

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
NATURE AND STAGE OF PROCEEDINGS	1
SUMMARY OF ARGUMENT	1
STATEMENT OF FACTS	3
ARGUMENT	6
I. THIS COURT LACKS SUBJECT MATTER JURISDICTION UNDER THE DECLARATORY JUDGMENT ACT	6
A. Red Hat Cannot Establish an “Actual Controversy” as Required by 28 U.S.C. § 2201	7
1. Counts I and II must be dismissed because Red Hat cannot establish a “reasonable apprehension” that SCO will sue it for copyright infringement or misappropriation.	9
B. Even if the Court Determines Subject Matter Jurisdiction Exists, the Court should Exercise its Discretion and Decline to Consider the Case.	15
II. RED HAT’S CLAIMS FALL OUTSIDE THE SCOPE OF THE LANHAM ACT AND RELATED STATE LAW CLAIMS AND ARE BARRED BY THE FIRST AMENDMENT	16
A. The Public Statement are Fully Protected Speech Under the First Amendment	17
1. Nature of The Speech	19
2. Governmental Interests Served by Regulating the Speech in Question	23
CONCLUSION	28

TABLE OF AUTHORITIES

Aetna Life Ins. Co. v. Haworth,
300 U.S. 227 (1937)..... 7

Avery Dennison Corp. v. Acco Brands, Inc.,
2000 U.S. Dist. LEXIS 3938 (C.D. Cal. February 22, 2000)21, 22, 25

BASF Corp. v. PPG Industries,
1991 WL 354884 (D N.J. February 11, 1991).....12

B.P. Chemicals, Ltd. v. Union Carbide Corp.,
4 F.3d. 975 (5th Cir. 1993)8

Board of Trustees v. Fox,
492 U.S. 469 (1989).....17

Bolger v. Youngs Drug Products Corp.,
463 U.S. 60 (1983).....18, 23

Bonterra America v. Bestmann,
907 F.Supp. 4 (D.D.C. 1995)12, 13

CAE Screenplates Inc. v. Beloit Corp.,
957 F.Supp. 784 (E.D. Va. 1997)8, 9, 13

Central Hudson Gas & Electric Corp. v. Public Service Comm'n.,
447 U.S. 557 (1980).....18

City of Cincinnati v. Discovery Network, Inc.,18
507 U.S. 410 (1993)

City of Pittsburgh v. West Penn Power Co.,
147 F.3d 256 (3d Cir. 1998).....6

Diagnostic Unit Inmate Council v. Films Inc.,
88 F.3d. 651 (8th Cir. 1996)8, 9

Doug Grant, Inc. v. Greate Bay Casino Corp.,
232 F.3d 173 (3d Cir. 2000).....6

Emerson v. Thiel College,
296 F.3d 184 (3d Cir. 2002).....5

Gordon and Breach Science Publishers, S.A. v. American Institute of Physics,
859 F.Supp. 1521 (S.D.N.Y. 1994)17, 18, 23

Interdynamics, Inc. v. Firma Wolf,
698 F.2d 157 (3d Cir. 1983).....8

International Harvester v. Deere & Co.,

623 F.2d 1207 (7 th Cir. 1980)	8, 14
<i>International Med. Prosthetics Research Assoc. v. Gore Entrp. Holdings</i> , 787 F.2d. 572 (Fed. Cir. 1986).....	8
<i>Kewanee Oil Co. v. Bicron Corp.</i> , 416 U.S. 470 (1974).....	14
<i>Maryland Cas. Co. v. Pacific Coal & Oil Co.</i> , 312 U.S. 270 (1941).....	7
<i>Mikohn Gaming Corp. v. Acres Gaming, Inc.</i> , 165 F.3d 891 (Fed. Cir. 1988).....	20, 21, 22
<i>Phillips Plastics Corp. v. Kaisha</i> , 57 F.3d 1051 (Fed. Cir. 1995).....	14
<i>Public Affair Assoc. v. Rickover</i> , 369 U.S. 111 (1962).....	8, 14
<i>Riley v. National Fed'n of the Blind</i> , 487 U.S. 781 (1988)	123, 24
<i>Shearin v. Baldwin</i> , 1988 Del. Super. LEXIS 243 (July 5, 1988).....	25
<i>Shell Oil Co. v. Amoco Corp.</i> , 970 F.2d 885 (5 th Cir. 1992)	8, 9
<i>Symbol Technologies, Inc. v. Proxim, Inc.</i> 2003 WL 21840774 (D. Del. July 30, 2003).....	19, 20, 22
<i>United States v. Edge Broadcasting Co.</i> , 509 U.S. 418 (1993).....	17, 18
<i>Village of Schaumburg v. Citizens for a Better Environment</i> , 444 U.S. 620 (1980)	23
<i>Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Counsel</i> , 425 U.S. 748 (1976).....	17

OTHER AUTHORITIES

15 U.S.C. § 1125.....	17
17 U.S.C. § 101.....	19, 24
17 U.S.C. § 106.....	24
17 U.S.C. § 401-412	24
17 U.S.C. § 502.....	24
17 U.S.C. § 503.....	24
Restatement (Second) Torts § 586.....	25
Restatement (Second) Torts § 587.....	24, 25

NATURE AND STAGE OF PROCEEDINGS

Red Hat, Inc. ("Red Hat") filed suit against The SCO Group, Inc. ("SCO") on August 4, 2003. Red Hat seeks a declaratory judgment that Linux software distributed by it does not infringe or violate certain of SCO's intellectual property rights in a software product known as UNIX. Red Hat also seeks damages and injunctive relief against SCO under the Lanham Act and related state law claims, alleging deceptive trade practices, unfair competition, tortious interference with prospective business opportunities and trade libel and disparagement arising out of certain public statements made by SCO.

Pursuant to a stipulation entered by the parties and signed by the Court, SCO's response to Red Hat's Complaint is due on September 15, 2003. This Motion to Dismiss, pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure, is SCO's response to Red Hat's Complaint.

In a separate but related case, SCO has sued International Business Machines Corporation ("IBM") in the U.S. District Court, District of Utah (the "SCO v. IBM Case"). In that action, which was filed five months before this case, SCO contends that IBM has breached its UNIX license with SCO by improperly using UNIX software code and methods to enhance the functionality of Linux.

SUMMARY OF ARGUMENT

1. Red Hat's claims under Counts I and II of the Complaint seek declaratory relief that a software product distributed by Red Hat known as "Linux" software does not infringe or violate any of SCO's intellectual property rights in UNIX. These claims fail for lack of subject matter jurisdiction under the Declaratory Judgment Act, 28 U.S.C. § 2201, because Red Hat cannot satisfy its burden of establishing an "actual controversy" as required by the Declaratory Judgment Act. Specifically, Red Hat cannot identify any express or

implied threats to enforce SCO's intellectual property rights against Red Hat. In fact, SCO has never threatened to sue Red Hat. Based on its wholesale failure to establish "reasonable apprehension" of being sued, Red Hat fails to meet the core jurisdictional requirement for an action under the Declaratory Judgment Act. Red Hat's legal action does nothing more than seek general guidance for the marketplace as to the legal rights SCO has with respect to Linux software. This is an impermissible use of the Declaratory Judgment Act.

2. Additionally, even if Red Hat were able to successfully establish the jurisdictional requirements for declaratory relief, this Court should decline to exercise jurisdiction because there is no practical reason to do so. The infringement and misappropriation issues Red Hat seeks to adjudicate in this case are currently before U.S. District Judge Dale A. Kimball in the SCO v. IBM Case pending in Utah Federal District Court.

3. Red Hat's claims under Counts III through VII seeking tort damages and injunctive relief based upon SCO's so-called "campaign" of filing suit against IBM and publicly discussing that case and other potential legal liabilities are barred by the First Amendment to the U.S. Constitution and by the common law doctrine of litigation immunity. The nature of SCO's statements complained of by Red Hat do not give rise to liability under the Lanham Act or the associated state law claims. Further, any governmental interest served under the Lanham Act is heavily outweighed by fundamental governmental interests in protecting copyright interests, ensuring full and free access to courts, providing litigation immunity, promoting judicial economy and fairness in litigation, and safeguarding freedom of speech and the press. Therefore, Counts III through VII must be dismissed with prejudice.

STATEMENT OF MATERIAL FACTS

The following facts are taken from Red Hat's Complaint, documents to which it refers, documents that the Complaint incorporates by reference, and other materials on which this Court may properly rely. SCO accepts as true the allegations in Red Hat's Complaint only for the purposes of the present motion. Facts also are presented from the Amended Complaint in the SCO v. IBM Case and from IBM's Answer and Counterclaim to supplement the record in ways consistent with the standard of review on a motion to dismiss.

The Parties

Red Hat and SCO are companies that provide computer software to large and mid-size corporations. Red Hat Complaint, ¶¶ 24, 25, 30, 33.¹ SCO owns all right, title and interest in and to computer software known as UNIX System V and UnixWare, together with related copyrights ("UNIX"). ¶¶ 5, 18, 33; *see also* SCO v. IBM Amended Complaint ¶¶ 1, 2, 60-63.² SCO licenses UNIX software to its corporate customers for a fee. SCO also licenses UNIX software to other software companies, who then modify UNIX to their own needs and sublicense UNIX to their own corporate customers, also for a fee. ¶ 18; SCO ¶¶ 2, 4. IBM is one of the major licensees of UNIX. IBM licenses UNIX from SCO, modifies it to its own needs, and sublicenses UNIX under its own brand known as AIX. SCO ¶ 26.

Red Hat is one of many companies that distributes a software program called "Linux." ¶ 28. Linux was developed under an "open source development model"³ that prohibits proprietary

¹ Hereinafter, all references to the Red Hat Complaint will be designated as "¶ ____."

² Hereinafter, all references to the SCO v. IBM Amended Complaint will be designated as "SCO ¶ ____." The SCO v. IBM Amended Complaint is attached as Exhibit A. All exhibits described herein are attached to the Declaration of Mark J. Heise filed contemporaneously herewith.

³ Under the open source development model numerous, perhaps hundreds, of different software developers each contribute parts of the software code base. These code contributions are assembled into a single working software product. Open source development is traditionally done as a hobby, without compensation to the software developers. Its goal is to make free software that everyone can use and share without restriction and without paying a licensing fee.

ownership or control by anyone. ¶¶ 22, 26, 32. Therefore, Red Hat has no ownership or proprietary interest in Linux. ¶ 32.

The SCO v. IBM Litigation

IBM has implemented a program to “exploit its expertise in AIX to bring Linux up to par with UNIX.” SCO ¶ 97. SCO contends that these efforts are contrary to IBM’s obligations under its UNIX licensing agreements. SCO filed suit to vindicate its rights on March 7, 2003. ¶ 41. SCO filed an Amended Complaint on July 22, 2003. As an additional step to protect its rights, SCO terminated IBM’s UNIX rights under the authority of SCO’s UNIX agreements with IBM. SCO ¶¶ 119-121. IBM requested two extensions of time to answer SCO’s Amended Complaint, and in its August 6, 2003, Answer it denied SCO’s allegations and in turn counterclaimed against SCO for breach of contract, Lanham Act violations, unfair competition, intentional interference with prospective economic relations, unfair and deceptive trade practices, breach of the General Public License (“GPL”) under which Linux is licensed, and four patent infringement claims. IBM Answer and Counterclaim in SCO v. IBM’s Exhibit B.

The issues in the SCO v. IBM litigation involve many companies in the software and computing industry. Competing principles of open source versus proprietary software have come into focus and have attracted a great deal of attention from news media, industry analysts, and numerous companies. In response to this interest, SCO tried to provide substantial information, while remaining true to its contractual obligations to keep UNIX code confidential. ¶¶ 1, 2, 7, 37, 42, 45, 49-54, 66. To this end, SCO representatives have given interviews and made public statements about the case, and in several of those interviews and statements they have mentioned, or have been asked about, Red Hat and other Linux distributors. On May 12, 2003, SCO took an additional step to educate the Global 1,500 companies through a direct

mailing discussing SCO's intellectual property rights. ¶ 42; May 12, 2003, Letter.⁴ This letter refers to the SCO v. IBM Case and names IBM and Linux, but does not mention Red Hat or any other Linux distributor, nor does it propose any commercial transaction. *See*, May 12, 2003, Letter, Exhibit C. In addition, in order to provide end users with the ability to run Linux without violating any of SCO's intellectual property rights, SCO announced a licensing program in July 2003.

The Red Hat v. SCO Dispute

Red Hat has not been satisfied to await the outcome of the SCO v. IBM Case. ¶ 56. Instead, it sent SCO a letter on July 18, 2003, asking SCO to "fully explain the bases, if any, for its public allegations concerning Red Hat Linux." July 18, 2003, Letter. SCO CEO Darl McBride telephoned Red Hat CEO Matthew Szulick on July 31 to discuss Red Hat's letter. According to Red Hat's Complaint, on July 31, 2003, SCO merely offered it an "unneeded Unix license." ¶ 11. Then, on August 4, 2003, Red Hat filed its Complaint against SCO in the instant action. Concurrent with filing the Complaint, Red Hat issued a press release announcing its lawsuit against SCO and explaining the reason for the lawsuit.⁵ Red Hat claimed in the August 4, 2003 press release that "in its role as an industry leader," to fulfill its responsibility to "ensure [that] the legal rights of users are protected," and to defend "the worldwide Linux industry,"⁶ it had filed the present Complaint against SCO. ¶ 13. No reference was made to any threat or apprehension of threat of being sued by SCO

⁴ The May 12, 2002 letter is attached as Exhibit C.

⁵ The Press Release is attached as Exhibit D.

⁶ http://www.redhat.com/about/presscenter/2003/press_sco.html

ARGUMENT

A complaint will not withstand attack under Federal Rule of Civil Procedure 12(b)(6) unless the material facts, as alleged, in addition to inferences drawn from those allegations, provide a basis for recovery. *Emerson v. Thiel College*, 296 F.3d 184, 188 (3d Cir. 2002). While all of the allegations in the complaint must be taken as true, the Court “need not accept as true unsupported conclusions and unwarranted inferences.” *Doug Grant, Inc. v. Greate Bay Casino Corp.*, 232 F.3d 173, 183-84 (3d Cir. 2000). As the Third Circuit has observed “[c]ourts have an obligation in matters before them to view the complaint as a whole and to base rulings not upon the presence of mere words but, rather, upon the presence of a factual situation which is or is not justiciable. [Courts are to] draw on the allegations of the complaint, but in a realistic, rather than a slavish, manner.” *Id.*, quoting *City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 263 n.13 (3d Cir. 1998). Based on the facts Red Hat alleges in its Complaint, dismissing this case on a 12(b) motion is particularly appropriate for the reasons set forth in this Memorandum.

I. **THIS COURT LACKS SUBJECT MATTER JURISDICTION UNDER THE DECLARATORY JUDGMENT ACT.**

In Counts I and II of their Complaint, Red Hat seeks declaratory judgments. In Count I, Red Hat begins by requesting a declaratory judgment that “it does not infringe any SCO copyright.” Then, in a sweeping effort to obtain a declaratory judgment on behalf of the entire Linux industry, Red Hat seeks a declaration that “any SCO copyright to cover Linux software is unenforceable.” Finally, again on behalf of the entire Linux industry, Red Hat requests the declaration that “SCO is equitably estopped from asserting any SCO copyright with respect to any Linux software.”⁷ These broad claims for declaratory relief far exceed the scope and

⁷ These requests are consistent with Red Hat’s stated intentions in its press release filed on the date suit was filed: “Red Hat today made two significant announcements to protect Red Hat Linux customers and the worldwide Linux community,” *i.e.*, the filing of the lawsuit and pledging a fund to pay the legal expenses of anyone who actually may be sued for infringement by SCO under specified conditions.

purpose of the Declaratory Judgment Act. More importantly, Red Hat fails to establish the existence of an “actual controversy” as required by the Declaratory Judgment Act, and therefore this Court lacks subject matter jurisdiction to adjudicate these claims.

In Count II, entitled “Declaratory Judgment of No Misappropriation of Trade Secrets,” Red Hat seeks similarly sweeping declarations. Specifically, Red Hat seeks a declaration “that it has not misappropriated any SCO trade secret, that any SCO trade secret claimed to cover UNIX software found in Linux is invalid, that the source code for the Linux kernel and operating system are public and cannot constitute a trade secret and that SCO is equitably estopped from asserting any SCO trade secret with respect to any Linux software.” Red Hat, however, has never had any license from SCO providing access to SCO’s trade secrets or other confidential information and, to SCO’s knowledge, has not stolen or otherwise misappropriated any of SCO’s trade secrets or confidential information. Therefore, unlike companies that have contractual obligations to SCO, Red Hat has no legal or factual basis for apprehension of suit by SCO with respect to trade secrets or confidential information it has licensed from SCO, and its claims in Count II can be summarily dismissed.

A. Red Hat Cannot Establish an “Actual Controversy” as Required by 28 U.S.C. § 2201.

The Declaratory Judgment Act limits the use of declaratory judgments to cases of “actual controversy.” 28 U.S.C. § 2201; *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-40 (1937). Generally, the presence of an “actual controversy” within the Act depends on “whether the facts alleged, under all circumstances, show that there is a substantial controversy between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). The plaintiff, as the party seeking to invoke the court’s jurisdiction, bears the burden of proving

by a preponderance of evidence that an “actual controversy” existed not only at the time of the complaint’s filing but also throughout the pendency of the action.” *CAE Screenplates Inc. v. Beloit Corp.*, 957 F.Supp. 784, 788 (E.D. Va. 1997); *International Med. Prosthetics Research Assoc. v. Gore Entrp. Holdings*, 787 F.2d. 572, 575 (Fed. Cir. 1986). When factual questions concerning jurisdiction have been raised, the court need not accept the allegations of the complaint as true, but may look behind the complaint and view the evidence to determine whether a controversy actually exists. *International Harvester v. Deere & Co.*, 623 F.2d 1207, 1210 (7th Cir. 1980). Significantly, even when it is determined that an actual controversy exists, federal courts may decline to exercise that discretionary jurisdiction. *Public Affair Assoc. v. Rickover*, 369 U.S. 111, 112 (1962) (“The Declaratory Judgment Act was an authorization, not a command. It gave federal courts competence to make a declaration of rights; it did not impose a duty to do so.”).

In deciding whether to allow a claim for declaratory relief to proceed in patent and copyright cases, federal courts have widely used a two-step analysis in determining whether an “actual controversy” exists. *See, e.g., Diagnostic Unit Inmate Council v. Films Inc.*, 88 F.3d. 651, 653 (8th Cir. 1996); (“In patent and copyright cases, there is an actual controversy if defendant in a declaratory judgment lawsuit has either expressly or impliedly charged defendant with infringement.”) *B.P. Chemicals, Ltd. v. Union Carbide Corp.*, 4 F.3d. 975, 978 (5th Cir. 1993); *Interdynamics, Inc. v. Firma Wolf*, 698 F.2d 157, 166-70 (3d Cir. 1983); *International Harvester, supra*. First, defendant’s conduct must have created a reasonable apprehension on the plaintiff’s part that it will face a suit for infringement. This test is an objective one, focusing on whether the defendant’s conduct rose to a level sufficient to indicate an intent to enforce its patent or copyright. *See Shell Oil Co. v. Amoco Corp.*, 970 F.2d 885, 888 (5th Cir. 1992);

Diagnostic Unit, 88 F.3d at 653. To assess the defendant's conduct, courts look initially for a specific and express charge of infringement and, if none is found, then to the "totality of the circumstances." *Shell Oil*, 970 F.2d at 888 ("We must look for any express charges of infringement, and if none, then to the totality of the circumstances."). Second, plaintiff must have engaged in allegedly infringing acts or possessed the capability and definite intention to engage immediately in such acts. *CAE Screenplates*, 957 F.Supp. at 789; *Diagnostic Unit*, 88 F.3d at 653. This second prong, in essence, prohibits declaratory judgment plaintiffs from seeking advisory opinions on their potential liability for initiating some future activities.

1. **Counts I and II must be dismissed because Red Hat cannot establish a "reasonable apprehension" that SCO will sue it for copyright infringement or misappropriation.**

Stripped of its rhetoric, Red Hat's Complaint fails to establish a "reasonable apprehension" that it will be sued by SCO for copyright infringement or misappropriation. SCO has not threatened Red Hat with a claim for copyright infringement or misappropriation. Further, Red Hat has not identified facts supporting such a threat. The inquiry consequently becomes whether Red Hat's allegations of the "totality of circumstances" provide a "reasonable apprehension" that it will face such a suit. The answer to that question is a resounding "no."

As a preliminary observation, its August 4, 2003 press release (see, footnote 5, *supra*.) reveals that Red Hat's real motive for filing suit against SCO was to somehow vindicate the entire Linux industry. Further, in paragraph 13 of the Complaint, Red Hat alleges:

In light of SCO's consistent refusal to identify any specific source code in the public LINUX kernel or operating system that SCO is currently claiming infringes its intellectual property rights, Red Hat brings this action.

This allegation reveals that Red Hat's action does nothing more than seek an advisory opinion of

this Court regarding SCO's intellectual property rights, something that is clearly prohibited under the Declaratory Judgment Act.

The examples Red Hat uses to claim apprehension of suit belie its assertion. As detailed below, when the entire quotes, not the biased excerpts that have been placed out of context, are carefully examined, the conclusion is undeniable that Red Hat has no reasonable apprehension that it will be sued for copyright infringement or misappropriation.

In paragraph 50, for example, Red Hat identifies a quote from Darl McBride, the Chief Executive Officer of SCO, in which he says simply "[t]here will be a day of reckoning for Red Hat ...*when this is done.*" ¶ 50 (emphasis added). On its face, this quote makes clear that any action against Red Hat would take place only when litigation against IBM is completed. Moreover, when this quote is read in the context of the very next sentence, which Red Hat failed to provide, there is no doubt as to SCO's intentions: "But we are focused on the IBM situation." CRN article attached as Exhibit E. With the quote presented in context there can be no legitimate claim by Red Hat of "reasonable apprehension" of suit by SCO. Lest there be any doubt about Red Hat's complete lack of a "reasonable apprehension" of being sued, SCO's Vice President Chris Sontag was asked in an interview to explain Mr. McBride's comment about "a day of reckoning:"

What he meant was that if SCO prevails in their lawsuit with IBM, companies like Red Hat and SuSE may need to revisit their distributions and remove any UNIX system code from their distributions and compensate SCO in some way for the software code that they benefited from by using our UNIX code."

Mozilla Article attached as Exhibit F. Nothing in that statement indicates that SCO is intending to sue Red Hat for infringement or misappropriation. Instead, it makes the rather unremarkable observation that *if* SCO prevails in its litigation against IBM, there will be ramifications to other

companies in the Linux industry.

Red Hat apparently was aware that Mr. McBride's statement had been clarified. Indeed, when Red Hat presented the foregoing quote of Mr. Sontag, it intentionally deleted the reference showing that the comment was an explanation of Mr. McBride's statement about a "day of reckoning." ¶ 52. Whatever Red Hat's motivation for its selective editing, it remains clear that nothing in any of these quotes gives rise to a "reasonable apprehension" of suit by SCO.

In its quest for claiming a "reasonable apprehension," Red Hat next incorrectly attributes a quote to Chris Sontag. Specifically, in paragraph 50, Red Hat claims Mr. Sontag said that SCO "may bring subsequent actions against Linux software developers such as Red Hat" There are two significant flaws with Red Hat's use of this "quote." First, it is not a statement that Chris Sontag made. According to the CNETnews.com article from which the quote came, the quote was the reporter's interpretation of Mr. Sontag's statement.⁸ More importantly, when the statement and Mr. Sontag's actual statements are read together, it is clear that Mr. Sontag's comments do not give rise to "reasonable apprehension" on the part of Red Hat:

SCO may also amend its complaint to bring additional causes of action against IBM, he added, and bring subsequent actions against Linux software developers such as Red Hat and SuSE.

"The fact that there are other companies infringing our contract ...(means) there could be other complaints," Sontag said.

In particular, Sontag said that a "major" hardware vendor inserted code protected by SCO's UNIX intellectual-property rights into a Linux product.

Article attached as Exhibit G.

⁸Nonetheless, even if Mr. Sontag did make such a statement or one similar to it, it is merely consistent with the earlier comments that *if* SCO is successful against IBM, it *may* bring subsequent actions against Red Hat and SuSE. Again, such comments do not give rise to an immediate need for declaratory relief.

The actual quotes attributed to Mr. Sontag indicate that at least one other company (besides IBM) with whom SCO has a license agreement is in violation of that license agreement. Red Hat does not have any such license agreement and it has not alleged that it has any such license agreement with SCO. Under these circumstances, Red Hat is well aware it is not the unidentified "major" hardware vendor. Thus, there is nothing in this article presented by Red Hat to provide Red Hat with a "reasonable apprehension" of being sued for infringement or misappropriation.

In paragraphs 56 through 58 of its Complaint, Red Hat points to the pre-suit letter it wrote to SCO. This letter and SCO's response certainly do not provide a "reasonable apprehension" that Red Hat may be sued. In its Complaint, Red Hat outlines the letter it sent to SCO in which Red Hat demanded that SCO identify the infringing code "and noted that SCO had 'failed to provide any details' in support of its allegations *so that Red Hat could refute them.*" ¶ 56 (emphasis added). While Red Hat identified its desire to refute SCO's allegations, it never mentioned either in its letter or in reaction to SCO's response to its letter any fear that it would be sued. Rather, according to its allegations, Red Hat received "a telephone call seeking to have Red Hat pay for an unneeded UNIX license." ¶11. Two business days later, Red Hat filed suit. "The unavoidable inference is that plaintiff, recognizing that it did not have a reasonable basis for apprehension of suit, intentionally attempted to goad defendant's counsel into threatening a lawsuit." *BASF Corp. v. PPG Industries*, 1991 WL 354884 *9 (D N.J. February 11, 1991)⁹.

Courts confronted with far more compelling examples of purported "reasonable apprehension" have rejected such claims. In *Bonterra America v. Bestmann*, 907 F.Supp. 4, 7 (D.D.C. 1995), for example, the "totality of circumstances" was (1) an offer from the defendant

⁹ Opinion attached as Exhibit H.

patent holder of a non-exclusive license; (2) statements allegedly made to plaintiff's customer and/or marketing representative that certain of plaintiff's products violated defendant's patent; and (3) a letter to the same person from defendant's attorney in which the attorney declined to answer legal questions about defendant's patent and directed the person to seek his own counsel regarding such questions. *Id.* The court further noted the absence of allegations that may have supported jurisdiction:

No allegations have been made by [plaintiff] that [defendant] has contacted [plaintiff] and informed it that its products are in violation of the patent. No allegations have been made that [defendant] has conveyed to [plaintiff] either expressly or implicitly that it intends to sue to enforce its patent, and no allegations have been made that [defendant] has ever before sued another entity for infringement.

Id.

Red Hat's Complaint suffers from the same infirmities found by the court in *Bonterra America* to preclude subject matter jurisdiction. There are no allegations that SCO has contacted Red Hat and informed it that its product violates SCO's copyrights. Nor has SCO done so. There are no allegations that SCO has conveyed to Red Hat either expressly or implicitly that it intends to sue Red Hat to enforce its copyrights. Nor has SCO done so. There are no allegations that SCO has sued any other entity for infringement. Nor has SCO done so. Under these circumstances, the declaratory judgment claims fail for lack of subject matter jurisdiction. *See also CAE Screenplates*, 957 F.Supp. at 790 (series of letters between patentee's counsel and putative infringer's counsel concerning putative infringer's demands for license, fears of putative infringer's customers about patent, and patentee's history of patent litigation did *not* give putative infringer objective, reasonable apprehension of infringement suit, as required for subject matter jurisdiction and declaratory judgment action for a non-infringement, unenforceability and

invalidity of patent); *Phillips Plastics Corp. v. Kaisha*, 57 F.3d 1051, 1053 (Fed. Cir. 1995) (“The offer of a patent license does not create an actual controversy”).

Red Hat’s allegations directed solely to its claim for a declaratory judgment for “no misappropriation of trade secrets” also do not provide proof of an “actual controversy.” Red Hat certainly has not alleged it has been threatened with such an action. Similarly, the “totality of circumstances” do not imply such a threatened action. As to any threats by SCO, real or perceived, they are found in paragraph 51 of its Complaint. There, Red Hat claims SCO has asserted Red Hat wrongfully misappropriated portions of SCO’s proprietary UNIX software. However, the purported factual support for this proposition incorporated in Plaintiff’s allegations eviscerates this pronouncement. Specifically, Red Hat notes that Darl McBride stated that “*IBM* took chunks [of code] out of [Project] Monterey, and gave it away. You can find it in Red Hat ...Linux.” ¶ 51 (emphasis added). As this quote makes clear, any claim for misappropriation asserted by SCO would not be made against Red Hat, but instead would be made against IBM, as SCO has done in the litigation pending in federal court in Utah.

In addition to this lack of a threat, there is a simple factual hurdle that precludes any “reasonable apprehension” of suit against Red Hat. Red Hat, unlike IBM, has never signed a license agreement giving it access to SCO’s confidential trade secrets in System V source code. A fundamental principle of trade secret law is that “[t]he protection accorded the trade secret holder is against the disclosure or unauthorized use of the trade secret *by those to whom the secret has been confided under the express or implied restriction of nondisclosure or nonuse.*” *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 475 (1974) (emphasis added). In the absence of access to the confidential UNIX System V source code or the improper taking of that source code Red Hat cannot legally be in a position of “reasonable apprehension” that it may be sued

for misappropriation of trade secrets.

B. Even if the Court Determines Subject Matter Jurisdiction Exists, the Court Should Exercise its Discretion and Decline to Consider the Case.

It is clear that Red Hat has not established (and cannot establish) a reasonable apprehension of suit by SCO for infringement or misappropriation. Nonetheless, even if Red Hat could satisfy the prerequisites, this Court has the discretion to decline to exercise its jurisdiction. *Rickover, supra; International Harvester*, 623 F.2d at 1217. The previously filed SCO v. IBM Case addresses most, if not all, of the issues of copyright infringement and misappropriation. If these issues are decided against SCO in that case, then Red Hat's lawsuit becomes unnecessary. Certainly, Red Hat's "need for declaratory relief does not outweigh the interests in judicial expediency and in avoiding unnecessary federal court decisions." *International Harvester*, 623 F.2d at 1218. This Court, therefore, should decline jurisdiction, if it exists, in this case and dismiss Counts I and II of the case.

II. RED HAT'S CLAIMS FALL OUTSIDE THE SCOPE OF THE LANHAM ACT AND RELATED STATE LAW CLAIMS AND ARE FULLY PROTECTED SPEECH UNDER THE FIRST AMENDMENT.

Red Hat's claims for relief under the Lanham Act and related state law claims, as set forth in Counts III through VII of the Complaint, contain only legal conclusions in the body of each count, without reference to specific averments of fact. Therefore, it is necessary to glean factual support for each of these claims from the Background Facts contained in paragraphs 1 through 69 of the Complaint. A complicating factor is that many of the "Background Facts" are argument and *ad hominem* attacks, rather than averments of factual conduct.

Nevertheless, the Background Facts generally condense into five public statements made by SCO that relate to Red Hat's claims: (1) Linux software versions 2.4 and 2.5 contain intellectual property owned or controlled by SCO,¹⁰ (2) IBM has improperly contributed UNIX intellectual property into Linux,¹¹ (3) SCO intends to protect and defend its intellectual property rights,¹² (4) legal liability for use of infringing versions of Linux may rest with end users,¹³ and (5) corporate end users can avoid potential legal liability to SCO by acquiring a right-to-use license¹⁴ (collectively, the "Public Statements").

¹⁰ ¶¶ 1, 40, 59 and 66.

¹¹ ¶¶ 2, 41 and 51.

¹² ¶¶ 42 and 52.

¹³ ¶¶ 2, 4 and 42.

¹⁴ ¶¶ 38 and 60.

SCO's Public Statements fall outside the scope of the Lanham Act and related state law claims and are protected under the First Amendment to the U.S. Constitution. The Public Statements also address or relate to pending or potential litigation and are privileged under the common law doctrine of litigation immunity. Therefore, Counts III through VII of Red Hat's Complaint fail to state claims upon which relief may be granted and must be dismissed with prejudice.

A. The Public Statements are Fully Protected Speech Under the First Amendment.

Red Hat's claims under the Lanham Act and related state laws are based on the Public Statements summarized above. The question on this Motion to Dismiss is whether the Public Statements could legitimately be considered "False Advertising in Violation of § 43(a) of the Lanham Act," as pled by Red Hat in the Complaint. For the reasons detailed below, the answer to this question must be "no."

For a representation to be actionable under the Lanham Act, it must be made "in commercial advertising or promotion." 15 U.S.C. § 1125(a)(1)(B). Congress intended § 43(a) of the Lanham Act to extend only to false and misleading speech that is encompassed within the "commercial speech" doctrine developed by the United States Supreme Court. *Gordon and Breach Science Publishers, S.A. v. American Institute of Physics*, 859 F.Supp. 1521, 1535-36 (S.D.N.Y. 1994). "Commercial speech" is protected under a lesser standard than other forms of constitutionally guaranteed speech. *See, e.g., United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993); *Board of Trustees v. Fox*, 492 U.S. 469 (1989). As a result, the government may regulate commercial speech in ways that it may not regulate other forms of speech. *See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Counsel*, 425 U.S. 748, 770-73

(1976).

One definition of "commercial speech" set forth by the U.S. Supreme Court is "speech proposing a commercial transaction." *Edge Broadcasting, supra*, at 426. An alternative definition, also set forth by the U.S. Supreme Court, is "expression related solely to the economic interests of the speaker and its audience." *City of Cincinnati v. Discovery Network, Inc.* 507 U.S. 410, 422 (1993). Notwithstanding these different definitions of "commercial speech," the Supreme Court cautions that distinguishing between commercial and noncommercial speech is not susceptible to the drawing of bright lines. *Id.* See also *Gordon and Breach*, 859 F. Supp. at 1537-38. **"The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation."** *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 68 (1983), quoting *Central Hudson Gas & Electric Corp. v. Public Service Comm'n.*, 447 U.S. 557, 563 (1980). The prohibition against use of a bright-line test ensures that restrictions on speech are carefully evaluated and that speech deserving of greater constitutional protection is not inadvertently suppressed:

We conclude that...the articles' commercial or noncommercial nature cannot be determined simply through the application of the bright-line test of whether they "propose a commercial transaction" (or alternatively, whether they "do no more than propose a commercial transaction" [citation omitted]). In cases such as this where commercial and noncommercial speech are closely intertwined, our task is not to apply bright-line tests but rather to **"examine restrictions on speech carefully to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed."**

Gordon and Breach, 859 F.Supp. at 1540 n. 7, quoting *Discovery Network*, 507 U.S. at 423. Thus, the inquiry to determine whether speech is "commercial" under the Lanham Act requires an analysis of both the nature of the particular speech in question, and the governmental interest served by regulating that type of speech.

1. Nature of the Speech.

In the instant case, the speech in question is set out in SCO's Public Statements. The nature of the Public Statements concerns (a) rights under the Copyright Act, 17 U.S.C. § 101 *et seq.*, (b) contract and copyright claims against IBM, (c) potential copyright liability of corporate end users of Linux versions 2.4 and 2.5, and (d) licensing options for corporate end users to avoid potential copyright liability.¹⁵ The nature of this particular speech can be generally categorized as follows: ownership of intellectual property rights, violation of those rights by others, pending and potential litigation, ways to avoid intellectual property infringement claims without litigation, and a licensing offer that is compatible with, not competitive to, Red Hat products.

On the issues of ownership of intellectual property rights, public statements of ownership in those rights and infringement by others, this Court's decision in *Symbol Technologies, Inc. v. Proxim Inc.*, 2003 WL 21840774 (D. Del. July 30, 2003)¹⁶ clearly demonstrates the protections afforded to such speech. *Symbol Technologies* involved the filing of a patent infringement case. The plaintiff filed its complaint for infringement, and also issued a press release in connection with the complaint, publicly asserting patent infringement claims against the defendant. In response, the defendant filed a counterclaim for, *inter alia*, Lanham Act violations, together with unfair competition and tortious interference claims under Delaware law. This Court reviewed these alleged violations on a summary judgment motion, summarized as follows:

In its counterclaims, defendant first asserts that this press release constituted unfair competition under § 43(a) of the Lanham Act, 15 U.S.C. S 1125 (a). (D.I. 6 at 11) It alleges that the press release contains materially false and misleading statements stating that defendant infringed four patents owned by plaintiff and that plaintiff would obtain injunctive relief against Proxim's Home-RF products. (Id. at 12) Defendant also alleges that plaintiff's press release was made in bad faith because plaintiff knew that

¹⁵ SCO has never asserted in any statement that individual, non-corporate users of Linux may be liable to SCO, or otherwise would need to purchase a right to-use-license.

¹⁶ Case attached as Exhibit I.

defendant's products did not infringe the asserted patents. Rather, the press release was meant to mislead and deceive defendant's investors, suppliers, distributors, retailers and other business partners. (Id. at 13) Finally, defendant asserts that ultimately, plaintiff's press release caused the failure of defendant's Home-RF product line and caused defendant substantial financial loss. Defendant next asserts that plaintiff's press release also violates Delaware's common laws governing unfair competition and tortious interference with actual and prospective contractual relations, (Id. at 14) Again, defendant alleges that plaintiff's press release was intended to dissuade defendant's business partners from doing business with it and to push defendant's Home-RF products out of the market.

Id at * 3.

These facts are remarkably similar to those alleged in the instant case, with the significant difference that SCO has not accused Red Hat of infringement. This Court entered summary judgment in *Symbol Technologies*, dismissing the Lanham Act and state law claims and adopting the test for evaluating public statements to the industry about pending patent infringement matters set forth by the Federal Circuit in *Mikohn Gaming Corp. v. Acres Gaming, Inc.*, 165 F.3d 891, 897 (Fed Cir. 1998). The *Mikohn Gaming* case similarly dealt with public statements about patent infringement allegations issued by a party prior to full and final resolution of the infringement claims at issue. The Federal Circuit ruled:

Communication to possible infringers concerning patent rights is not improper if the patent holder has a good faith belief in the accuracy of the communication. Although "bad faith" may encompass subjective as well as objective considerations, and the patent holder's notice is not irrelevant to a determination of bad faith, a competitive commercial purpose is not of itself improper, and bad faith is not supported when the information is objectively accurate. In general, a threshold showing of incorrectness or falsity, or disregard for either, is required in order to find bad faith in the communication of information about the existence or pendency of patent rights. Indeed, a patentee, acting in good faith on its belief as to the nature and scope of its rights, is fully permitted to press those rights even though he may misconceive what those rights are. Consequently, patentees do not violate the

rules of fair competition by making accurate representations, and are allowed to make representations that turn out to be inaccurate provided they make them in good faith.

Id. at * 4.

Under the *Mikohn Gaming* rule adopted by this Court, the only threshold SCO faces with respect to the SCO Public Statements is the threshold of good faith. The question of good faith pleading regarding SCO's intellectual property rights with respect to Linux, and attendant infringement of the Linux 2.4 kernel software, is squarely before the Utah Court in the SCO v. IBM Case. This issue should not be allowed to go forward as a collateral attack against SCO in the instant case.

Public statements that discuss pending or potential litigation in direct communication to customers are not in the nature of a "proposal for a commercial transaction" under the Lanham Act. In a factually similar case, the court in *Avery Dennison Corp. v. Acco Brands, Inc.*, 2000 U.S. Dist. LEXIS 3938 (C.D. Cal. February 22, 2000)¹⁷ found that demand letters to customers which contained allegedly false and misleading statements about the nature of the defendant's legal claims failed to give rise to a Lanham Act claim, as a matter of law. The court reasoned:

The Letters did not ask the recipients not to buy Acco's products; rather they asked the recipients not to use the allegedly infringing packaging in their catalogs...From a reading of the content of the Bohrer Letters, it is clear that these letters consisted of "cease and desist" language rather than any marketing or sales pitch.

As such, this Court concludes that the Bohrer Letters do not constitute an advertisement as a matter of law. Furthermore, in examining the disputed communication in light of its surrounding circumstances, this Court concludes that the Letters do not constitute commercial speech. As Avery argues, the central message of the Letters was that Avery believed its legal rights were being violated and that it did not want the recipients of the letters to continue that violation.

Id. at *23-24

¹⁷ Case attached as Exhibit J.

Avery Dennison is persuasive in the instant case. Here, as in *Avery Dennison*, the speech in question includes statements of legal rights and alleged violations of those rights by others. These statements are not a "marketing or sales pitch" they are in the nature of legal demands. Legal demands and assertions do not rise to the level of an "advertisement" or "commercial speech" under the Lanham Act. The *Avery Dennison* court entered a ruling to this effect as a matter of law. This Court should reach the same conclusion and rule that the SCO Public Statements related to legal rights and violation of those rights by others do not, as a matter of law, give rise to Lanham Act claims.¹⁸

SCO's statements about the right-to-use intellectual property license offered by SCO to large corporations ("RTU License") involves additional inquiry. The RTU License has the following characteristics: it is offered for simultaneous use with any Linux 2.4 operating system, not a replacement for Linux; it releases the licensee from any past or future liability it may have to SCO for infringing use of any Linux product; it covenants not to sue the licensee for any infringement of SCO's intellectual property rights that might otherwise arise from running Linux. ¶¶ 61, 62. This RTU License does not fall within the Lanham Act for three distinct reasons: first, it is a reasonable extension of SCO's legal claims involving current or potential litigation, and therefore should be treated under the rationale of *Mikohn Gaming, supra*, and *Avery Dennison, supra*; second, its salient features are a release of liability and covenant not to sue customers who run Linux, which are distinctly protected legal statements; and third, it does not compete with Linux, but rather depends entirely on the acceptance and licensing of Linux by customers. Because SCO's RTU License depends on the continued licensing of Linux by customers for its ongoing success, and because the RTU License principally involves a legal release and covenant not to sue, this Court should rule that it falls outside of Lanham Act

¹⁸ SCO recognizes that *Symbol Technologies, Mikohn Gaming* and *Avery Dennison* were decided on motions for summary judgment. However, based on the facts as presented in Red Hat's Complaint in the instant case, this Court is likewise in a position to rule on the issues of the protected speech as a matter of law on this Motion to Dismiss.

coverage.

For the above reasons, the Public Statements made by SCO do not have the fundamental characteristics of commercial speech required to support a Lanham Act claim. This is particularly apparent when the Public Statements are evaluated in context of the governmental interests that relate thereto. When evaluated against the relevant governmental interests, it is clear that the Lanham Act coverage does not extend to the Public Statements under the fundamental test for commercial speech articulated in *Bolger v. Youngs*, 463 U.S. at 68; and explained in *Gordon and Breach*, 859 F.Supp. at 1535-40.

2. Governmental Interests Served by Regulating the Speech in Question.

The governmental interests in regulating speech under the Lanham Act must be balanced against the weight of other governmental regulations that already exist with respect to that speech. Clearly, the governmental interest in regulating commercial speech under the Lanham Act is to prevent false and misleading advertisement. So long as other governmental regulations do not counterbalance this interest, commercial speech that otherwise meets the required elements of proof will be subject to the Lanham Act. However, when speech has some commercial characteristics but is also directly implicated by other significant governmental regulations, the elements of commercial speech are "inextricably intertwined" with protected speech, and therefore fall outside Lanham Act coverage. *See e.g., Riley v. National Fed'n of the Blind, Inc.*, 487 U.S. 781, 796 (1988) (theological component of speech was "inextricably intertwined" with its commercial nature and therefore not subject to Lanham Act); and *Village of Schaumburg v. Citizens for a Better Env't.*, 444 U.S. 620 631-37 (1980) (mandated disclosure of administrative costs was "inextricably intertwined" with noncommercial charitable solicitation and therefore subject to heightened First Amendment scrutiny). Thus, when speech with commercial characteristics is "inextricably intertwined" with otherwise fully protected speech, courts are to treat all aspects of the subject speech as fully protected expression. *Riley v.*

National Federation of the Blind, 487 U.S. at 795-96.

There are four primary governmental interests implicated by regulating the speech in question (the SCO Public Statements). These governmental interests are compelling in their own right and are inextricably intertwined throughout the entirety of the SCO Public Statements. Individually and collectively these governmental interests require treatment of SCO's Public Statements as fully protected speech under the First Amendment, falling outside of the Lanham Act.

The first governmental interest implicated by regulating the SCO Public Statements is the exclusive set of rights granted to copyright holders under the Copyright Act, 17 U.S.C. § 101 *et seq.* The Copyright Act grants certain exclusive rights to owners of copyrights, including the right to reproduce the copyrighted works, prepare derivative works thereof and authorize reproduction and derivative works by others. 17 U.S.C. § 106. The Copyright Act authorizes such acts as public registration and notice (17 U.S.C. § 401-412), legal action for damages (17 U.S.C. § 503) and injunctive relief (17 U.S.C. § 502). It would be anathema for copyright holders to be prohibited from speaking about the nature and extent of their rights under the Copyright Act. Therefore, the Copyright Act provides a significant governmental interest that weighs against Lanham Act relief with respect to statements made about the nature and extent of SCO's copyrights.

The second governmental interest implicated by regulating the SCO Public Statements is the constitutional guarantee to free and uninhibited access to courts. This governmental interest is embodied in the litigation privilege recognized at common law. The Restatement of Law, Second, Torts §587 recognizes this principle as follows:

A party to a private litigation or a private prosecutor or defendant in a criminal prosecution is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of or during the course and as a part of, a judicial proceeding in

which he participates, if the matter has some relation to the proceeding.

Under the Restatement position, the only condition to absolute immunity for parties involved in pending or potential litigation is that published statements must bear "some relation to the proceeding." Various versions of the Restatement position on litigation immunity have been widely adopted by state and federal courts throughout the United States, including Delaware. See, e.g., *Shearin v. Baldwin*, 1988 De. Super. LEXIS 243 (July 5, 1988)¹⁹. *Shearin v. Baldwin* involved attorney litigation immunity under Restatement (Second) §586, which appears to be identical in principle to Restatement §587 that extends to litigants. In *Shearin v. Baldwin*, the Delaware Superior Court found that:

Delaware law recognizes the common law rule, protecting "statements of judges, parties, witnesses and attorneys offered in the course of judicial proceedings from a cause of action in defamation." *Nix v. Sawyer*, Del. Super. 466 A.2d 407, 410 (1983) and cases there cited; *Hoover v. Van Stone*, 540 F. Supp. 1118, 1121 (D. De. 1982). "The privilege affords absolute protection upon a showing that: (1) statements issued as part of a judicial proceeding; (2) the alleged defamation is relevant to a matter at issue in the case." *Id.* at 410; Restatement (Second) of Torts §586 (1977) n.2 Comment (a) of the official comment to this section of the Restatement explains that this absolute privilege is founded on a public policy of providing attorneys with a great degree of freedom in their efforts to obtain justice for their clients and, therefore, applies to communications incident to the institution and conduct of litigation, and to conferences and other communications preliminary to the formal commencement of judicial proceedings.

Id. at p. 3 (emphasis added). See also *Avery Dennison*, at p. 5 (applying California law, the principal purpose of litigation immunity is to afford litigants the "utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. . . . If this Court were to impose tort liability based on the Letters, then it would inhibit trademark holders from attempting to protect the rights granted it under the Lanham Act.") SCO's Public Statements fall

¹⁹ Case attached as Exhibit K.

squarely in the rule of *Shearin v. Baldwin* and the rationale of *Avery Dennison*. SCO has an absolute privilege to make statements related to litigation, both inside and outside the courtroom. All of SCO's Public Statements relate to pending or potential litigation, or matters related thereto. Even the RTU Licensing offer to customers was related to actual and potential legal proceedings. SCO is entitled to an absolute privilege to have made the Public Statements. The governmental interest in protecting the litigation privilege and allowing free and unfettered access to courts without the fear of being harassed subsequently in derivative tort actions overrides any governmental interest in the Lanham Act with respect to SCO's Public Statements. Here, without any allegation that SCO's Public Statements are defamatory, it is even more compelling that the absolute litigation privilege applies.

The third governmental interest implicated by regulating the SCO Public Statements is the Judicial Code set forth in Title 28 of the United States Code. This governmental interest relates to regulation of litigation and court proceedings in an efficient and fair manner. The U.S. Court for the District of Utah already has before it the question of whether Linux software infringes SCO's intellectual property rights. SCO's allegations in the SCO v. IBM Case are subject to the normal standards of good faith pleading that govern litigation proceedings and are within the jurisdiction of the Utah Federal District Court. As noted above, this Court has already adopted the decision of the Federal Circuit in *Mikohn Gaming*. Under *Mikohn Gaming*, the only threshold SCO faces with respect to the SCO Public Statements is the threshold of good faith. Because the question of good faith pleading regarding SCO's intellectual property rights is pending before the Utah Court in the SCO v. IBM Case, no governmental interest is served by exercising jurisdiction over SCO's Public Statements in the instant case. Rather, in the interest of judicial economy and fair litigation, Red Hat should be precluded from bringing its Lanham Act claims and related state law claims in this action.

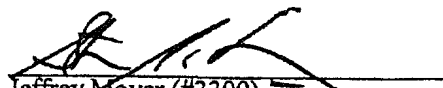
The fourth governmental interest implicated by regulating the SCO Public Statements is

the constitutional guarantee of a free and impartial press under the First Amendment. As noted in Red Hat's Complaint, the press has taken a keen interest in the issues raised in the SCO v. IBM Case. Indeed, SCO's Public Statements are also part of a wider debate in the technology and music industries about the scope of intellectual property protection in a digital age. As open source software development becomes prevalent and digital music can be downloaded for free, many people are simply ignoring copyright and patent laws. Many public commentators recognize this disintegration of property rights as a danger to our economic system. In a small way, SCO's Public Statements are part of this debate. This is an additional factor that weighs in favor of holding SCO's Public Statements as fully-protected speech, not subject to the Lanham Act or associated state law claims. It would pervert the First Amendment to allow the Lanham Act to chill broad debate about the relative merits, and problems, with open source software.

CONCLUSION

Red Hat is not in reasonable apprehension of being sued by SCO for infringement or misappropriation. In fact, Red Hat's stated purpose for its declaratory relief claims is to seek an advisory opinion from this Court regarding SCO's intellectual property claims. This is an entirely impermissible use of the Declaratory Judgment Act. Red Hat cannot establish subject matter jurisdiction to support its claims for declaratory relief, and Counts I and II of the Complaint must be dismissed for lack of jurisdiction.

Red Hat's claims under Counts III through VII seek to impose liability for actions and expression that do not give rise to liability under the Lanham Act or the associated state law claims. Further, any governmental interest served under the Lanham Act is heavily outweighed by fundamental governmental interests in protecting copyright interests, ensuring full and free access to courts, providing litigation immunity, promoting judicial economy and fairness in litigation, and safeguarding freedom of speech and the press. Therefore, Counts III through VII must be dismissed, with prejudice.



Jeffrey Moyer (#3309)
Steven J. Fineman (#4025)
Richards, Layton & Finger, P.A.
One Rodney Square
P.O. Box 551
Wilmington, DE 19899
(302) 651-7700
Attorneys for Defendant The SCO Group, Inc.

OF COUNSEL:

Stephen N. Zack
Mark J. Heise
Boies, Schiller & Flexner LLP
Bank of America Tower
100 Southeast 2nd Street, Suite 2800
Miami, Florida 33131
(305) 539-8400

Dated: September 15, 2003

CERTIFICATE OF SERVICE


I hereby certify that on September 15, 2003 true and correct copies of the foregoing were caused to be served on counsel of record at the following addresses in the manner indicated:

BY HAND DELIVERY

Josy W. Ingersoll
Adam W. Poff
Young, Conaway, Stargatt & Taylor
The Brandywine Building
1000 West Street, 17th Floor
Wilmington, DE 19899

BY FIRST CLASS U.S. MAIL

William F. Lee
Mark G. Matuschak
Michelle D. Miller
Doland R. Steinberg
Hale and Dorr, L.L.P.
60 State Street
Boston, MA 02109


Steven J. Fineman (#4025)