

# SCO v. IBM

IBM's Motion for Summary  
Judgment on SCO's Copyright  
Claim (SCO's Fifth Cause of  
Action)

**UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH  
Civil No.: 2:03CV294DAK**

# Amendment X

INTERNATIONAL BUSINESS MACHINES CORPORATION  
THE SANTA FE OPERATION, INC.  
NOVELL, INC.

Amendment No. X to Software Agreement SOFT-00015 as amended,  
Sublicensing Agreement SUB-0015A as amended,  
Software Agreement SOFT-00015 Supplement No. 179 as amended,  
and Sublicensing Agreement XFER-00015B

This amendment ("Amendment X") is made by and between International Business Machines Corporation, a New York corporation ("IBM"), 438 Raritan Street, Santa Clara, California 95050, and Novell, Inc., a Delaware corporation ("Novell"), 3501 La Tijera Avenue, Santa Clara, California 95051.

AT&T Technologies, Inc. ("AT&T"), a Delaware corporation, is a party to the Software Agreement SOFT-00015 and the Sublicensing Agreement XFER-00015B (the "Related Agreements"). In an agreement dated [redacted], AT&T and Novell have mutually agreed to assign to Novell all of the rights and obligations of AT&T under the Related Agreements.

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Novell, SCO and IBM agree as follows:

1. *No Additional Royalty.* Upon payment to SCO of the consideration in the section entitled "Consideration", IBM will have the irrevocable, fully paid-up, perpetual right to exercise all of its rights under the Related Agreements beginning January 1, 1996 at no additional royalty fee...Notwithstanding the above, the irrevocable nature of the above rights **will in no way be construed to limit Novell's or SCO's rights to enjoin or otherwise prohibit** IBM from violating any and all of Novell's or **SCO's rights** under this Amendment No. X, the Related Agreements, or under general patent, copyright, or trademark law.

# Under the Plain Language of Amendment No. X, SCO Had the Right to Terminate IBM's UNIX Agreements

- Amendment No. X gives IBM the “irrevocable, fully paid-up, perpetual right to exercise all of its rights under the Related Agreements beginning January 1, 1996 at no additional royalty fee.” (Emphasis added.)
- IBM had no “right” to materially breach the Related Agreements among its “rights under the Related Agreements.”
- What was perpetual and irrevocable, moreover, was IBM’s right to exercise its rights under the Related Agreements “at no additional royalty fee.”

# The Extrinsic Evidence Is More Than Sufficient to Show That SCO Had the Right to Terminate IBM's UNIX Agreements

To the extent Amendment No. X is ambiguous on the issue of termination, summary judgment is improper where, as here, extrinsic evidence confirms that SCO retained its rights to terminate the IBM Agreements for breach, such as testimony by:

- Larry Bouffard, Novell's representative in the negotiations of Amendment No. X.
- Steven Sabbath, Santa Cruz's Vice President of Law and Corporate Affairs and SCO's signatory to Amendment No. X.
- Kimberly Madsen, a Manager in Santa Cruz's Law and Corporate Affairs group, who worked closely with Mr. Sabbath on Amendment No. X.
- Alok Mohan, the President and Chief Executive Officer of Santa Cruz and a high-level participant in the negotiations of Amendment No. X.
- Doug Michels, a senior executive and later the CEO at Santa Cruz in 1996 during the negotiation of Amendment No. X.

# Declaration of Lawrence A. Bouffard 11/8/06

38. **It was not my view, however, that Santa Cruz was precluded from terminating IBM's UNIX source code license agreement if IBM in fact had failed to honor it and Santa Cruz could prove that.** If Amendment No. X had not provided otherwise, that would have constituted a substantial expansion of IBM's rights under its UNIX source code agreement, which I did not understand Amendment No. X to accomplish. Amendment No. X says that Santa Cruz "may enjoin or otherwise prohibit" IBM from violating Santa Cruz's rights, and I think **the "otherwise" language includes terminating IBM's UNIX license agreements for IBM's actual breaches.**

# IBM's Treatment of Mr. Bouffard's Testimony Is Unreasonable

In addition, Mr. Bouffard has given an “adequate explanation” for the testimony in his second declaration. Mr. Bouffard recently testified in his deposition in the Novell case:

- In the “first go-round” of a draft declaration prepared by counsel for IBM, “there were several sections that were completely objectionable and wrong. Actually, they didn’t reflect what I said. And it was clear that it was trying to get me to say something that they wanted to hear. So I didn’t sign it the first go-round.” (58.)
- “I got another draft, and it still was not what I had said, so I asked them to strike some things, I believe they did, and then we went back and forth a few times.” (Id.)
- “By the last time reading it over, I read it over at that point a little weary of it from the standpoint of ‘well, I guess you could interpret what I said that way.’ . . . It’s not really a statement of my words.” (Id.)
- “But this was particularly difficult working with them, trying to get it to be how I would characterize things. It became a negotiation of my words rather than a document of my own words.” (Id.)
- “But at that point, I just go kind of tired of the process, and I said that’s, you know, close enough.” (Id. at 59.)

# Declaration of Kim Madsen

## 11/4/06

18. Apart from the possible exception of source code libraries, I did not understand the parties to intend Amendment No. X to increase IBM's rights with respect to the UNIX System V source code it had licensed, and I did not understand Amendment No. X to preclude Santa Cruz from terminating IBM's UNIX System V license if IBM breached that license.

# **SCO v. IBM**

## **SCO's Summary Judgment Hearing Binder**

**IBM's Motion for Summary Judgment  
on its Claim for Declaratory Judgment  
of Non-Infringement (IBM's  
Tenth Counterclaim)**

***United States District Court  
District of Utah  
Civil No.: 2:03CV – 0294DAK***