Sequent and  
11   IBM people that these are derivative operating systems based on  
12   System V. We would submit that the combination of that plain  
13   language, and the expert testimony together with the plain  
14   meaning of the Sequent agreement, is why we're entitled to  
15   partial summary judgment on Sequent on the ground, one, that  
16   Section 2.01 means what it says, that the derivative work has  
17   to protect like the original product and, two, that DYNIX is in  
18   fact a derivative of System V, because that is not disputed at  
19   either the expert level or the level of the admissions which we  
20   have put into the record and excerpted at tab 10.

21           Your Honor, for that reason we don't believe it is  
22    necessary to turn to parol evidence in this case. There is an  
23    integration clause that would even exclude doing so. However,  
24    the parol evidence is sharply disputed and it would require a  
25    trial. If one turns to tab 13, and I have already touched on

1 this subject with respect to certain declarations from the very  
2 witnesses who IBM relies upon, but beyond that there are over  
3 20 witnesses, 20 witnesses who are involved with AT&T and  
4 Novell and Santa Cruz in the negotiations, in the  
5 administration, in the enforcement of these agreements, who  
6 contradict IBM's contract interpretation.

7 I don't have time to go through here now all of this  
8 testimony that is in the record and excerpted at tab 14, but it  
9 is directly on point.

10 Mitzi Bond, for example --

11 THE COURT: You said 14. Do you mean 13?

12 MR. SINGER: It is 13 that I am referring to right  
13 now, Your Honor.

14 THE COURT: Okay.

15 MR. SINGER: Behind tab 13, which is the chart, there  
16 are excerpts from each of this witnesses and declarations or  
17 depositions.

18 Just to touch on one, Mr. Guffey, who during the  
19 relevant time period, '80 to '85, was the head of the software  
20 services division which included UNIX, and he said I believe  
21 that the members of my division and other AT&T employees  
22 involved in licensing UNIX share the foregoing understanding  
23 because it was a common subject in training and discussion.  
24 The licensee was obligated to keep all parts of those  
25 modifications and derivative works confidential, including the



1 methods and concepts embodied in those modification and  
2 derivative works, just as the licensee was required to keep all  
3 parts of the UNIX software product confidential.

4           If one turns to Burn Levine, who was an attorney at  
5 the time involved with these agreements at AT&T, and he said  
6 nothing in the agreement reduced AT&T's protection for UNIX  
7 software, and that it was not limited to the disclosure of just  
8 little source code.

9           Beyond those witnesses, let's turn to some of the  
10 very witnesses who IBM relies upon. If we turn to tab 16, we  
11 have again Mr. Kistenberg who says exactly the opposite of what  
12 IBM relies upon in connection with the testimony that you have  
13 heard earlier from IBM. If we turn to tab 17 you have Mike  
14 DeFazio who was there and he supports IBM's position, but he  
15 concedes that he really relied on Martin Pfeffer who was the  
16 general counsel, who had primary responsibilities for  
17 supervising the drafting of these agreement, and Mr. Pfeffer  
18 supports our position.

19           You have at tab 18 Otis Wilson, and Mr. Wilson, as we  
20 have seen, contradicted his position that he takes now, closer  
21 to the time in the USL case, where he gave sworn testimony and  
22 where he said anything that created an exposure to the licensed  
23 software or was based on or was a derivative work had to be  
24 treated in that way.

25           We have seen with respect to David Frasure, tab 19,

1 another one of the individuals up on the scene, that he  
2 specifically said in the USL versus Berkeley case that the UNIX  
3 source code had been instrumental in its development, and that  
4 that is why it cannot be freely distributed by Berkeley.

5 Mr. Vuksanovich, the other gentleman up there at tab  
6 20, says that if there is a single line of UNIX source code in  
7 a modification or derivative work, then that modification or  
8 derivative work has to be treated like the software product  
9 that has been licensed under the agreement. He agreed with  
10 that. So clearly this is a case where both the subsequent UNIX  
11 agreement and the testimony requires a trial.

12 One final point on that, which is at tab 23. That is  
13 that there are documents from IBM that are also inconsistent  
14 with what IBM maintains today. This was an analysis of these  
15 very agreements done by IBM. We put the whole document behind  
16 tab 23 for the Court to read. This analysis was done in 1989,  
17 and specifically concluded that all copies of the derivative  
18 works of UNIX source code must be treated in exactly the same  
19 manner as the UNIX source code as received from AT&T. Nowhere  
20 in this document is there any mention that they could extract  
21 parts of the modifications and the derivatives and do with them  
22 what they would. That is something that is a position taken in  
23 this litigation.

24 Your Honor, they talk about the parade of horrors  
25 that will occur if this interpretation is afforded. That is

1 simply not the case. There are only two derivative works at  
2 issue, AIX and DYNIX. IBM can use that technology to market  
3 product, and they can come up with their own independent  
4 operating system, and their employees are not restricted in  
5 their work, they simply can't open source the result of that  
6 work if it is based on System V.

7 So the consequences of agreeing with our  
8 interpretation is simply that our contract is upheld, we  
9 receive damages, we receive an injunction against further  
10 violations to prevent this head start from being dissipated and  
11 being given away to Linux. No other company that we're aware  
12 of has done what IBM had tried to do, even though there have  
13 been many licensees. None of them have come in here and open  
14 sourced their source code in the manner that IBM has to enhance  
15 Linux.

16 Your Honor, we have put in the book as well the  
17 various legal authorities as to why this interpretation is  
18 reasonable. There has been a dispute of experts between  
19 Mr. Willick, who they submit, and Mr. Popono, who is a  
20 professor at Harvard Business School, and at trial I think that  
21 will be interesting testimony, and certainly not something that  
22 the Court needs to deal with on summary judgment.

23 Now, with respect to estoppel, at tab 27 we include  
24 the fact that estoppel is an issue of fact that we would submit  
25 is inherently unsuited for summary judgment. The requirements

1 are that there be some concealment of a material fact by us,  
2 and some lack of knowledge regarding these contracts by IBM.  
3 That simply is not feasible in this situation.

4 First of all, you have an integration clause which  
5 said that the parties can only change the agreement by a signed  
6 agreement in writing. IBM knows that even if it were true that  
7 some people told them, well, disregard this and don't believe  
8 that, they knew that the only thing they could rely on was a  
9 change in writing, and that is in the agreement, and that we  
10 submit is why IBM went to the trouble of getting those side  
11 letters in 1985 and 1987 and negotiating amendment X in 1996.  
12 That is how these things are changed.

13 The case law we cite at tab 28 in our brief say that  
14 that is an integral matter for an estoppel claim. Certainly  
15 there can be no concealment of material facts when what  
16 allegedly is being concealed is the plain language of the  
17 contract. Now, beyond that there is no competent evidence that  
18 establishes that AT&T or any of its successors told IBM or  
19 Sequent that they could simply do as they wished.

20 That library shelf of books which was brought in  
21 here, there is nothing shown that the specific technology that  
22 is at issue in this case is disclosed there. Many of those, we  
23 would submit all of those, have copyright notices, so to the  
24 extent there is information it is still protected by our  
25 copyrights. They talk generally about System V but don't

1 disclose the information here. They are welcome to roll in  
2 that cart we submit to the jury in this case and make that  
3 argument, but that is certainly not a part of a summary  
4 judgment proceeding.

5 Now, as to the witnesses who they claim say that AT&T  
6 gave them these assurances to do as they wished, that is  
7 sharply disputed. Your Honor, turn to tab 30, if you would, in  
8 the binder. You see there over a dozen witnesses on those two  
9 pages that flatly dispute that they or anyone they worked with  
10 at AT&T or Novell or Santa Cruz ever told licensees that they  
11 could disregard the plain language of those agreements. At a  
12 minimum, even if that is a legally tenable argument for  
13 estoppel, it is subject to a factual dispute.

14 Your Honor, specifically, Doug Michels testified, and  
15 this is at tab 31, that when there was a concern at Santa Cruz  
16 that IBM announced support for Linux, he went to talk to IBM  
17 and they assured Santa Cruz, which is now SCO, that they would  
18 not commercially harden Linux, and that they would not  
19 substantially encroach on Santa Cruz's core market, so that  
20 there was nothing here we had to worry about. Now they claim  
21 that is estoppel and waiver. I submit that there cannot be any  
22 evidence of reliance because IBM gave those rights no  
23 consideration at all.

24 First of all, let's look at the fact, and they talk  
25 about this in connection with waiver, with the distribution of

1 Linux, but who was distributing what when? When did IBM make  
2 their Linux decision? IBM decided to pursue Linux and to  
3 distribute technology beginning in '98, and they started the  
4 Linux Technology Center in '99, and the first disclosures were  
5 at the end of '99 and into 2000. At that time period, up to  
6 May of 2001, these copyrights and contracts were owned by Santa  
7 Cruz which was not in the Linux business. Caldera, which was  
8 in the Linux business, did not own them. Caldera acquired them  
9 afterwards, after they had already made this decision and gone  
10 forward.

11 But beyond that, Mr. Frye, who is the very head of  
12 the IBM Linux Technology Center, specifically denied that he  
13 ever gave any consideration to any of these issues with SCO.  
14 That is at tab 32.

15 Your Honor, in addition, at tab 34 you have  
16 Mr. Sandve's e-mail from IBM, and Mr. Sandve specifically  
17 states, because he was asked by one of his superiors, why can't  
18 we let you look at the AIX source code? He says it was because  
19 of the 5.3 source code license, and that it would take 50 to  
20 \$80 million to buy it from SCO even if SCO would deal with it  
21 right now. All these assertions of estoppel and waiver are at  
22 a minimum factual issues which have to be decided at trial.

23 Very briefly with respect to the issue of Novell  
24 waiving our rights.

25 By the way, one last point on IBM's suggestion that

1 Mr. Love waived his rights and that SCO made a knowing waiver.  
2 Mr. Love, who IBM did not disclose to the Court, is a paid IBM  
3 consultant, he contradicted that in a subsequent declaration,  
4 saying that there was never an investigation while he was the  
5 C.E.O. of these property rights. We have submitted  
6 declarations, and this is at tab 40, from other members of the  
7 board of directors and management directly contradicting his  
8 testimony.

9 So all of these issues, and the United Linux issue  
10 they raise, and it is treated in the copyright argument which  
11 you'll hear later in the week, and they incorporated that in  
12 their briefs and we incorporated it in our briefs, and that  
13 will be later this week, and so will the issues concerning the  
14 other waiver argument they made about our distribution of  
15 Linux. At a minimum there are factual issues that preclude an  
16 estoppel and waiver argument.

17 I would like to talk about the issue of Novell's  
18 purported waiver of SCO's rights. This interpretation would  
19 make a mockery, Your Honor, of the very asset purchase  
20 agreement that was signed by the parties, where it gave the  
21 whole business to SCO. The Court will remember the argument  
22 about this in the Novell case a few weeks ago, and yet they  
23 maintain that they can come in here and they can prevent SCO  
24 from enforcing its intellectual property rights by a contorted  
25 interpretation of Section 4.16. First of all, this issue is

1 resolved in the Novell trial.

2 Secondly, their position is simply flat wrong. If  
3 one turns to tab 43, and Your Honor has seen this section, but  
4 4.16 defines the SVRX licenses for purposes of this agreement  
5 under item six of the schedule. That schedule does not list  
6 these IBM agreements in item six. It lists them as a different  
7 item, item three. That is where the software and sublicensing  
8 agreements at issue here are listed. At a minimum, there is an  
9 ambiguity in that issue.

10 At tab 46 we present for the Court testimony from the  
11 lead negotiators and the businesspeople on both sides of the  
12 issue who agree that Novell had no ability to waive IP rights  
13 with respect to the source code license at issue here. That  
14 was limited to protect their binary royalties, which were  
15 bought out in 1996, and had no continuing role. Both Chatlook  
16 and Wilt, who were the negotiators for Novell and Santa Cruz  
17 respectfully, and the other individuals on these pages all  
18 agree, and more testimony is being developed every week in the  
19 Novell case supporting this position, that they had no ability  
20 to waive these rights.

21 That was made clear as well in an amendment in  
22 writing to the APA. It is amendment number two, which is at  
23 tab 44. It says that Novell has no right to increase any SVRX  
24 licensee's rights to source code, and may not prevent SCO from  
25 exercising its rights with respect to SVRX source code in



1 accordance with the agreement.

2           So their position, which may or may not be related to  
3 the fact that IBM paid Novell about \$50 million right at about  
4 the time of this waiver, is not supported by the plain  
5 language. It is not supported by the extrinsic evidence. It  
6 is contrary to the entire purpose of the agreement. In any  
7 event, it will be resolved in the Novell trial.

8           Briefly on the statute of limitations, their final  
9 argument, that breach arose from open sourcing to Linux. That  
10 is not the same thing as a patent which restricts the use to  
11 IBM. Only IBM could use it. That would be consistent with our  
12 agreement because IBM has the right to use it. Open sourcing,  
13 which is what occurred during the period when the statute of  
14 limitations had not run, it occurred only a few years ago, that  
15 is what gives rise to our cause of action. IBM's patent,  
16 therefore, does not begin the statute of limitations. Their  
17 cases do not support that proposition.

18           Your Honor, at tab 49 we briefly point out what the  
19 Court is well aware of, the fact that you cannot raise new  
20 legal arguments in a reply brief for the first time. All of  
21 these arguments that we heard at the end of Mr. Marriott's  
22 presentation about this specific technology are not the four  
23 arguments listed in their reply brief. We are not charged with  
24 anticipating everything they might draw from all of the factual  
25 material.

1           So in addition to the fact that that is new, we have put  
2     in testimony related to each of these technologies at tabs 50,  
3     51 -- these are all in the record -- 52, which indicates that  
4     there is a factual dispute at a minimum with respect to these  
5     technologies issues, rather than the legal issues which they  
6     base their initial legal brief on, but now presumedly they have  
7     found some reason to want to raise new issues in reply.

8           Your Honor, we have established, as I mentioned earlier,  
9     that our cross motion for summary judgment should be granted.  
10    Their only real argument with respect to that is that you  
11    should not issue partial summary judgment. They note that the  
12    courts are in disarray on that issue. We believe that the  
13    better authority is that you can and should issue such a  
14    partial summary judgment. Alternatively, under Rule 56(d)  
15    you're entitled, in fact, directed to make such findings if the  
16    facts are not in dispute.

17           I would like to save the balance of my time for my  
18    rebuttal on the cross motion.

19           THE COURT: Go ahead, Mr. Marriott.

20           MR. MARRIOTT: Thank you, Your Honor.

21           First, with respect to the plain language, the  
22    provision on which SCO relies, Your Honor, says simply that  
23    resulting materials are to be treated hereunder like software  
24    product. Whatever precisely that means, Your Honor, the  
25    categories of information that IBM is supposed here to have

1 improperly disclosed are not resulting materials. And,  
2 therefore, the limitation, whatever precisely it is, on  
3 materials covered by Section 2.01 is inapplicable.

4           Again, we're talking -- Your Honor, if I may approach  
5 with a chart?

6           THE COURT: You may.

7           MR. MARRIOTT: If this is the one item, Your Honor,  
8 that you licensed as your product as I described previously  
9 from SCO, and that is subject to the terms of their agreement,  
10 we didn't disclose that. Nor, Your Honor, did we disclose the  
11 derivative work. The allegation is that IBM took pieces out of  
12 its own original works and used them as it wished. Some of  
13 them got put in different products. That, they say, is a  
14 violation of the agreement.

15           That disclosure reveals nothing about this, and that  
16 disclosure does not compromise the entirety of the product so  
17 that there would be some reason to be concerned about that.  
18 Taking this out and putting it here, Your Honor, does not mean  
19 that that might be a derivative work, or it might not, and you  
20 have to look at that particular thing. Is that a derivative  
21 work? Under SCO's theory you might have an obligation to limit  
22 what you do. If what you take out is not a derivative work,  
23 Your Honor, then it is not subject to the provisions of 2.01 of  
24 the agreement.

25           2.01, if it means anything, Your Honor, it relates to

1 precise terms, resulting materials. The things which IBM has  
2 alleged to have taken out, that are not modifications or  
3 derivative works or resulting material, can't possibly have  
4 been distributed in violation of Section 2.01 of the agreement.

5 Parol evidence, Your Honor. Mr. Singer points to, as  
6 I suggested he would, a long list of individuals who he says  
7 have offered testimony to support SCO's case. He pointed to  
8 the testimony from Mr. Wilson who he says, for example, has  
9 offered contradictory testimony in a case in 1991. Your Honor,  
10 time won't allow for a line by line recitation of that. Let  
11 me, if I may approach, with one example.

12 In 1992 in the litigation to which Mr. Singer refers  
13 and to which he claims Mr. Wilson offered inconsistent  
14 testimony, Mr. Wilson offered testimony that is perfectly  
15 consistent with the testimony he and the other individuals who  
16 negotiated the agreement in this case have given. If you look,  
17 Your Honor, at page 47, he says, quote, we did not -- we, AT&T,  
18 did not want to have any rights or ownership to anything they  
19 created. And yet SCO says that while we, IBM, may own our  
20 stuff, they control it. Mr. Wilson said that in 1992 in the  
21 litigation in which Mr. Singer claims he offered inconsistent  
22 testimony.

23 If you turn to page 76 from that same case, Mr.  
24 Wilson said, quote, the intent is what I have stated many times  
25 earlier. In other words, the intent is such that we protect

1 our intellectual property, and assert no rights in the  
2 licensee's intellectual property. Yet SCO asserts the right  
3 forever to control IBM works original to it, the disclosure of  
4 which couldn't possibly disclose anything owned by SCO.

5 Your Honor, the parol evidence offered by SCO is no  
6 impediment to the entry of summary judgment, because the  
7 individuals upon which it relies didn't negotiate and execute  
8 the agreement. Your Honor can look at those and decide if  
9 there is any contradiction. That testimony is overwhelmingly  
10 in favor of IBM's construction.

11 To decline summary judgment here, Your Honor, is to  
12 basically say that a reasonable jury could project the  
13 testimony of the individuals who negotiated and executed the  
14 agreements on behalf of IBM, and accept in its stead the  
15 subjective understanding of individuals who might have been  
16 employed at AT&T along with hundreds of thousands of others,  
17 but who never communicated their subjective intent to IBM as  
18 part of any negotiations. Under New York law, Your Honor, that  
19 testimony is not capable of altering the plain language of the  
20 agreement of impeding the entry of summary judgment.

21 The reasonableness of SCO's claim -- Your Honor, if  
22 that operating system, if the DYNIX operating system, if the  
23 AIX operating system were a General Motors car, and if the  
24 chassis of that car, Your Honor, were licensed under the  
25 agreements as SCO interprets them, that SCO, Your Honor, would

1 not only control the car in its entirety, but IBM would be  
2 unable to take the dice off of the mirror of the car and do  
3 what it wanted with those. It would be unable to take the  
4 radio manufactured by Sony and put it in another car. It  
5 couldn't take glass manufactured by PPG and put it in another  
6 car. The design of the car could never be used in connection  
7 with any other vehicle.

8 Estoppel. The cases are clear, Your Honor, that  
9 estoppel can be entered at the summary judgment phase of the  
10 case. AT&T and its successors, again, as we laid out, said  
11 over the course of decades that IBM could do and other  
12 licensees could do as they wished. The mere fact that SCO has  
13 produced a number of witnesses who say they never said that,  
14 and they never heard that, does not make incompetent the sworn  
15 testimony of the numerous people laid out in our book.

16 The fact that these books, Your Honor, some of them  
17 may have a copyright notice on them does not in any way mean  
18 that there wasn't the disclosures of the supposed secrets which  
19 SCO claims it seeks to protect. The integration clause to  
20 which Mr. Singer refers, Your Honor, has no bearing on  
21 testimony as to statements made over the course of decades that  
22 followed the execution of the agreement.

23 Section 4.16B. Mr. Singer says that IBM's  
24 interpretation of 4.16B makes a mockery of the agreement. Your  
25 Honor, under that agreement Novell retained the right to 95

1 percent of the royalties with respect to the licenses. It is  
2 hardly a surprise that Novell would retain the right to waive  
3 or to supplement or to change conduct that SCO might engage in  
4 that could compromise Novell's interests. Mr. Singer refers to  
5 amendment number two and suggests that that somehow is  
6 inconsistent. Amendment number two, Your Honor, relates to  
7 prospective buyouts. There is no prospective buyout at issue  
8 here. There is no buyout at issue here. IBM's rights to  
9 continue to distribute AIX were already bought out.

10 United Linux. Mr. Singer didn't to my knowledge  
11 address United Linux, and it was raised in our papers, and  
12 we'll discuss it on the 7th, Your Honor, in a different context  
13 independent of what it means in the context of IBM's claim for  
14 a declaration of non-infringement, it precludes SCO's claims  
15 here. A general public license on that is similarly deferred.  
16 It has independent meaning here to which SCO has not responded.

17 As to the four categories of alleged or misused  
18 information, Mr. Singer suggested that that is somehow new in  
19 the reply papers, Your Honor. I respectfully refer the Court  
20 to the statement of undisputed facts in our opening papers. It  
21 is not new. It was laid out and supported there by undisputed  
22 testimony. If it is new, Your Honor, it is curious that  
23 Mr. Singer's binder would have included a set of materials that  
24 supposedly refute the testimony there.

25 These specific items at issue here, about which SCO

1 seems to skirt, Your Honor, are items which when examined  
2 preclude SCO's claims. Mr. Singer refers to the RCU  
3 contribution and he says it is not barred by the statute of  
4 limitations because the disclosure was in a patent application,  
5 and a patent application is subject to certain protections.  
6 Your Honor, this case is not about misusing a patent, it is  
7 about disclosure. Whether or not a person could practice an  
8 invention, which is set out in a patent, is irrelevant to  
9 whether the information which supposedly is secret, and  
10 supposedly had to be kept confidential, was out there  
11 sufficient to start the running of the statute of limitations.  
12 The claim as to RCU is barred.

13 Mr. Singer said nothing, Your Honor, as a consequence  
14 about the Linux technology project contribution, except to  
15 suggest that experts had dealt with it. The expert testimony  
16 on which Mr. Singer relies, Your Honor, is not only mistaken,  
17 but it is testimony that Magistrate Judge Wells precluded SCO  
18 from proceeding as to because it was not disclosed with  
19 particularity in the final disclosures.

20 The e-mail on which SCO's expert, Mr. Rochkind,  
21 relies in saying that the Linux LTP contribution was actually  
22 from DYNIX is talking about a different set of LTP code than  
23 that which is at issue in this case. Mr. Rochkind's testimony  
24 is unresponsive of SCO's position.

25 Thank you, Your Honor.



1 THE COURT: Thank you.

2 Mr. Singer.

3 MR. SINGER: Your Honor, I suppose the short answer  
4 is that if DYNIX RCU does not matter, and if JFS does not  
5 matter and if they are like the dice on a car, then let's take  
6 them out. Let them go into Linux and take them out. Let them  
7 go into DYNIX and AIX and take them out and see what happens to  
8 those systems then. These are interwoven, as our experts have  
9 indicated, with the very operations of those systems, and those  
10 systems as a whole are derivative of and they would not exist  
11 but for System V.

12 Beyond that, we have shown direct links with respect  
13 to JFS to System V. I quoted Mr. Ivie's testimony and it is in  
14 record. I didn't hear Mr. Marriott say anything about it. It  
15 is interesting that JFS was said by IBM people at the time, and  
16 this is in the record, to be the most important contribution to  
17 Linux.

18 With respect to RCU, at tab 51 you have testimony  
19 from Mr. Rochkind, an acknowledged UNIX expert, showing that it  
20 is in Linux and that the DYNIX code is a derivative of System  
21 V, and that RCU is interwoven. So you can't simply take it  
22 out. By the way, he also noted in his report that Linus  
23 Torvell wrote that RCU was, quote, fundamental in summarizing  
24 Linux 2.543 which was the first version to have that  
25 contribution from IBM. He said the most fundamental stuff is

1 probably RCU and a program called Low Profile.

2           These are not dice hanging down on the dashboard,  
3 these are integral contributions that are integral to DYNIX and  
4 AIX, and they are derivative of our protected technology, and  
5 now they have been wrongly disclosed.

6           The second point which has been made is that the  
7 plain language does not support this, but they can't get around  
8 the fact that the plain language in both that agreement and the  
9 subsequent agreement never provide anywhere an invitation to  
10 IBM to disclose materials that they add to these derivative  
11 products that is not in some way based on these derivative  
12 products. What we have are snippets of testimony from these  
13 witnesses, that I submit really depend on what they mean when  
14 they are being asked about original software products or IBM's  
15 derivative products, and when you focus on the precise issue,  
16 as the testimony we presented here throughout, indicates that  
17 they say that it was the intent of AT&T to protect that. That  
18 testimony, if you need to get to extrinsic evidence, is fully  
19 admissible and at tab 14.

20           We submit that the cases from the Second Circuit,  
21 saying if there is ambiguity, the Court should accept any  
22 available extrinsic evidence, and that when you are dealing  
23 with form agreements and how they are interpreted generally is  
24 relevant, and these are form agreements, and that the course of  
25 conduct under them is a strong indication of intent, aside from

1 the fact that virtually everyone up there who they call and  
2 admit are involved persons have given contradictory testimony.

3 With respect to 4.16B -- well, first, with respect to  
4 the issue of estoppel, the integration clause does more, Your  
5 Honor, than simply say that parol evidence should be  
6 considered. This integration clause says any changes to the  
7 agreement must be made in writing. IBM knew that and they got  
8 changes in writing, they just didn't give them the rights,  
9 which IBM says that they have now, to do anything they wish  
10 with those products, and that is why you have not heard very  
11 much in this argument about those side letters or amendment X.

12 What that integration clause means is IBM cannot come  
13 into court years later and say, oh, we relied on the fact that  
14 someone else distributed a book that had a little bit of UNIX  
15 in it or something and, therefore, we have the right to  
16 disregard our contract. Or that we heard a licensee was told  
17 by someone that you could do it with a derivative product.  
18 That is directly in the face of the integration clause that  
19 says if you want a change, you get it signed in writing.  
20 Beyond that, there is a tremendous dispute where we have a  
21 dozen witnesses who were there that said those things were  
22 never said to licensees.

23 With respect to the Novell waiver, I didn't hear  
24 anything about the fact that 4.16B's definition of the SVRX  
25 license refers only to item six and that the IBM agreements in

1 issue here are in item three and are expressly not covered.  
2 That was made clear in amendment two. He says, well, amendment  
3 two is dealing with future buyouts. Amendment two was entered  
4 into at the same time in 1996 and IBM bought out its remaining  
5 royalty obligations. After that there was absolutely no  
6 interest Novell had with respect to how IBM acted under those  
7 agreements.

8 Last issue. There are 281 fact statements they make,  
9 40,000 pages of exhibits, and we are not charged with  
10 responding to every legal argument in our opposition that might  
11 have been made from those. We entered with four legal  
12 arguments in the initial brief. The fact that they have not  
13 extracted three new arguments about RCU, about these tests and  
14 others, are not properly considered on this motion for summary  
15 judgment and they were not a part of their initial papers. And  
16 because we submitted as a part of the record all of our expert  
17 reports, it happens that there is a part of the expert reports  
18 that contradict those, and now they are wanting the Court on  
19 summary judgment to make rulings about the weight to be given  
20 to those expert reports, and we think that is purely  
21 inappropriate.

22 Your Honor, I heard virtually nothing about our cross  
23 motion with respect to DYNIX, and there is no dispute that  
24 DYNIX is, in fact, a derivative product of System V. If the  
25 Court agrees with us and the plain language of 2.01, then that

1 limited but appropriate partial summary judgment should be  
2 entered.

3 Thank you very much.

4 THE COURT: Thank you. Thanks to you both.

5 I'll take these contract motions under advisement. I  
6 have a jury I have to deal with. Realistically I think we're  
7 looking at about 4:30 to continue with our motion.

8 We'll be in recess on this matter.

9 (Recess)

10 THE COURT: Welcome back, everyone. Sorry about the  
11 delay.

12 We'll now take up IBM's motion for summary judgment  
13 on SCO's copyright claim.

14 Are you arguing this, Mr. Marriott?

15 MR. MARRIOTT: I am, Your Honor.

16 THE COURT: You asked for 30 minutes each on this,  
17 right?

18 MR. MARRIOTT: That sounds familiar, Judge.

19 THE COURT: Go ahead.

20 MR. MARRIOTT: On the grounds that IBM breached its  
21 contractual obligations, and this is IBM, Your Honor, not  
22 Sequent, SCO purported to terminate IBM's license to continue  
23 to use its AIX product, to distribute that product, and it  
24 demanded that IBM shut down its AIX business, which over the  
25 course of decades it has invested hundreds of millions of

1 dollars in. We declined to do that and SCO amended its  
2 complaint and asserted copyright infringement. That is the  
3 claim that is at issue with this motion.

4 There are five reasons why summary judgment should be  
5 entered in favor of IBM on this motion. One, SCO can't  
6 identify and prove unauthorized copying by IBM. Two, SCO can't  
7 establish a predicate breach of contract. Three, SCO cannot  
8 terminate and did not properly terminate IBM's license. Four,  
9 SCO can't prove that it owns the allegedly infringed  
10 copyrights. Five, SCO has misused those alleged copyrights.  
11 With Your Honor's permission I want to focus on just the first  
12 three of those. By the parties in agreement and by order of  
13 the Court, the remaining two, four and five, will be addressed  
14 at the hearing on May 7th.

15 With that, Your Honor, point one, SCO can't show  
16 unauthorized copying by IBM. This is summarized at tab two of  
17 the book which I would like to approach and provide Your Honor.

18 THE COURT: Sure.

19 MR. MARRIOTT: We have a copy for counsel.

20 As you know, Your Honor, IBM repeatedly asked over  
21 the course of this litigation for SCO specifically to identify  
22 the allegedly misused information, and the Court repeatedly  
23 ordered SCO to do that as we show at tab 3 of the book. In a  
24 December 2003 order, Magistrate Judge Wells ordered SCO to  
25 identify and state with specificity, and this is at tab three,

1 the source codes that form the basis of their action against  
2 IBM.

3 Magistrate Judge Wells further ordered that SCO  
4 provide detailed answers to IBM's interrogatories as set out  
5 and requested in the interrogatories. She said, for example,  
6 that SCO was to identify and state -- SCO was to respond fully  
7 and in detail as stated in IBM's first set. Interrogatory one  
8 said identify with specificity all of the confidential or  
9 priority information that plaintiff alleges or contends IBM  
10 misappropriated or misused.

11 Interrogatory four, likewise, Judge, asked that SCO  
12 describe in detail the date of any alleged misuse or  
13 misappropriation, and the specific manner in which IBM is  
14 alleged to have engaged in the misuse or misappropriation.  
15 Magistrate Judge Wells reiterated that order in March of 2004,  
16 and then Your Honor set interim and final deadlines for final  
17 disclosures, and at this point SCO was required finally to  
18 identify with specificity the allegedly misused information.

19 THE COURT: And you say they have not done that?

20 MR. MARRIOTT: They have not done that, Your Honor.

21 If you turn in the book to tab four, you will see  
22 that in connection with our summary judgment papers, Your  
23 Honor, we set out in paragraph 69 the following. Dispute the  
24 Court's orders, SCO has never described by version final line  
25 of coding any material allegedly infringed by IBM's

1 post-termination AIX and DYNIX activity. Moreover, SCO has  
2 declined to provide full and detailed responses to IBM's  
3 interrogatories directed at SCO's allegations of unauthorized  
4 copying.

5           In response, Your Honor, SCO does not dispute that.  
6 It says instead, simply, that, in effect, that it was not  
7 required to do that. The Court has since made it abundantly  
8 clear in a series of orders that, in fact, SCO was required to  
9 do that, Your Honor, and it has still never done that. For  
10 that reason, alone summary judgment on this claim should be  
11 entered in IBM's favor. The orders of the Court were clear  
12 that neither party could proceed with respect to any material  
13 that wasn't identified as directed by the Court, and SCO has  
14 not done that and the claim, Your Honor, should go for that  
15 reason alone.

16           Point two, SCO can't establish a predicate breach of  
17 contract, as we summarize at tab seven of our book. SCO's  
18 copyright claim here, Your Honor, depends on whether it can  
19 show that IBM breached one of its licensing agreements with  
20 AT&T. It is on that basis that SCO purports to terminate IBM's  
21 license. If there is no breach of contract, no predicate  
22 breach, then the copyright claim fails as a matter of law. The  
23 problems with SCO's contract claims have been discussed at  
24 length in the papers and in the argument, and I don't intend to  
25 repeat all of those here, but --



1 THE COURT: Good.

2 MR. MARRIOTT: Your Honor will recall that I said by  
3 way of footnote in connection with the past argument that I  
4 would dwell in this argument on the JFS language.

5 THE COURT: I do remember that.

6 MR. MARRIOTT: The one of the four not addressed  
7 there.

8 Your Honor, SCO's contract claim involves, as I have  
9 previously indicated, four contracts. Two of them are for IBM  
10 and two for Sequent. The Sequent contracts are irrelevant to  
11 this predicate breach of contract. The Sequent contracts were  
12 about the distribution of DYNIX, not AIX. There is absolutely  
13 no evidence that IBM has continued to distribute AIX. This is  
14 all about the IBM agreements with AT&T and not the Sequent  
15 agreements.

16 As I previously indicated, SCO has offered no  
17 evidence and Mr. Singer did not point, Your Honor, to a shred  
18 of evidence that IBM breached the sublicensing agreement.  
19 SCO's entire case depends upon the IBM software agreement as it  
20 relates to this purported cause of action for copyright  
21 infringement. In its final disclosures, Your Honor, the only  
22 contribution identified as having been made to Linux in  
23 violation of SCO's rights is the JFS contribution. This claim  
24 turns entirely on that.

25 So with that, Your Honor, let me suggest that there

1 are at least two reasons, and one of them has a lot of sub  
2 reasons, why SCO's claims with respect to JFS fail as a matter  
3 of law. The first of those reasons, Your Honor, is that SCO's  
4 allegations of breach with respect to JFS simply lack merit,  
5 and the second is that the alleged breach, even if it were a  
6 breach, is immaterial as a matter of law and, therefore, can't  
7 substantiate the kind of breach necessary to establish a breach  
8 of contract.

9 Let's take the first of those, SCO's allegations with  
10 respect to JFS lack merit. That is true, Your Honor, for at  
11 least six reasons, and I am going to quickly run through those.

12 THE COURT: They are at tab ten, right?

13 MR. MARRIOTT: They are at tab ten, Your Honor.

14 Apparently the binder is not as difficult to follow as --

15 THE COURT: Not if I can figure it out. That is  
16 right.

17 MR. MARRIOTT: The first reason, Your Honor, the JFS  
18 contribution did not come from AIX, it came from IBM's OS2  
19 operating system. SCO's theory depends on the proposition that  
20 AIX is a derivative work of AT&T's UNIX System V software, for  
21 which we don't believe there is adequate evidence in the  
22 record, despite Mr. Singer's assertions to the contrary, but  
23 assume that it is, Your Honor, the JFS contribution came from  
24 IBM's OS2 operating system and it did not come from IBM's AIX  
25 operating system.

1           The undisputed evidence shows that. If you look at  
2     tab 11, Your Honor, you will see evidence to this effect. The  
3     individual identified by SCO as having made these supposedly  
4     improper contributions have offered their testimony, the people  
5     in the best position to know that it came from OS2 and not from  
6     IBM's AIX operating system. SCO's claim that it came from  
7     IBM's AIX operating system, Your Honor, is mistaken for the  
8     reasons which we set out at tab 13 of our book. It relies  
9     principally if not entirely upon the testimony of SCO's Dr.  
10    Ivie, and that analysis, Your Honor, relies upon evidence that  
11    was required to be put in SCO's final disclosures, and that it  
12    didn't put in those final disclosures, and that Magistrate  
13    Judge Wells struck at a hearing late last year, an issue in  
14    which SCO has taken an appeal.

15           The only evidence they purport even to offer, Your  
16    Honor, that could competently demonstrate that and they argue  
17    is that of Mr. Ivie. Mr. Ivie's testimony was untimely  
18    provided and it can't support the motion. In any event, Your  
19    Honor, Mr. Ivie's testimony is not competent evidence that JFS  
20    came from the AIX operating system as opposed to the OS2  
21    operating system. Dr. Ivie says that there is a similarity  
22    between the JFS contribution and the JFS that is in AIX. Well,  
23    that is not a surprising similarity, Your Honor, because the  
24    JFS contribution in AIX came from IBM's OS2 operating system,  
25    so the similarity on which he relies for these opinions is not

1 a similarity that has any probative effect. That is point one,  
2 Your Honor, as to why the JFS contribution allegations fail.

3 Point two. For this I refer Your Honor to tab 14 of  
4 our book. SCO's claim fails unless the JFS contribution was  
5 resulting material. Their entire theory depends upon, we  
6 think, a distorted reading of Section 2.01 of the agreement.  
7 But in any case, it depends upon the JFS contribution being  
8 resulting material. As I said in the prior argument, it is  
9 not. The undisputed evidence demonstrates that there is no  
10 UNIX System V method, code or concept in that JFS contribution,  
11 and that it was created independent of UNIX System V, and the  
12 people who created it, Your Honor, the people who supposedly  
13 made the contributions have offered testimony to that effect.

14 The only thing on which SCO relies in this connection  
15 is the testimony of Mr. Ivie, which testimony again, Your  
16 Honor, Magistrate Judge Wells could not properly be relied upon  
17 because it was not properly disclosed in the final disclosures.

18 Point three. As I said in the last argument, Your  
19 Honor, IBM owns the JFS contribution. There is not any dispute  
20 about that. IBM owns it. IBM has copyrights in that  
21 distribution, and SCO concedes that, as you see, at page 15 of  
22 the book. It further concedes in its opposition papers that,  
23 quote, under the Copyright Act, copyright ownership consists of  
24 exclusive rights to, among other things, reproduce, prepare  
25 derivative works, and distribute a work. IBM owns the

1 contributions and the notion that SCO can control it  
2 effectively guts IBM's rights of ownership. If IBM's rights of  
3 ownership mean anything, Your Honor, it means that IBM has the  
4 right to do what a copyright holder under the copyright laws  
5 has the right to do.

6 Mr. McBride, the CEO of the SCO group, Your Honor,  
7 testified in his deposition in a way that is completely  
8 contrary to the proposition that SCO can control anything and  
9 everything that is in the AIX operating system. He said the  
10 following, quote, I am sure there are things inside of AIX that  
11 were not derived from System V or from one of our contractual  
12 arrangements, that they would be free to do whatever they  
13 wanted. That appears, Your Honor, in Mr. McBride's deposition  
14 which is IBM Exhibit 330, page 231, lines 18 through 23.

15 Fourth point, Your Honor. Novell waived SCO's right  
16 to terminate IBM's license pursuant to 4.16B of the asset  
17 purchase agreement. We discussed this briefly in the last  
18 argument. As we discussed there, the APA expressly gave Novell  
19 the right to waive alleged breaches with respect to SVRX  
20 licenses. The only issue, Your Honor, is whether the licenses  
21 in question are SVRX licenses. There is absolutely no question  
22 that they are. Mr. Singer made reference to a schedule in  
23 which he says there is some lack of reference to the IBM  
24 agreements being SVRX licenses. Let me walk you through that,  
25 Your Honor, if I may.

1           If you don't have the book from the last argument, it  
2           is at tab 40 of that book, and I have a copy to hand up.

3           THE COURT: I might have it.

4           MR. MARRIOTT: At tab 40 of that book, Your Honor, we  
5           walked through why it is that the licenses in question here are  
6           SVRX licenses. Let's take that given Mr. Singer's focus on  
7           that issue. The first sentence of the asset purchase  
8           agreement, 4.16A, states that SVRX licenses are those licenses  
9           listed in detail under item six of Schedule 1.A hereof. Item  
10          1.A of the asset purchase agreement provides a list of the SVRX  
11          licenses that related to various UNIX System V software  
12          releases, including System V releases 2.0 and so on. As well  
13          as, quote, all prior UNIX system releases and versions  
14          preceding UNIX System V release 2.0.

15          The supplements, Your Honor, to the IBM Sequent  
16          agreements which are at issue in this motion identify the  
17          licensed software product as consisting of various UNIX System  
18          V releases. Again, as I said in the last hearing, Mr. McBride  
19          in a letter to the C.E.O. of Novell conceded that the licenses  
20          at issue here are SVRX licenses. In SCO's own opposition  
21          papers in connection with this case acknowledge that the  
22          licenses at issue are SVRX licenses. There is, we respectfully  
23          submit, no genuine issue on that question, and as a result the  
24          only real argument that SCO has made in opposition with respect  
25          to 4.16B falls flat.

1 Fifth point, Your Honor, with respect to the JRS  
2 contribution. SCO assigned its rights to the JFS contribution  
3 to United Linux, as is illustrated at tab 19 of the book. We  
4 discussed this briefly in connection with the prior motion  
5 hearing, Your Honor. But the flaws in SCO's case are  
6 particularly pronounced as they relate to the JFS contribution.

7 Again, as a member of the United Linux initiative,  
8 SCO assigned all rights, all intellectual property rights that  
9 it had with the exception of those specifically carved out to  
10 the United Linux LLC. SCO's product -- SCO's Linux IV included  
11 the JFS contribution. The JFS contribution was not on the list  
12 of exclusions and, in fact, Your Honor, the JDC itself  
13 specifically refers to JFS as a part of the joint development  
14 product. And then SCO in its product announcement for its  
15 United Linux product touted the product as including the JFS  
16 contribution. Any claim to the JFS contribution, Your Honor,  
17 is gone pursuant to SCO's assignment of rights under the United  
18 Linux agreement.

19 Sixth point. SCO licensed the JFS contribution and  
20 the GPL, the General Public License. This is the same basic  
21 point as before. Again, the contribution was included in their  
22 product, and the GPL is clear as to what it means, the license  
23 in the GPL, and any claim as to that is gone.

24 Now, I said there were two points with respect to --  
25 two general points with respect to JFS. The first is that

1 SCO's allegations related to JFS lack merit. That is the sixth  
2 point I just listed. There is an additional point, Your Honor.  
3 That is that even if there were merit to SCO's allegations of  
4 breach relating to the JFS contributions, the alleged breach is  
5 material. Assuming SCO has the right to terminate, as we'll  
6 talk about in connection with my next point, it does not, but  
7 assuming that it did have that right, the right to terminate  
8 applies only with respect to breaches that are material  
9 breaches of the agreement.

10 The IBM side letter, which Mr. Singer suggests in the  
11 last argument IBM had ignored, expressly says that breaches can  
12 be used as a basis for termination only if they are material  
13 breaches. In the case law, Your Honor, which we lay out at tab  
14 31 of the book, indicates that breaches that are sufficient to  
15 permit termination must be material breaches. A material  
16 breach is a breach that frustrates the core of the contract.  
17 The cases describe it that it goes to the very purpose or the  
18 root of the agreement.

19 The JFS contribution here, Your Honor, could not  
20 possibly have gone to the root of an agreement between IBM and  
21 AT&T in 1985 that concerned the protection of AT&T's UNIX  
22 System V software. The JFS contribution, Your Honor, again,  
23 which is owned by IBM and copyrighted by IBM, represents .01  
24 percent of the Linux Kernel. There are as we show at tab 40 --  
25 at tab 34 of this book, a large number of file systems, as much



1 as Mr. Singer suggests in the last argument that the JFS is the  
2 next greatest thing to sliced bread, that there were 40 some  
3 file systems in the Linux operating system, Your Honor. The  
4 JFS contribution could not possibly be considered a material  
5 breach of the contract, especially when IBM owns it and when  
6 there is no UNIX System V code in it, and when the protections  
7 of the software agreement as between IBM and AT&T, if they  
8 meant anything, were about ultimately protecting AT&T's UNIX  
9 System V source code. They have conceded there is no UNIX  
10 System V -- there is no trade secret in UNIX System V. And yet  
11 the contribution of IBM's own original work could go to the  
12 root of an agreement that was about protecting not IBM's  
13 original works, but the UNIX System V software? The arguments,  
14 Your Honor, which SCO makes in this regard are dealt with in  
15 our papers, and they are dealt with at tab 35 of the book if  
16 Your Honor wishes to look at them there.

17 The third point and final point that I wish to make  
18 this afternoon, is that SCO cannot establish a predicate --  
19 rather cannot establish that it properly terminated IBM's  
20 license. That is true for two reasons. The first reason, Your  
21 Honor, is that IBM has pursuant to an amendment to its original  
22 agreement with AT&T a perpetual and irrevocable license. That  
23 is point one. Point two, Your Honor, is that even if under the  
24 language of the original agreement the license could be  
25 terminated, SCO failed to abide by the requirements for

1 termination. I will talk Your Honor through those.

2 Let me take now, if I may, each of those in turn.  
3 First the irrevocable and perpetual license. Referring Your  
4 Honor to tab 37 of the book, the plain language of amendment X  
5 granted IBM a perpetual and irrevocable license. Amendment X  
6 says, and I quote, IBM will have the irrevocable, fully paid up  
7 perpetual right to exercise all of its rights under the  
8 agreement. The meaning of the term irrevocable and perpetual  
9 is no mystery. They are clear and they are unambiguous, and  
10 some of the definitions of those terms, Your Honor, appear at  
11 tab 38 and tab 39 of the book, from a variety of dictionaries.

12 For example, irrevocable is defined to mean  
13 impossible to retract or revoke, that which cannot be  
14 abrogated, annulled, or withdrawn, not revocable, irreversible,  
15 final, unmodifiable, indistinguishable, unalterable, immovable.

16 THE COURT: I see one that says lasting for eternity.  
17 Are you claiming that here?

18 MR. MARRIOTT: I like that idea, Your Honor, lasting  
19 for eternity. A lasting irrevocable license that lasts for  
20 eternity, in a sense, Your Honor.

21 Similarly, with respect to perpetual, which is  
22 actually the definition for lasting for eternity, it is also  
23 defined, Your Honor, as continuous, without interruption,  
24 everlasting, eternal, lasting or destined to last forever.

25 Accordingly, Your Honor, on the plain language of the

1 agreement IBM has a perpetual and irrevocable license. It does  
2 not have a terminable license as SCO suggests, as is required  
3 for it to have terminated IBM's license, which is the predicate  
4 to this claim of breach of contract.

5 Now, the second point here, Your Honor, is that even  
6 if the license were revocable, even if it were not perpetual,  
7 and even if SCO could do as it purports to have done here to  
8 terminate it, there are under the terms of the agreement before  
9 it was amended, to give IBM an irrevocable and perpetual  
10 license, requirements that have to be satisfied. Prior to  
11 being able to terminate IBM's license, SCO had to give IBM, and  
12 we lay this out at tab 45, SCO had to give IBM notice, it had  
13 to give IBM an opportunity to cure, and it had to exercise its  
14 good faith best efforts to avoid termination.

15 As shown at tab 46, Your Honor, the case law in New  
16 York which controls this agreement is clear that where there  
17 are provisions of this kind, that the plaintiff must satisfy  
18 the requirements to provide notice and cure and an opportunity  
19 for cure and meet its duty of good faith best efforts to  
20 resolve the agreement short of termination before it can in  
21 fact terminate. SCO couldn't satisfy any of those three, Your  
22 Honor, and for that reason, summary judgment should be entered  
23 in IBM's favor as well.

24 Let me take those each briefly. Notice, SCO's notice  
25 letter, Your Honor, which was filed with its complaint in this

1 action, which we have attached in the book at tab 48, accused  
2 IBM of improperly disclosing, of misappropriating even SCO's  
3 trade secrets. Well, again, Your Honor, as I have now said at  
4 least twice, SCO has conceded that there are no trade secrets  
5 in UNIX System V. It made that concession in open court after  
6 it purported to terminate IBM's license. The notice letter  
7 says you misappropriated our trade secrets, stop or we're going  
8 to terminate your license.

9 It then admits after it has terminated IBM's license  
10 that there are no trade secrets in UNIX System V. It withdraws  
11 its claim for trade secret misappropriation.

12 Opportunity to cure. Because it never disclosed with  
13 any meaningful particularity what it was it was complaining  
14 about, Your Honor, IBM was never given an opportunity to cure  
15 the alleged breach. In fact, Your Honor, if I may approach --

16 THE COURT: You may.

17 MR. MARRIOTT: Thank you.

18 Following SCO's letter of March 6th in which it  
19 indicated that it was going to terminate IBM's license, IBM  
20 sent SCO a letter and said, well, what is it that you contend  
21 we did? Please tell us what it is you claim that we need to do  
22 to cure this alleged breach. The response that we received,  
23 Your Honor, from Mr. McBride, the C.E.O. of the company said,  
24 quote, if you would like further written information regarding  
25 IBM's past and continuing violations, we need more information

1 from you. So rather than provide IBM a meaningful opportunity  
2 to cure, Your Honor, we were told that before we would learn  
3 anything more about what we supposedly had done, we would need  
4 to tell SCO what it is that we, in fact, had done.

5 Finally, Your Honor, with respect to good faith and  
6 best efforts, again, as you know, and I reluctantly repeat what  
7 has been said so many times before, IBM has repeatedly asked  
8 SCO in this litigation what it is that we supposedly did. SCO  
9 has repeatedly refused to provide IBM that information and,  
10 instead, Your Honor, played what I think is a game of where is  
11 the pea? It has required motion after motion to figure out  
12 what exactly it was that IBM supposedly did.

13 It was only after IBM filed motions to compel that we  
14 finally learned something of consequence about the JFS  
15 contribution, about which so much still remains a mystery. It  
16 simply cannot be, Your Honor, that SCO provided by way of its  
17 notice letter, proper notice, a notice 100 days before the  
18 supposed termination, that it gave IBM a reasonable opportunity  
19 to cure, and that it exercised its good faith best efforts, not  
20 just good faith efforts, it is good faith best efforts, and I  
21 would respectfully submit that no reasonable juror could  
22 conclude in this instance that SCO exercised its good faith  
23 best efforts to provide IBM information sufficient to allow a  
24 cure of the supposed breach.

25 In summary, Your Honor, summary judgment should be

1 entered in favor of IBM on this motion for five reasons. The  
2 three I touched upon here are that SCO can't establish  
3 unauthorized copying by IBM, they can't show a predicate breach  
4 of contract, and IBM's license is in any event not a terminable  
5 license, and certainly not one that satisfies the conditions to  
6 terminate.

7 Thank you.

8 THE COURT: Thank you, Mr. Marriott.

9 Mr. Hatch.

10 MR. HATCH: Thank you, Your Honor. Good to be here.

11 Let me start with what I think is really one of the  
12 more obvious ones, and it is IBM's claim that these contracts  
13 are not terminable. I think we need to know more than look at  
14 the plain language of the agreement. And, again, I didn't want  
15 to disappoint, so I have a book as well.

16 THE COURT: I am sure that you do.

17 MR. HATCH: I just want to be clear that we  
18 understand what contract we are talking about. In 1985 the  
19 parties, AT&T, its predecessor to SCO, and IBM entered into two  
20 main agreements. One is the software agreement which covers  
21 how the source code itself would be handled. The same day a  
22 sublicense agreement was entered into which allowed IBM to  
23 relicense certain products it had, machine readable binary  
24 code, and it did not have source code in it. The termination  
25 rights that we're talking about here come from section six in

1 the source code agreement, Section 2.07 and 3.03 of the  
2 sublicensing agreement.

3 Now, if you wouldn't mind turning to tab six, that  
4 just shows from the software agreement, Section 6.03. As you  
5 can see there, if the licensee fails to fulfill one or more of  
6 its obligations under this agreement, AT&T may upon its  
7 election, in addition to other remedies it may have, at any  
8 time terminate all the rights granted by it hereunder, and it  
9 gives a notice provision. Now, there are similar provisions in  
10 the sublicensing agreement.

11 Now, on the same day, to make it even more complex,  
12 because these were essentially form agreements, agreements that  
13 had in large part been used with other parties. We often  
14 forget, and Mr. Singer alluded to it, but there are similar  
15 agreements have been done with many other companies. IBM is  
16 the first one that has taken the approach that we're hearing  
17 today. So IBM wanted some concessions. Instead of changing  
18 the formal contract, they entered into a side letter that exact  
19 same day.

20 The side letter modified both the software agreement  
21 and the sublicensing agreement. What is important about that  
22 is when it modified the agreement, it expressly called out and  
23 identified the sections in the two contracts it was modifying,  
24 so it would be very clear what it was modifying. If Your Honor  
25 would turn to tab seven, this is one such section in the side

1 letter. You'll notice here that, lo and behold, this is  
2 actually a modification of the termination rights in both of  
3 these two main agreements, Section 6.03 of the software  
4 agreement and Section 2.07 and 3.03 of the sublicensing  
5 agreement. So the parties clearly knew and understood, and the  
6 plain language was if we're going to modify it, we're going to  
7 identify it so you know exactly what we're modifying. Here  
8 you'll notice that it goes to the notice and cure provision  
9 that Mr. Marriott talked about, so they thought it was  
10 important enough to refer that expressly and that explicitly,  
11 even when it was something as minor as changing the notice from  
12 60 days to 100 days. It wasn't even a big part of the  
13 contract, and yet they used that type of expressivity.

14 Now, if we go to amendment ten, which is where they  
15 claim this was all modified, and if Your Honor does not mind, I  
16 would like to use an actual copy of it if we can, instead of  
17 the slides and the book.

18 THE COURT: Okay.

19 MR. HATCH: Now, this particular amendment ten came  
20 to be several years later in 1996. The purpose of it was very  
21 clear. As IBM had grown tired of trying to manage and account  
22 for the royalties that were due under the underlying  
23 agreements, they wanted to buy out the royalty stream and have  
24 it paid all up front, paid at once. Okay. The first  
25 underlining that you see that I have in the recitals makes it



1 very clear that that is what this amendment is about. It says  
2 in an effort to simplify the royalty requirements contained in  
3 the related agreements, the following modifications to the  
4 terms and conditions of the related agreements have been  
5 mutually agreed to by the parties. So that is putting in  
6 context what is happening here.

7 Now, you'll notice, and it is very interesting here,  
8 that the section in which they claim they get a non-terminable  
9 right, and, one, it does not mention that word, two, it is  
10 unlike the side letter where specific sections of the  
11 agreement, the termination sections were agreed to, so the  
12 parties know what is being modified, it just says no additional  
13 royalty. That is what was at issue here.

14 Just to juxtapose that, if you look at paragraph two  
15 on the next page, you'll see that when they wanted to modify  
16 2.05B and 2.05C of the sublicensee agreement they called it out  
17 so everyone would know what was being modified. Now, what was  
18 being modified here wasn't a section but a schedule of  
19 royalties, and they were paying them up in full. They were  
20 given an irrevocable, fully paid up perpetual right to exercise  
21 rights. So it is very clear, and that should really be the end  
22 of it, is that in the plain language, this is not modifying any  
23 termination rights in the contract, otherwise they would have  
24 said so.

25 The plain language of that provision cannot be read

1 to suggest that it completely eliminated the termination  
2 provisions, the material termination provisions of both the  
3 software agreement and the sublicense agreement without a  
4 mention of it. This is all being read into it by IBM today.

5 Now, that should be enough, but let's look at the  
6 language itself. IBM has raised the issue that somehow  
7 irrevocable and fully paid up and perpetual really mean  
8 non-terminable. Well, if you will notice here, what it really  
9 does say is it does not say here that they are given an  
10 irrevocable license. They read that, and they say that in the  
11 briefs, but that is not the wording here. The wording is they  
12 have been given an irrevocable and fully paid up perpetual  
13 right to exercise their rights, in other words, under the  
14 related agreement. Okay. In other words, as is set out in the  
15 recitals they don't have to pay anything else. No matter what  
16 we do, we cannot require them to pay extra money. This is  
17 being paid up now, and if we decide this is a bad deal ten  
18 years from now, we can't require them to start paying royalty  
19 payments again or another up-front payment or anything of that  
20 nature. That is what perpetual and irrevocable means. They do  
21 not mean non-terminable. They could have said that and they  
22 didn't.

23 Now, we did one other thing, and if you look in that  
24 same section, and it actually goes on to the second page, and  
25 it goes on because the drafters of this agreement wanted to

1 make it very clear that they really weren't going beyond giving  
2 them an irrevocable right and a perpetual right not to pay  
3 royalty payments. They wanted to make it clear that it is not  
4 affecting anything else. It says notwithstanding the above,  
5 the irrevocable nature of the above rights will in no way be  
6 construed to limit, and now we are talking about very broad  
7 language, it is not going to limit SCO's rights to enjoin or  
8 otherwise prohibit IBM from violating any of Novell's or SCO's  
9 rights under this amendment ten or the related agreement. One  
10 of their rights certainly is termination, but this is broad  
11 language because it is saying this contract cannot be read to  
12 give you additional rights other than the ones expressly set  
13 forth. It never addressed termination.

14 Now, they say enjoin means all that you can do is  
15 court action. You can seek an injunction for court action.  
16 Well, that is not what that means. In a normal sense of the  
17 words, parties when they contract with each other quite often  
18 use as authority the contract language itself, and bring back,  
19 especially a contract that lasts as long as one like this, to  
20 the knowledge of people saying, by the way, you're doing  
21 something that you ought not to be doing. The authority that  
22 is cited is the contract itself.

23 Even if that were the case, it says or otherwise  
24 prohibited. With the or being used as the alternative, and to  
25 have any meaning at all, it is clearly a broad provision here

1 that SCO has the right, has kept all of its rights under the  
2 contract and has the ability to do whatever it needs to enforce  
3 those rights, including breach.

4 Now, IBM's reading would make all of that just  
5 superfluous. The parties knew that, and if we look at one  
6 point in time, of course, Novell sold its rights out and the  
7 technology licensing agreement to Santa Cruz, a predecessor to  
8 SCO as well. IBM objects to this because they were not a  
9 party, but this was involving the same licensing agreement and  
10 rights, and I have a copy at tab 11, and you'll notice there  
11 that the same parties here, which were Novell and Santa Cruz,  
12 that when they wanted to make something non-terminable they  
13 knew how to do it. They used that language and they said that.  
14 They said it was a non-exclusive, non-terminable worldwide fee  
15 license.

16 So if we look at just the plain language, what IBM is  
17 asking you to do is to read things into it. They are not  
18 making a plain language argument. They are trying to change  
19 the language.

20 Now, we went to Nimmer & Dodd. Nimmer, as you know,  
21 has written a case book on copyrights, but he also with Mr.  
22 Dodd did a treatise called Modern Licensing Law. He addressed  
23 this exact point. At tab 10, the highlighted part, the license  
24 contains terms that provide that it is irrevocable or  
25 perpetual. We understand these terms to mean that the license

1 cannot be terminated by the licensor or otherwise and except  
2 for breach by the licensee. In other words, SCO in this  
3 instance can't take an act to then revoke the rights, revoke  
4 the charge in the amendment that they do not have to pay any  
5 more royalties, but if IBM breaches the agreement, then that is  
6 totally within their control. IBM argued in the brief that  
7 this just gives SCO willy-nilly to be able to cancel any time  
8 they want and ruin their investment. That is absolutely not  
9 true and they can't point to any language that allows us to do  
10 that. It is totally in IBM's control. If you fail the terms  
11 of the agreement, they go forward. If they breach it, we have  
12 our remedies.

13 Now, that being a pretty strong statement from  
14 Professor Nimmer, they filed an affidavit from Professor Nimmer  
15 trying to say, well, it didn't quite mean that. Well, there  
16 are a couple of problems with that. One, not the least of  
17 which is that he is giving expert opinions without any chance  
18 to cross-examine, and he has also determined that apparently  
19 Mr. Nimmer has represented to us that he is a paid consultant  
20 of IBM and that was not disclosed when he gave the declaration.  
21 I don't think he's trying to get out of the wording that he put  
22 in his treatise has any application whatsoever.

23 Importantly, in their brief, and some of these  
24 arguments I just don't understand, but IBM in its brief said,  
25 well, we shouldn't listen to what Mr. Nimmer said in his text,

1 in his treatise that he put out for peer review and put out  
2 into the world because he is just summarizing cases. Well, our  
3 view is that his book is there and it is called Modern  
4 Licensing Law, and it is there to set forth industry practices,  
5 and for the industry to rely on and to understand what terms  
6 mean. If he is summarizing cases, then I guess IBM is saying,  
7 well, that is the law pronounced by the court, so I didn't know  
8 how that helps them in any way.

9 Now, even if somehow Your Honor still said this is  
10 ambiguous, okay, I think if it becomes really unclear, then it  
11 is not a matter for summary judgment. Unless the extrinsic  
12 evidence is clear, which we think it is, the extrinsic evidence  
13 that we have put forward is a number of people, none of whom  
14 were employed by SCO, they are all people who were involved in  
15 the initial transactions and negotiated it and set it forth,  
16 and what was the meaning? The fact that they don't say  
17 non-terminable, can we read that in as evidence as to what they  
18 intended?

19 Well, I think what is most telling of that, if you  
20 turn to tab 20, is Steven Sabbath. Mr. Sabbath was Santa  
21 Cruz's vice president of law and corporate affairs. He was  
22 Santa Cruz's signatory to amendment X. He was asked the  
23 question, and he said as I said before the phrase irrevocable,  
24 fully paid up and perpetual, you usually see that strung  
25 together. Commercial lawyers don't define it. It's, you know,

1 like the sun and the moon. I mean you don't have to define it.  
2 We know what it is.

3 Then Mr. Marriott, who I believe was the one taking  
4 this deposition, said and that is because irrevocable means  
5 what it means in the ordinary sense of the term. He said, yes,  
6 it does not mean non-terminable in the event of, you know,  
7 breach or default. It just means you're getting -- you pay on  
8 time, and we can't change our mind on you and terminate unless  
9 you pay more. We can't charge more. It is perpetual. It is  
10 forever. It is a one-time fee. Okay. It does not mean  
11 anything more than that.

12 Kimberly Madsen, a manager, at tab 21, and she was a  
13 manager in the Santa Cruz law department and was there at the  
14 time, said that I did not understand amendment ten to preclude  
15 termination for breach.

16 Alok Mohan at tab 23, the president and chief  
17 executive officer of Santa Cruz, and a high level participant  
18 in the negotiations, said that that language did not preclude  
19 termination for breach. No one else during the negotiations  
20 contradicted that.

21 Doug Michels at tab 22, and he was a senior executive  
22 and later the CEO, he makes it very clear that I would not have  
23 agreed to the terms of amendment X if it had been explained to  
24 me that way.

25 Now, IBM just raised with you a concept that I kind

1 of enjoyed. I have to really work to be able to remember it,  
2 but it is unexpressed subjective intent. They claim that,  
3 well, gee, if Santa Cruz meant something else they should have  
4 told us. Well, the people who are trying to read a word in  
5 here that is not there, it is not SCO, it is IBM. If anybody  
6 had an unexpressed subjective intent it was them, because if  
7 they meant that language to mean something different than what  
8 it means by its plain language, and what Nimmer meant and what  
9 he understood and what businesspeople understood, and they  
10 never raised it in these meetings, as indicated by Mr. Michels  
11 and others there, then that is unexpressed subjective intent.  
12 They are putting new words in and trying to give words  
13 different meanings.

14 Now, even Novell's people have the same thing. When  
15 Mr. Singer went through Mr. Bouffard's testimony, and at tab 19  
16 is what he said, and he was the other side of that from Novell,  
17 he said it was not my view that Santa Cruz was precluded from  
18 terminating UNIX source code. He said the otherwise language  
19 includes terminating IBM UNIX license agreement for IBM's  
20 actual breaches. We have plain language and we have authority  
21 and we have law and we have extrinsic evidence, all of which  
22 point directly to the fact that IBM is trying to read into this  
23 contract things that don't exist there.

24 Now, I think we cover pretty well in our brief the  
25 arguments Mr. Marriott raised on notice and opportunity to



1 cure. I am not sure how serious an argument that can really  
2 be. I will just say this: What they forget is that there were  
3 a number of meetings, a number of meetings prior to the letter  
4 giving notice of potential termination if they did not cure.  
5 What basically happened in those meetings, and what I want to  
6 show you is kind of how, in a bit, how that started, but if you  
7 turn to tab 69, in January of 2003 this is how IBM starts this.  
8 In large part SCO starts to become aware of what IBM is up to.

9 At Linux World New York, which is, as I understand  
10 it, the world's largest trade show for Linux, the largest  
11 conference, Mr. Steven Mills, who was a senior executive at  
12 IBM, indicated, and this is from the Computer Reseller News,  
13 but in this deposition he confirmed that he said these things.  
14 He said IBM will exploit -- that is an interesting choice of  
15 words -- exploit its expertise in AIX to bring Linux up to par  
16 with UNIX.

17 Then further down he says our deep experience with  
18 AIX and its 250-member open source development team -- well, we  
19 have found out in discovery that 250-member team are the people  
20 who got the UNIX source code and were under the obligations of  
21 confidentiality, and they got SCO's copyrighted works and now  
22 they are changing. They are taking all that knowledge and they  
23 are now considered their 250-man open source development team,  
24 and he says the road to get there is well understood. Well,  
25 they have a great jump-start. Then he ends it by saying that

1 what their goal is is to obliterate UNIX.

2 Well, they now say, well, gee, if you had just given  
3 us a better notice and an opportunity to cure, maybe we could  
4 have gone through these things, but through several meetings  
5 prior to the filing of the complaint and giving the notice  
6 letter, Mr. McBride and others had met with senior people at  
7 Novell, and they were basically told, and a lot of this is out  
8 of Mr. McBride's affidavit and other places in the record and  
9 in our briefs, that if SCO goes forward, we're going to talk to  
10 your partners and we're going to destroy your business. As a  
11 matter of fact, Karen Smith, an IBM vice president, went to HP  
12 and attempted to get them to withdraw support. That is going  
13 to be the subject of another motion that I think we're hearing  
14 Monday. That is the tone of it.

15 The thing that is kind of important to note is that  
16 the notice and opportunity to cure we're supposed to give them  
17 is not that we won't file suit because we gave them that. But  
18 in every instance they said to us, in essence, it is futile,  
19 we're fixed, it is unequivocal, we know what we're going to do.  
20 It does not matter. We followed the letter of the law and we  
21 gave them the letter and gave them 100 days' notice. They knew  
22 what it was about.

23 Here is what they said. Instead of trying to  
24 negotiate with us and to try and cure it -- as a matter of  
25 fact, at one point they said we can't meet with you now. We

1 will meet with you in three months. At tab 77 this is what  
2 their response was. This is an IBM press release from the 16th  
3 of June of 2003. In the second paragraph it says from the  
4 outset, it does not say we just came up with this, from the  
5 outset IBM's position on this lawsuit has been unequivocal.  
6 IBM's licenses are irrevocable and perpetual and fully paid up  
7 and cannot be terminated. IBM will defend itself vigorously.  
8 The matter will be resolved in the normal legal process. In  
9 other words, they are now saying there is nothing to negotiate.  
10 There is nothing to talk about. The dispute is fixed as of  
11 that moment.

12 In the next paragraph, and this comes up a little  
13 later, you'll remember that Mr. Marriott indicated that, well,  
14 we didn't know it was about AIX. Here it is in June, their  
15 notice, their press release to the world says IBM will continue  
16 to ship, support and develop AIX. They knew that is what the  
17 issue was from day one. Now they are saying we never disclosed  
18 and they didn't know. That is just simply not true.

19 Let me move quickly to JFS. Mr. Marriott talked at  
20 length about that. IBM claims that JFS came from OS2. They  
21 gave you a graph. I would like you to look at the one that we  
22 prepared as well from our expert report. It is at tab 49.  
23 Using IBM documents that were produced in discovery, and this  
24 is probably the best graphic --

25 THE COURT: Go ahead.

1 MR. SINGER: -- depiction that I can give you, the  
2 file system that we're talking about began in UNIX System V.  
3 It was owned by AT&T the predecessor of SCO. IBM licensed that  
4 initially and put it in AIX version two back in the early  
5 nineties. Eventually IBM modified and improved the AIX  
6 system's version 3.1, and as derivative works, and Mr. Singer  
7 has talked about it, used the file system to create a journal  
8 file system.

9 We know from, and they say we have no evidence, but  
10 if you go to the very next tab, and since time is short I will  
11 just do a few of these things, but we know where these things  
12 came from. Your Honor, they say we have not produced anything.  
13 Even if we exclude the things that Judge Wells excluded, which  
14 we disagree with, and this is just disclosure number one, we  
15 made 294 disclosures of taken material and misused materials  
16 that are still in this case. The things I'm pulling from here  
17 would be from just this first disclosure. It is a pile that is  
18 about this big.

19 Mr. Baker, who was an IBM executive, in his  
20 deposition said would it surprise you -- because they say this  
21 came from OS2. On the chart we are not even to there yet.  
22 Would it surprise you if half of the C files in JFS 3.1 have  
23 the original code three and are therefore based in part on UNIX  
24 source code licensed from AT&T? The answer, no, it wouldn't  
25 surprise me. Then if you go down to the bottom quote, it says,

1 so it appears as though JFS two, and if you look at the chart  
2 that is what was in OS2. It is their derivative work that  
3 originally starts from System V and comes through its  
4 improvements and through to the end, and it says it appears  
5 that JFS continued to have and continued to include files that  
6 were based upon, at least in part, AT&T's UNIX source code,  
7 right? Answer, it appears to be that way. Well, why does he  
8 say that, Your Honor? Well, if we go to disclosure one, and we  
9 look at the files, and if you look at tab 37, and here it is  
10 just talking about JFS, there were identified to be 62 C files  
11 in JFS. You'll see that the top 30 came from AT&T. How do we  
12 know that? Well, the comments, I believe it is from CMVC that  
13 the programmers wrote, they state the origin. The origin says  
14 origin three. All 30 of these, almost half of our entire JFS  
15 originated from AT&T.

16 Now, we just heard IBM say it came solely from OS2.  
17 That is because they want to write out the prior history. They  
18 want to draw a line in history and don't look in front of it.

19 Your Honor, I will give you this. This is an extra  
20 copy. What I'm reading from is from tab nine of the first  
21 disclosure.

22 From Mr. Baker's testimony that we just read, you'll  
23 notice -- let's see. Mr. Baker is talking about some of this  
24 stuff, and you'll remember that at tab 44 Mr. Baker identified  
25 that his user ID was 905. The question was asked, if your

1 using ID was 905 for the CMVC, and that is where the  
2 programmers recorded their notes, would you agree that this --  
3 he is referring to the exhibit at tab 45 -- is a comment you  
4 made into the CMVC at that time? Answer, yes.

5 Now, this is just one example of many from an IBM  
6 programmer. You'll see Exhibit 887 and it is an e-mail from  
7 Baker, and from CMC where he is making comments, and 905 is his  
8 number, and what he is saying here is making a comment to the  
9 people in his division. The same is true in the System V file  
10 system where this stuff originates. He does not say OS2. The  
11 only way it could be OS2 is if you drew a line and forgot all  
12 the previous stuff and where it started.

13 As we go down that list, over half, according to the  
14 testimony of just Mr. Baker who was an IBM employee, over half  
15 of JFS as it ended up in Linux came from and originated from  
16 the source code here that they were not allowed to give away by  
17 contract.

18 Now, Your Honor, if you thumb through this book  
19 you'll see, and there are numerous pages, and I have put a  
20 bunch of them at tabs 38 through 42 or so, but you'll see here  
21 there is a lot of red. They say we don't disclose anything.  
22 These are all disclosures where it is either verbatim or near  
23 verbatim. The AIX, that we just learned from IBM's own mouth  
24 is derived from the System V code, is being taken almost  
25 wholesale and put into Linux. They say there is nothing. That

1 is just simply not the case.

2 Now, I think the last point is Mr. Marriott  
3 indicated, well, it is not material. This JFS stuff just does  
4 not matter.

5 If I can approach?

6 THE COURT: Yes.

7 MR. HATCH: This is an internal IBM e-mail. If you  
8 look on the fourth page, and now they are saying that JFS is  
9 .01 percent, and I think during the contract argument I heard  
10 him call it just the fuzzy dice on the dash of a car. Well,  
11 let's see what they say when they are not talking to the Court.  
12 Let's look and see what they are talking about when they are  
13 trying to develop a product and make money.

14 On the third page of this, it says we, IBM, would  
15 like to make JFS available to the open source community for  
16 several reasons. I have highlighted the number one reason, a  
17 lack of a journal file system on the Linux platform was chosen  
18 as the number one deficiency by the Linux community. That does  
19 not sound immaterial to me. It sounds a lot more than fuzzy  
20 dice.

21 There are several instances where I disagree with Mr.  
22 Marriott. I think he misquoted Mr. McBride. He quoted Mr.  
23 McBride for the proposition that he said that they could do  
24 whatever they wanted with their code, and I think, just like we  
25 saw earlier today with the clips, not everything was read. Mr.

1 McBride's actual testimony was the exact opposite of that. He  
2 said my view of that is that IBM is free to contribute anything  
3 they owned to Linux, and that is about as far as IBM went  
4 today, except they didn't read the rest of it, except as it  
5 relates to either source code that we own or a derivative of  
6 that code. So he is saying exactly what we are saying here,  
7 and they're trying so cite and smear Mr. McBride as saying  
8 something totally opposite to what is in the case.

9 Your Honor, I think based on that, there clearly is  
10 no basis for IBM to get summary judgment granted here and I  
11 submit it.

12 Thank you.

13 THE COURT: Thank you.

14 Mr. Marriott.

15 MR. MARRIOTT: Thank you, Your Honor.

16 Mr. Hatch said a number of things, Your Honor, which  
17 I think simply are not factually correct. I would point the  
18 Court to the papers for that other than take too much time  
19 here.

20 THE COURT: He went overtime so if you want to you  
21 can, too.

22 MR. MARRIOTT: I appreciate that, Your Honor.

23 Contrary to what Mr. Hatch suggests, there are not  
24 294 items of allegedly misused information in this case. There  
25 is only one of them, the first item in their final disclosures



1 that is in any way relevant to this motion. That is the JFS  
2 contribution. The reference to the 294 is, at a minimum,  
3 grossly overstated.

4 Mr. Hatch suggests that I misrepresented the  
5 testimony of Mr. McBride. I gave Your Honor a cite and I urge  
6 you to look at the cite for yourself. There is nothing  
7 misrepresented about it. Mr. McBride said that he is sure that  
8 there are things in AIX which IBM could properly contribute to  
9 Linux.

10 If that is true, Your Honor, and I think Mr. McBride  
11 is right, if that is true it is completely inconsistent with  
12 their theory of the case, that once you touch something they  
13 call it a modification and a derivative work and it is forever  
14 controlled by them and IBM can't without their permission  
15 disclose it.

16 Mr. Hatch suggested that IBM conceded -- apparently I  
17 conceded at the last argument that AIX is a derivative work of  
18 AT&T's UNIX System V. I didn't concede that, Your Honor. The  
19 evidence in the record does not demonstrate that.

20 Let me come to the points, if I may, Your Honor, that  
21 were raised in my opening arguments and those to which Mr.  
22 Hatch responded and did not respond. I began, Your Honor, by  
23 pointing out that SCO had failed entirely to comply with the  
24 Court's order to identify with specificity what it is  
25 specifically that represents the infringing material here,

1 because of IBM's continued distribution of AIX. You heard not  
2 a word from Mr. Hatch on that. It is not there. Because of  
3 the Court's orders the claim should be dismissed for that  
4 reason alone.

5 With respect to the JFS contribution, Your Honor, I  
6 offered two reasons -- six reasons why the JFS allegation lacks  
7 merit and one reason as to immateriality. Mr. Hatch, so far as  
8 I could tell, addressed one, Your Honor, of the six arguments  
9 as to JFS. As to that argument he pointed the Court to the  
10 testimony principally of SCO's expert Mr. Ivie, who has offered  
11 testimony to be sure that JFS comes from the AIX operating  
12 system. The testimony on which they rely was struck by  
13 Magistrate Judge Wells.

14 In any event, Your Honor, it is simply incorrect. If  
15 you look at the witnesses who would have personal knowledge to  
16 speak to this, people who actually were involved with the  
17 contribution, whose testimony is set out in our book, they say  
18 in unequivocal terms that it was from the OS2 operating system,  
19 not from the AIX operating system.

20 Immateriality, Your Honor. Mr. Hatch suggests that  
21 the alleged breach here is somehow a material breach because  
22 there is an internal IBM e-mail from some person saying it  
23 looks like the Linux community thinks there is a need for a  
24 journal file system. That does not say anything about whether  
25 the specific contribution here was a material breach of the

1 agreement. The fact that someone might like a certain  
2 technology in Linux is entirely a separate question from  
3 whether the supposedly improper contribution here was a  
4 material breach of the agreement.

5           Again, as we say in our opening papers, Your Honor,  
6 there are 40 plus file systems in the Linux operating system.  
7 The JFS contribution represented less than .01 percent. It  
8 cannot be, Your Honor, that that represents a material breach  
9 when it is owned by IBM and reveals nothing of SCO's code.

10           With respect, Your Honor, to amendment X and the  
11 perpetual and irrevocable license, Mr. Hatch suggests that IBM  
12 seeks to rewrite the provision of that agreement. He began his  
13 presentation with respect to references to the history of the  
14 negotiations. I would respectfully submit that that  
15 description, Your Honor, was riddled with errors and  
16 inaccuracies, and I would simply point the Court to the papers  
17 and to the sworn testimony of the people who were actually  
18 involved in the discussions as to what the purpose of that  
19 licensing agreement was, and why it was IBM sought what it  
20 sought, and why it was given. Mr. Hatch focused on the  
21 language in the agreement that concerns a fully paid up  
22 royalty. That suggests that amendment X was only about fully  
23 paid up royalties. I would point the Court to the agreement,  
24 which you can read for yourself, and see that it was about a  
25 heck of a lot more than a fully paid up royalty.

1                   It is not IBM, Your Honor, that seeks to read  
2 anything into the agreement. On the contrary, it is SCO that  
3 seeks to read out of the agreement the words perpetual and  
4 irrevocable. The notion that IBM's license is terminable here  
5 is absolutely at odds with the idea that it has a perpetual and  
6 irrevocable license. You cannot have a license that is  
7 perpetual and irrevocable and at the same time terminable.  
8 That makes no sense, Your Honor. It would strain the simple  
9 meaning of the words perpetual and irrevocable beyond  
10 recognition.

11                   Mr. Hatch points to an excerpt from a treatise from  
12 Professor Nimmer and suggests that somehow that is indicative  
13 of what the plain meaning of the agreement is. It is not, Your  
14 Honor. It is not parol evidence here and, in any event, as  
15 Mr. Nimmer says in his declaration, the citation is a citation  
16 that is misplaced. Whatever it is, it is not capable of  
17 altering the plain and simple language of this agreement.

18                   Parol evidence, Your Honor. The Court need not and,  
19 indeed, should not even reach parol evidence on this motion.  
20 The language of this is clear. If you do, however, I would  
21 respectfully submit that the only parol evidence that matters  
22 is that which was communicated. That is what New York law  
23 provides, Your Honor. While Mr. Hatch referred to testimony  
24 and viewpoints of certain people from Santa Cruz, they didn't  
25 negotiate this agreement with IBM. The agreement was

1 negotiated between Novell and IBM and between Novell and Santa  
2 Cruz. The Sabbath testimony to which Mr. Hatch refers was  
3 never communicated to IBM. The record does not reflect that it  
4 was.

5 Finally, Your Honor, with respect to notice and cure  
6 and good faith, I think the record is as set out in the papers  
7 and speaks for itself. A complaint was filed accusing IBM of  
8 the misappropriation of trade secrets. After the termination  
9 of the agreement, SCO concedes there are no trade secrets in  
10 UNIX System V. This Court in connection with one of IBM's  
11 summary judgment motions, year after the filing of this case,  
12 maybe not years, but almost two years after the filing of this  
13 case, expressed astonishment at the idea that despite the  
14 public assertions of SCO, there had been no production of  
15 evidence to support its allegations. The idea that IBM knew  
16 before the filing of the suit, which is what Mr. Hatch  
17 suggested, precisely what it is we supposedly did here, and how  
18 it is we were to cure it, simply is not supported by the  
19 record.

20 Summary judgment should be entered in favor of IBM,  
21 Your Honor.

22 Thank you.

23 THE COURT: Mr. Hatch, briefly.

24 MR. HATCH: I will keep it brief this time.

25 Your Honor, it is kind of interesting, and I'll make

1 just a couple quick points. He is now saying that we should  
2 read out all of the Santa Cruz people. What relevance do they  
3 have? Well, if you look at the agreement, it is because they  
4 are a party and a signatory. Mr. Sabbath is a signatory for  
5 Santa Cruz right here. IBM is so desperate here that they want  
6 to say you shouldn't even listen to anything that he has to say  
7 because he is not relevant. Well, he was sure relevant to the  
8 agreement at the time they signed it.

9 Mr. Marriott has also thrown up, and I think he did  
10 in the contract case as well, a real red herring here. They  
11 say what SCO is trying to do is control. You can't control  
12 what we did. Well, what controls them is not SCO, it is their  
13 contractual obligations. They made a deal that said if you'll  
14 give us source code, we'll keep it confidential. If we develop  
15 something with that source code, we will keep the drive source  
16 code confidential as well. That was their choice. The  
17 contract did that, not SCO.

18 Now, if they have got a big picture, and Mr. Marriott  
19 is really correct that it is just the fuzzy dice on the  
20 dashboard, then take them, the fuzzy dice off the dashboard.  
21 They won't do that. They say, well, it is not material. This  
22 JFS stuff is not important, but they won't take it out. They  
23 knew, as the internal memo we gave you specifically said that,  
24 that it was the -- I can't read this note.

25 THE COURT: You're going to have a hard time

1 commenting on it until you can read it.

2 MR. HATCH: The book that I gave you and this item  
3 one, the thick disclosure --

4 THE COURT: Right.

5 MR. HATCH: Mr. Marriott kind of alluded to that, and  
6 I don't know what he was talking about, but he alluded to Judge  
7 Wells striking Ivie and striking things. Striking stuff from  
8 IBM. That has never been struck. I don't know what he is  
9 talking about there.

10 They want to get away from all of that verbatim  
11 copying that we have shown from AIX and Linux, but that hasn't  
12 been struck and it is there and that is in the case. There are  
13 294 disclosures that are like that that are in the case. Some  
14 are relevant to other points, I agree with that, but if there  
15 is one, just one that I showed you, that in and of itself  
16 creates enough of a fact issue for us to go forward. Dr. Ivie  
17 talked about it and it is there and it has not been stricken.  
18 IBM did not even move to have it stricken. I leave you with  
19 that.

20 One quick point. He brought United Linux and I  
21 forgot to address that. That is real interesting and that is  
22 really kind of almost a little too cute for this case. What he  
23 fails to tell you with United Linux, is he is saying there is a  
24 waiver argument there, but what he fails to tell you is that  
25 SCO entered into agreements with other people to build

1 something on the existing Linux Kernel. In other words, they  
2 were going to put things in and then give it to the open source  
3 community. Then he said when you put it in, it was all waived.  
4 Well, he says this and his brief is very, very ambiguous on  
5 this, and so I think it is important for Your Honor to  
6 understand this, because they say it in a way that makes it  
7 sound like the stuff that SCO put in on top of that Kernel to  
8 build a new product is what we waived.

9 What was waived, of course, was the whole thing, but  
10 what they don't tell you is unbeknownst, and to be fair there  
11 are comments either way, but the JFS system was put into the  
12 Kernel and SCO was unaware of that. That was put in there by  
13 IBM. That is essentially saying IBM can take something in  
14 violation of the contract and plug it into a document, and if  
15 SCO does not find it out and it uses that and puts it in, that  
16 somehow it was waived something. Waiver requires knowledge and  
17 that is not here. At the very least it is hotly disputed. I  
18 think they were somewhat disingenuous on that as well.

19 Thank you, Your Honor.

20 THE COURT: Thank you.

21 Well, not surprisingly I will take these motions  
22 under advisement and look forward to seeing all or most of you  
23 again on Monday at 2:30.

24 Thank you.

25 We'll be in recess.



1 MR. SINGER: Thank you, Your Honor.

2 MR. MARRIOTT: Thank you, Your Honor.

3 (Proceedings concluded.)

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