

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RED HAT, INC.

Plaintiff,

v.

THE SCO GROUP, INC.

Defendant.

Civil Action No. 03-772-SLR

**DEFENDANT THE SCO GROUP, INC.'S
REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS**

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Red Hat seeks declaratory and other relief from this Court with respect to the Linux software "product." Red Hat, however, has no proprietary interest in, contractual right to, or control over the "product" for which it seeks this Court's intervention. Not coincidentally, this Linux product (i.e., the Linux 2.4 and 2.5 kernels) is the very subject of the SCO v. IBM litigation pending in Federal court in Utah. Complaint, ¶¶ 22, 26-27. The Linux 2.4 and 2.5 kernels are developed, tested and ultimately implemented and distributed under the General Public License ("GPL"), which prohibits Red Hat's proprietary interest and provides that they may be freely copied by anyone. *Id.* at ¶ 26. Red Hat's Complaint and answer brief entirely gloss over its lack of ownership or proprietary interest in the Linux 2.4 and 2.5 kernels.

Red Hat, despite the complete absence of any ownership rights whatsoever in the Linux kernels, seeks a declaration that these Linux kernels do not infringe SCO's intellectual property rights. Similarly, Red Hat seeks redress based upon Lanham Act and state law claims, despite the fact that the Linux kernel is provided to any and all comers for free. This lack of ownership, combined with a careful review of complete quotations and accurate statements of law, makes clear that Red Hat's claims must fail.

I. RED HAT'S CLAIMS FOR DECLARATORY JUDGMENT SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

In its opening brief, SCO demonstrated that it never made any express or implied threats of litigation against Red Hat and that the quotes cited by Red Hat for that proposition were incomplete and inaccurate. In its answering brief, Red Hat does not address or explain its questionable editing of the quotes it assembled nor does it demonstrate "reasonable apprehension" of suit. Rather, it first sets forth an incorrect statement of the standard of review on the declaratory judgment claims and then repeats incessantly, without any support from the complete quotations, that SCO has threatened Red Hat and Linux users with copyright infringement or misappropriation. When the proper standard is used and the actual statements are analyzed and placed in context, it is clear that Red Hat has not alleged an objective "reasonable apprehension" that SCO has threatened it or its customers with claims for copyright

infringement or misappropriation.

A. On a Motion to Dismiss for Lack of Subject Matter Jurisdiction, the Court May Properly Consider Evidentiary Matters Outside the Pleadings.

Red Hat repeatedly claims that its selectively-edited allegations must be accepted as true. Red Hat Br., pp. 1, 6-8. In actuality, when factual questions concerning jurisdiction have been raised, the Court need not accept the allegations in the complaint as true, but may look behind the complaint and view the evidence to determine whether a controversy exists. *Indium Corp. of America v. Semi-Alloys, Inc.*, 781 F.2d 879, 884 (Fed. Cir. 1985) (in deciding motion to dismiss for lack of subject matter jurisdiction, court may consider evidentiary matters outside the pleadings); *International Harvester v. Deere & Co.*, 623 F.2d 1207, 1210 (7th Cir. 1980); see also *Field Container Co. v. Sommerville Packaging Corp.*, 842 F.Supp 338, 341 n.3 (N.D. Ill. 1994) (plaintiff "has the burden of supporting the allegations with competent proof and demonstrating by a preponderance of evidence the existence of an actual controversy.")

Even if this Court did not wish to consider evidentiary matters outside the pleadings, the documents SCO has provided are merely the complete documents showing the *entire* quotes, which this Court obviously can consider. See Fed.R.Evid. 408. Indeed, even under a traditional 12(b)(6) analysis, a court may properly refer to the factual allegations contained in other documents, such as those referred to in the Complaint and matters of public record, if the claims of the plaintiff are based upon those documents. *In Re Westinghouse Sec. Litig.*, 90 F.3d 696, 707 (3d Cir. 1996). This rule exists to prevent "[t]he situation in which a plaintiff is able to maintain a claim of fraud by extracting an isolated statement from a document and placing it in the complaint, even though if the statement were examined in the full context of the document, it would be clear that the statement was not fraudulent." *In Re Burlington Coat Factory*, 114 F.3d 1410, 1426 (3d Cir. 1997); *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993) (court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the

document). In short, this Court may properly consider all of the documents SCO submitted, particularly since they contain the complete text of quotes used throughout Red Hat's Complaint and answer brief.

B. Red Hat Failed to Establish a Reasonable Apprehension that SCO Would Sue it for Infringement or Misappropriation.

On at least ten occasions in its answer brief, Red Hat claims that SCO threatened it with legal action. Red Hat Br., pp. 1 (twice), 2 (twice), 6, 9 (twice), 11, 12 (twice), 13. None of these assertions are supported by the Complaint itself. Simply saying over and over in an answer brief that SCO threatened Red Hat with legal action does not make it so. In fact, when this Court compares Red Hat's allegations of purported threats of litigation by SCO (§§ 49-58) to the actual statements made, it is clear that there has never been an actual threat of litigation against Red Hat. See SCO opening brief, pp. 9-14. Red Hat's Complaint does not identify one letter or one statement *ever* made by SCO in which SCO threatened Red Hat with suit. Noticeably absent from Red Hat's Complaint is the mention of *any* contact between it and SCO until Red Hat's CEO sent SCO a letter demanding to see the infringing code shortly before filing this action. Complaint, ¶ 9. In the complete absence of any contact between the parties, Red Hat's claim of a direct threat of litigation by SCO is specious.

As noted in SCO's opening brief, in the absence of a direct threat of litigation, courts look to the totality of circumstances to see if there is an objective "reasonable apprehension" of being sued for infringement. The facts and the law make clear that Red Hat has failed to meet *its* burden of alleging facts sufficient to prove an objective "reasonable apprehension."

Red Hat begins this portion of its brief by mischaracterizing SCO's discussion in its opening brief about the "day of reckoning" as merely being an issue of "timing." This is wrong. Red Hat carefully edited the full quote when it appeared in its Complaint by deleting the introductory clause that clarified what was meant by the "day of reckoning" comment:

What he meant [by the day of reckoning] was that if SCO prevails in their lawsuit with IBM, companies like Red Hat ... 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 to opening brief. Thus, when the entire quote is read, it is clear that the "day of reckoning" had nothing to do with any threat of litigation or the timing of any litigation, but merely referred to the fact that a distributor like Red Hat may need to revisit its distributions and remove any UNIX code from its distributions and compensate SCO in some way for the use of SCO's UNIX code.

In the face of this clear statement that does not remotely give rise to a threat of litigation against it, Red Hat nonetheless claims that SCO is simply trying to avoid an "actual controversy" based upon the timing of any purported legal action against Red Hat. This argument is wrong on the law and Red Hat cites to inapposite authority for its position. Specifically, in the cases Red Hat cites, jurisdiction for declaratory relief existed because the parties seeking declaratory relief "had taken adverse positions with their existing obligations," *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242 (1937); *Maryland Cas. Co. v. Consumers Fin. Serv. Inc. of Pa.*, 101 F.2d 514, 515-16 (3d Cir. 1938) (action between insurer and insured to determine insurance coverage was proper subject for declaratory action), or because the defendant did not contest that "reasonable apprehension" existed when the complaint was filed, *United Sweetener USA v. The NutraSweet Co.*, 760 F.Supp 400, 404 (D.Del. 1991) ("[Defendant] does not contest that reasonable apprehension existed when the complaint was filed"), or because the cases involved a series of adversarial correspondence, including "an unmistakable threat of litigation." *IMS Health Inc. v. Vality Tech Inc.*, 59 F.Supp. 2d 454, 461 (E.D. Pa. 1999). Here, conversely, SCO had never contacted Red Hat, much less taken an adverse position with an existing obligation and SCO had never written any adversarial correspondence to Red Hat containing an unmistakable threat of litigation; indeed, it had never written Red Hat any correspondence at all. Moreover, SCO has vigorously contested jurisdiction from the time the Complaint was filed. Thus, none of these cases provide Red Hat with any support for jurisdiction in this case.

In the remaining case cited in this section, Red Hat flatly misrepresents the holding of the Third

Circuit in *The Salvation Army v. Dept. of Cmty. Affairs of the State of New Jersey*, 919 F.2d 183 (3d Cir. 1990). According to Red Hat, "the Third Circuit held that, despite a state's waiver of enforcement of administrative regulations, it continued to be a possibility that suit would eventually be commenced at some future time by private beneficiaries." Red Hat Br., p.10. Red Hat continues then, citing to the concurring opinion, alleging that the threat of suit was sufficiently tangible and immediate. *Id.* The Third Circuit held to the contrary:

Nor do we believe the theoretical possibility of a suit against TSA by a program beneficiary provides justification for a continuation of this litigation insofar as the "waived" provisions are concerned.

* * *

Nothing in the current record indicates that TSA has been threatened with suit by a former beneficiary or provides any other reason to believe that TSA's professed fear of a beneficiary suit is a realistic one.

Id. at 193. Thus, contrary to Red Hat's misrepresentation about the holding, the Third Circuit clearly requires a threatened lawsuit or that the professed fear of a lawsuit be a realistic one. As in *The Salvation Army*, Red Hat has not identified a threatened lawsuit and, based upon the full text of the quotes of SCO executives, Red Hat's professed fear of a lawsuit is not a realistic one. Thus, consistent with the actual holding of *The Salvation Army*, Red Hat has not alleged an objective reasonable apprehension of litigation and the claims for declaratory relief must be dismissed for lack of subject matter jurisdiction.

C. SCO's Contacts with Linux End Users Do Not Create a Reasonable Apprehension of Suit Against Red Hat.

SCO had not contacted Red Hat before this case, much less threatened litigation. In an attempt to get around this obvious defect in its Complaint, Red Hat argues that (1) there were threats to its customers or potential customers and (2) licenses were offered by SCO to Linux users, so surely there must be an "actual controversy." Both of these arguments likewise fail to establish jurisdiction.

Red Hat relies upon paragraph 42 of its Complaint to claim that threats of litigation were made by SCO in a letter sent to 1,500 actual or potential Linux users. However, in its attempt to construct a threat of suit against customers, Red Hat misleadingly juxtaposes two sentences in the letter entirely out of

context with each other, as follows:

SCO "believe[s] that Linux infringes on [its] Unix intellectual property and other rights" ... and SCO "intend[s] to aggressively protect and enforce these rights and that [l]egal liability that may arise from the Linux development process may also rest with the end user."

Complaint, ¶ 42.

This is a misrepresentation of the content and meaning of the letter. This letter does not threaten to sue customers. The full text of the relevant portion of the letter is as follows:

As a consequence of Linux's unrestricted authoring process, it is not surprising that Linux distributors do not warrant the legal integrity of the Linux code provided to customers. Therefore legal liability that may arise from the Linux development process may also rest with the end user.

We believe that Linux infringes on our UNIX intellectual property rights and other rights. *We intend to aggressively protect and enforce these rights. Consistent with this effort, on March 7, we initiated legal action against IBM for alleged unfair competition and breach of contract with respect to our UNIX rights. This case is pending in Utah Federal District Court.* As you are aware, this case has been widely reported and commented upon in the press. If you would like additional information, a copy of the complaint and response may be viewed at our web site at www.sco.com/scosource. (emphasis added).

Letter attached as Exhibit C to SCO's opening brief.

When the letter is viewed as written, it is patently clear there is no threat of litigation by SCO against any company using the Linux 2.4 and greater kernels. Rather, the letter makes clear that SCO is aggressively protecting and enforcing its rights by filing suit against IBM. Moreover, the statement in SCO's letter that "legal liability that may arise from a Linux development process may also rest with the end user," similarly does not rise to a threat by SCO against Red Hat customers. This observation does nothing more than raise a theoretical question subject to various interpretations and legal arguments. Clearly, this statement does not place a customer in reasonable apprehension of suit, since it does not include an "unmistakable threat of litigation." *IMS Health*, 59 F.Supp. 2d at 461; *see also Cylink v. Schnorr*, 939 F.Supp. 39, 41 (D.D.C. 1996) (where letter that stated that defendant was going to

“vigorously enforce [the] rights with regard to this patent,” invited company to negotiate for a license, and stated that if company did not obtain a license, it should cease marketing and selling any products using the technology, court did not find “reasonable apprehension” of suit).

Further, the cases cited by Red Hat in this section do not support Red Hat’s efforts to create jurisdiction based upon purported threats to its customers. Red Hat initially relies upon *Aralac, Inc. v. Hat Corp. of Am.*, 166 F.2d 286, 292-93 (3d Cir. 1948). This case, however, is factually distinguishable. In fact, *Aralac* demonstrates why Red Hat cannot claim an actual controversy in this case. Initially, unlike the plaintiff in *Aralac*, Red Hat has not identified a single Red Hat customer that SCO has allegedly charged with infringement. In *Aralac*, the defendant had contacted one of plaintiff’s customers (Stetson) and charged it with infringement, and the dispute was litigated, settled, and Stetson paid for a license. *Id.* at 292.

Moreover, *Aralac* teaches that a controversy for patent infringement does not exist “where no charge of infringement has been made against the product sold by plaintiff but against a process with which plaintiff has had no connection.” *Id.* at 293. This means that Red Hat cannot allege it is party to a controversy involving the Linux 2.4 kernel or the 2.5 development kernel because Red Hat does not have a sufficient connection to that development process. Specifically, Red Hat has not alleged, and cannot allege, that it is the “manufacturer” of the infringing product; *to wit*: the Linux 2.4 and 2.5 kernels. In fact, Red Hat’s Complaint makes clear that Red Hat has no ownership or control over the Linux 2.4 and 2.5 kernels and Red Hat will never be able to make such necessary allegations. Complaint, ¶¶ 22, 26.

As in *Aralac*, Red Hat’s Complaint makes clear that it has no say in the creation, development, and implementation of the Linux 2.4 or 2.5 kernels, which are the subject of SCO’s litigation against IBM and SCO’s licensing efforts. Complaint ¶¶ 22-23, 26-27.¹ Rather, as touched upon in Red Hat’s Complaint, what is or is not included in the kernel is dependent upon Linus Torvalds (and others at the Open Source Development Lab), not with Red Hat. *Id.* Red Hat, as it has alleged, merely takes this

¹ Certainly, Red Hat has not alleged any such ownership or control over the Linux 2.4 or 2.5 kernels.

Linux kernel, which is free to everyone and anyone (Complaint, ¶26), and adds new features, tests them for compatibility and provides management services, training, global support, consulting and custom engineering so that it is an operating system. Complaint, ¶¶ 29-30. Because Red Hat's activities of adding features, testing, providing management services and consulting are wholly without any connection to the inclusion of SCO's intellectual property in the Linux 2.4 and 2.5 kernels, the cases cited by Red Hat make clear that Red Hat cannot establish an actual controversy.

Red Hat's reliance upon *Nippon Electric Glass v. Sheldon*, 489 F.Supp. 119 (S.D.N.Y. 1980) fares no better. In *Nippon*, unlike in the present case, defendant had its lawyer write to two of plaintiff's customers (Sony and Panasonic) and accuse them of directly infringing defendant's patent by using plaintiff's products. *Id.* at 121-22. No such threats have been made (or alleged to have been made) by SCO or its attorneys. Moreover, the *Nippon* court further observed that plaintiff had entered into indemnity agreements with both Sony and Panasonic, which created an actual controversy for the manufacturer. Red Hat, conversely, refuses to provide indemnity agreements to its customers and certainly has not alleged it has an indemnity agreement with any customers that have purportedly been threatened with suit by SCO.

Red Hat also makes passing reference to *Cargill Inc. v. Sears Petroleum & Trans. Corp.*, 2002 WL 31426308 (S.D.N.Y. October 28, 2002), which is factually removed from the instant case. In *Cargill*, unlike here, "(1) [defendant] had its outside attorney, rather than company executives, write two letters to [plaintiff]; (2) [defendant's] letters implied infringement, indicating that [plaintiff's] product or products 'may be covered by' the '793 patent; (3) [defendant's] letters implied threatened suit, because [plaintiff] was given a short period of time within which to respond—three weeks in the first letter and 10 days in the second—or [defendant] would take 'appropriate action' and be advised of its 'legal options'; and (4) [defendant] informed a distributor/customer of its discussions with [plaintiff] concerning the '793 patent, after which that individual thought there was a pending lawsuit between the parties." *Id.* at *3. Here, of course, neither SCO or its attorneys ever wrote to Red Hat so there were no threats of

infringement and no deadlines were given to Red Hat or its customers to take certain actions. Rather, as recognized by Red Hat's Complaint, SCO has been actively pursuing its claims against IBM, the company SCO accuses of improperly contributing protected Unix materials to the Linux 2.4 and 2.5 kernels.

In contrast to the cases relied upon by Red Hat, the cases cited by SCO clearly establish a lack of reasonable apprehension of suit by Red Hat, particularly *Bonterra America v. Bestman*, 907 F.Supp. 4 (D.D.C. 1995). As shown in SCO's opening brief, this case compels the conclusion that Red Hat's claims for declaratory relief must be dismissed. SCO opening brief, pp. 12-13. In attempting to distinguish this case, Red Hat repeats the familiar but unsubstantiated refrain that in the present case SCO has made an express charge of infringement to Red Hat. Red Hat Br., p. 14. As detailed above, however, when Red Hat's purported examples of "express charges of infringement against Red Hat" are reviewed paragraph by paragraph, quote by quote, it is clear that no such charges have ever been made by SCO against Red Hat. Thus, pursuant to *Bonterra*, Red Hat's claim for declaratory judgment should be dismissed. See also *CAE Screenplates, Inc. v. Beloit Corp.*, 957 F.Supp. 784, 790 (E.D.Va. 1997).

Red Hat also cannot seek to establish an "actual controversy" based upon SCO's decision to offer licenses to end users. It is black letter law that offering a license to end users does not create an objectively reasonable apprehension of suit in Red Hat. SCO opening brief, pp. 12-13; *Bonterra*, 907 F. Supp at 7 (offering license does not create an "actual controversy"); *CAE Screenplates*, 957 F. Supp. at 790 (demand letters between counsel for a license do not give rise to reasonable apprehension of suit); *Phillips Plastics Corp. v. Kaisha*, 57 F.3d 1051, 1053 (5th Cir. 1995) ("The offer of a patent license does not create an actual controversy"). Against this established precedent, Red Hat nonetheless claims that the offer of license somehow provides it with a reasonable apprehension of suit, particularly because a licensing program would cause a "disruption." Red Hat Br., p. 15. This "disruption" is purportedly identified in paragraph 61 of Red Hat's Complaint:

And so I'm guessing that those end users are going to be looking around to the vendor or vendors involved in supplying [Linux software] to them whether it's Red Hat or IBM and saying, 'What's up guys? You know what's happening here?' But, you know, that is going to be their beef with their particular vendor.

Nothing in this quoted language can reasonably be interpreted to be a threat of litigation to end users of Linux. In fact, even if this licensing proposal created a "disruption" to Red Hat, that fact does not serve to create a reasonable apprehension that SCO would sue Red Hat for infringement. *Bonterra*, 907 F.Supp. at 8 n.3 (the fact that a customer curtailed relationship with plaintiff to avoid any possible risk of suit for infringement does *not* serve to create in plaintiff a reasonable fear that defendant would sue plaintiff for infringement) (emphasis added); *Aralac*, 166 F.2d at 295 ("an economic interest is not enough to create justiciability").

Red Hat's reliance on *Tremond Co. v. Schering Corp.*, 122 F.2d 702 (3d Cir. 1941) for the proposition that SCO's efforts at licensing establish an actual controversy is wholly misplaced. In *Tremond*, the patent holder for Estradiol placed an advertisement in a trade journal that stated, in pertinent part:

Our patent . . . covers the process of making [Estradiol]. All uses of this material without our consent . . . are a violation of our [rights] under this patent. We are giving this notice to the trade so that there may be no misunderstanding or doubt as to the exclusiveness of our rights in the United States to the product Estradiol . . .

When this threatening language is compared to the quoted text above from paragraph 61 of Red Hat's Complaint, it becomes obvious that SCO's statements do not threaten infringement suits against Red Hat or Linux users. Accordingly, Red Hat's claims must be dismissed for lack of subject matter jurisdiction.²

D. Even if Red Hat Could Establish Subject Matter Jurisdiction, This Court Should Decline to Exercise Jurisdiction.

Although it is clear that Red Hat has not established (and cannot establish) a reasonable apprehension of suit by SCO for infringement or misappropriation, even if it could satisfy the prerequisites, this Court has the discretion to decline to exercise its jurisdiction. *International Harvester*, 623 F.2d at 1217. As noted in SCO's opening brief, the previously filed *SCO v. IBM* case addresses most, if not all, of the issues of copyright infringement and misappropriation. Specifically, the IBM action will decide the critical issue in this case; namely, whether the Linux 2.4 and 2.5 kernels contain source code contributed by IBM in violation of its license agreement. If SCO prevails and thereby establishes that the Linux 2.4 and 2.5 kernels improperly contain SCO's protected material, then all of Red Hat's claims necessarily fail, as there will be a determination that the Linux 2.4 and 2.5 kernels contain infringing material. If, however, SCO fails to establish that the Linux 2.4 and 2.5 kernels contain its protected intellectual property, then Red Hat's claims could proceed. However, in such an event, it would be an enormous waste of judicial effort, with a risk of inconsistent results, for two lawsuits addressing the same core issue to be litigated in two separate federal district courts at the same time.

² Red Hat included in this section of its brief a footnote that discussed privileged settlement communications between the parties. Specifically, Red Hat quoted from a letter responding to Red Hat's settlement proposal; a letter that indicated, in bold print, that it was a privileged settlement communication. Ignoring the impropriety of using a privileged settlement communication, Fed.R.Evid. 408; *Ward v. Allgheny Ludlum Steel Corp.*, 560 F.2d 579, 581 n.6 (3d Cir. 1977), Red Hat once again selectively quotes from a letter and concludes that the letter SCO wrote in response to Red Hat's settlement proposal and *after* Red Hat filed suit, "independently establishes an actual controversy" Red Hat Br., p. 15 n.5. First, the letter does no such thing, particularly if Red Hat had included the quote that SCO viewed Red Hat's proposal "as nothing more than an after-the-fact effort to create an 'actual controversy'" and that "SCO will not participate in such legal maneuvering." Letter attached hereto as Exhibit A. Second, a letter written *after* suit was filed cannot establish "reasonable apprehension" at the time suit was filed. *CAE Screenplates*, 957 F.Supp. at 789-90 ("Thus, all facts learned by plaintiff subsequent to the commencement of the declaratory judgment suit should be accorded no weight in the jurisdictional calculus, irrespective of whether they arose after or before the suit.").

Thus, if this Court does not dismiss the declaratory judgment for lack of subject matter jurisdiction or by its discretion, then it should stay the pending action or transfer it to Utah where the previously-filed IBM action is currently being prosecuted. Indeed, if this Court does not dismiss this action, SCO intends to file a motion to stay and/or transfer to Utah.

II. SCO'S CONDUCT ALLEGED IN THE COMPLAINT DOES NOT VIOLATE THE LANHAM ACT.

Red Hat relies on the test the Third Circuit set forth in *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914 922-23 (3d Cir. 1990) for the elements of a *prima facie* case under §43(a) of the Lanham Act. Red Hat Br., p.19. *U.S. Healthcare* provides five elements that must be met: (a) a false or misleading statement about *its product [or another's product]* (b) deception or a tendency to deceive a considerable portion of the relevant consumers, (c) this deception is significant and likely to influence *purchasing decisions* of these consumers, (d) the goods advertised are in interstate commerce, and (e) a likelihood that plaintiff will be injured. *Id.* at 922-23. Contrary to the assertions in Red Hat's answer brief, it has not stated (and cannot state) a *prima facie* case under the Third Circuit's Lanham Act test because of one incontrovertible fact—Red Hat has no ownership or proprietary interest in the Linux 2.4 and 2.5 kernels that are the subject of SCO's lawsuit against IBM—indeed no one has such an interest. Without such interest, Red Hat cannot establish any false or misleading statements about its product or that any statements influenced a “purchase” of the free 2.4 and 2.5 kernels.

The Linux 2.4 and 2.5 kernels are distributed under a licensing scheme that prevents Red Hat from having any proprietary interest therein. Pursuant to the GPL, the Linux kernel is provided to anyone who requests it for free, and is therefore not “purchased” by any customer in a commercial transaction as defined under the Act. Complaint ¶22, citing the GPL, attached as Exhibit B. Red Hat, accordingly, makes money by providing professional services. Complaint, ¶ 29; *see also* GPL (allows charging for services only). It does not make money by selling the Linux kernel.

Here, Red Hat has not alleged a single instance in which SCO has impugned, or even addressed,

Red Hat's services. Red Hat nevertheless claims that SCO's lawsuit and its public statements about the Linux 2.4 and 2.5 kernels somehow provide Red Hat with the right to assert a claim under the Lanham Act. Given the peculiar nature of the ownership and distribution of these kernels, however, Red Hat's alleged interest in the Linux 2.4 and 2.5 kernels is too indirect, too remote, and too disconnected from any ownership or proprietary control to show a sufficient economic interest in the "product" under the Lanham Act. See *Conte Bros. Automotive, Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 231-35 (3d Cir. 1998) (prudential standing requirements for 43(a) claim require, among other items, directness of injury and proximity of party to allegedly injurious conduct); *Joint Stock Society v. UDV North America, Inc.*, 266 F.3d 164, 179-80 (3d Cir. 2001) (addressing standing requirements under §43(a); plaintiff failed to satisfy prudential standing requirements); *Stansfield v. Osborne Industries, Inc.*, 52 F.3d 867, 873 (10th Cir. 1995) (standing for false advertising claim requires plaintiff to be a competitor and allege a competitive injury; with the freely distributed Linux kernels, Red Hat is not a competitor, cannot allege competitive injury and has no standing). Without alleging (or being able to allege) any ownership interest in the Linux 2.4 and 2.5 kernels, which are the subject of SCO's suit against IBM and all of SCO's public statements, Red Hat simply has no standing under 43(a). See, e.g., *Shonac Corp. v. AMKO Int'l Inc.*, 763 F. Supp 919, 930-31 (S.D. Ohio 1991) (no standing under 43(a) without showing of equitable or ownership interest).

III. RED HAT'S LANHAM ACT CLAIMS ARE BARRED BY THE FIRST AMENDMENT.

Red Hat asserts in its answer brief that alleged statements by SCO are "commercial" in nature. Red Hat Br., pp. 22-25. Red Hat's position, however, is overly simplistic—it merely tries to advocate that the speech is "commercial" so that it fits within the ambit of the Lanham Act, but ignores that the speech also contains protected, non-commercial elements. As a result, Red Hat simply argues for the exact "bright-line" test for commercial speech rejected by the U.S. Supreme Court in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993).

The difficulty of drawing a bright line test for commercial speech was thoroughly analyzed in *Gordon and Breach Science Publishers S.A., STBS, Ltd. v. American Institute of Physics*, 859 F. Supp. 1521 (S.D.N.Y. 1994). While the *Gordon and Breach* case is not controlling in the instant matter, the District Court's opinion in that case is well reasoned and persuasive in crafting the balance between commercial speech and protected speech for the purpose of the Lanham Act. The Court stated in *Gordon and Breach*:

Thus, rather than simply applying bright-line rules, the Court has "examined [restrictions on speech] carefully to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed." (quoting *Bolger*, 463 U.S. at 66, 103 S.Ct. at 2880). The need for a more nuanced inquiry arose in *Discovery Network* out of circumstances that we find material to the case before us—that is, the Court was faced with distinguishing commercial from noncommercial speech in publications that clearly contained elements of both.

Gordon and Breach at 1537-38. The constitutional problem articulated in *Discovery Network* and *Gordon and Breach* is exactly the problem facing the Court in the instant case, *i.e.*, distinguishing commercial from noncommercial speech where the speech arguably contains elements of both.

Red Hat relies on a case decided by this Court, *In re Warfarin Sodium Antitrust Litigation*, 1998 WL 883469 (D. Del. Dec. 7, 1998), for the proposition that if a plaintiff voluntarily includes the subject speech, it should be deemed "voluntarily intertwined," and not protected. However, in *Warfarin*, the speech at issue was a gratuitous comparison of business motives between two competing products (plaintiff's product allegedly motivated to "save money" while defendant's product allegedly motivated by need for "patient safety"). This fact pattern is far different from the facts of the instant case and involves different public interests and public concerns that weigh on the question of whether SCO's alleged speech is "commercial" under the Lanham Act. SCO's statements all involve expressions of its legal rights, granted by copyright and contract law, rather than gratuitous product comparisons of the type in *Warfarin*. Therefore, because SCO's speech addresses rights granted by law and contract, it is more closely related to the protected speech in *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988)

wherein the Court ruled that a North Carolina statute requiring disclosure of certain charitable donation information was inextricably intertwined with First Amendment issues and thus did not constitute commercial speech. Even though *Riley* involved a mandated restriction on speech, which is not present in the instant case, the Court in *Riley* nonetheless referred to underlying policy considerations intended to foster charitable contributions, noting that: "the reality [is] that without solicitation the flow of such information and advocacy would likely cease," quoting *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980).

While the underlying policy issues highlighted in *Riley* are different from those involved in the instant case, the fact remains that very important policy issues are involved here that must be considered by the Court. The public policy that makes SCO's speech inextricably intertwined with the First Amendment is generally identified in SCO's analysis of governmental interests set forth in the opening brief. SCO opening brief, pp.23-27. Red Hat would make light of SCO's analysis of the relevant governmental interests. Red Hat has addressed each stated interest, standing alone, and out of the context of the important public issues involved in the instant case. Red Hat Br., pp. 25-28. However, the various governmental interests stated in the opening brief are precisely the substantial considerations that affect the issue of whether speech is intertwined with fully protected First Amendment speech, or is separate, commercial speech. Simply put, a plaintiff should enjoy greater latitude to speak of its legal rights when these involve significant public issues than, say, gratuitous product comparisons of the type identified in *Warfarin* or the "Tupperware parties" involved in *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989). This argument that significant, protected public policy issues are at stake in this case is supported by numerous U.S. Supreme Court cases such as *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) and cases cited therein.

In *Harper & Row*, for example, the U.S. Supreme Court addressed the scope of fair use under the Copyright Act. In expounding the value and purpose of the United States Copyright Act, the Court made the following sweeping statements about the underlying value to society of our system of copyrights:

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in Science and useful Arts.

* * *

The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate [the creation of useful works] for the general public good.

Id. at 558-559 (citations omitted). The Court also referred to the constitutional underpinnings of the Copyright Act and the importance of their ongoing strength and validity:

Article I, § 8 of the Constitution provides: The Congress shall have Power ... to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

As we noted last Term: "[This] limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."

Id. at 546, quoting *Sony Corp of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

The reason this line of argument is relevant and important in the instant case is that the speech Red Hat complains of is entirely and unequivocally intertwined in SCO's attempts to publish and defend its intellectual property rights, including copyright and contract rights, protected by law in the face of withering pressure by Linux software advocates to make operating system software free and thereby destroy the economic value of software copyrights so highly protected under the U.S. Supreme Court cases cited above. This speech must be protected because it involves critical and timely public issues about legal rights of the type held by SCO. As such, SCO's speech in this case involves an issue of significant importance to our digital society; it is not just an issue between Red Hat and SCO. Indeed, as alluded to in Red Hat's Complaint, the issues in *SCO v. IBM* are widely analyzed and reported. These stories have come about because the *SCO v. IBM* litigation, and the issues of SCO's intellectual property claims, involve highly important public issues about how copyrights will be protected and valued in a

digital age. As articulated in Red Hat's Complaint, Linux advocates assert that the Linux free software is more valuable for society than proprietary software. However, it is indisputable--and the Court can consider Red Hat's allegations and the attached GPL--that free software licensed under the GPL is designed to eliminate the intellectual property value of proprietary software for the entire software industry. See GPL attached as Exhibit B. Therefore, unlike the seemingly petty product comparisons of the type at issue in the *Warfarin* case previously before this Court, or the "Tupperware party" case in *Fox*, *supra*, the instant case involves an issue of public importance that cannot be overstated.

Against this backdrop of public interest, SCO has alleged that the Linux 2.4 and 2.5 kernels violate its intellectual property rights. The Lanham Act cannot legitimately be used as a sword to destroy SCO's right to assert its intellectual property right claims, particularly where the outcome of the *SCO v. IBM* case will ripple across all software development throughout the world. As a matter of public policy and First Amendment law, the public statements by SCO regarding the Linux 2.4 and 2.5 kernels are not "commercial speech." Rather, SCO respectfully suggests that the Court should protect SCO's First Amendment right to assert the existence of its proprietary copyright and contract claims in keeping with the policies of *Harper & Row* and the other cases cited therein by the Supreme Court.

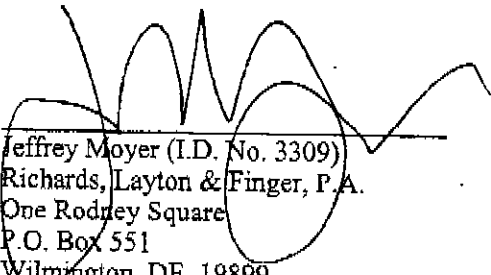
IV. COUNTS IV THROUGH VII SHOULD BE DISMISSED.

Contrary to Red Hat's assertion, there is indeed legal authority warranting the dismissal of Counts IV through VII. Red Hat Br., p. 28. From a procedural standpoint, the claims would have to be dismissed if this Court dismisses Counts I and III because it then would be without jurisdiction to entertain these state law claims. 28 U.S.C. §§ 1332, 1441 (b).

From a substantive standpoint, it should be noted that Red Hat's discussion regarding commercial speech as applied to these counts is a red herring. By attempting to re-frame the argument as one where "commercial speech" is not a required element of the state law claims, Red Hat ignores the argument SCO raised in its opening brief, and that it repeats here: if the statements that SCO made, which serve as the predicate for Counts IV through VII, are privileged on any grounds—First Amendment or common

law litigation privilege—then by definition those statements cannot support Red Hat's claims. *See, e.g., Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc.*, 774 A.2d 332, 338 (D.C. 2001) (explaining that “[a]long with the overwhelming majority of the States, the District of Columbia has long recognized an absolute privilege for statements made preliminary to, or in the course of, a judicial proceeding, so long as the statements bear some relation to the proceeding.”). The concept of privilege denotes precisely the absolute protection given to statements by parties or attorneys irrespective of their purpose in publishing the defamatory matter, their belief in its truth, or even their knowledge of its falsity, *Id.*; Restatement (Second) of Torts §§ 586, 587, even to the extent of making the denial of a motion to

dismiss on grounds of immunity immediately appealable as a collateral order. *Id.* at 340. Stated simply, if SCO's actions are protected speech or are otherwise privileged, then Red Hat cannot sustain a claim under either federal or state law.



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Dated: October 10, 2003

CERTIFICATE OF SERVICE

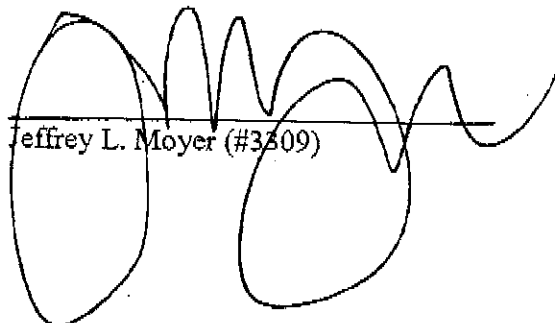
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Boston, MA 02109


Jeffrey L. Moyer (#3309)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RED HAT, INC.)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 03-772-SLR
)	
THE SCO GROUP, INC.)	
)	
Defendant.)	

**DECLARATION OF MARK J. HEISE IN SUPPORT OF
THE SCO GROUP, INC.'S MOTION TO DISMISS**

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Dated: October 10, 2003

I, MARK J. HEISE, hereby declare as follows:

1. I am an attorney at law, duly licensed to practice in the State of Florida. I am a member of the law firm of Boies, Schiller & Flexner, L.L.P., attorneys for Defendant The SCO Group, Inc. I make this declaration in support of SCO's Motion To Dismiss. I have personal knowledge of the facts set forth below and could and would competently testify thereto if called as a witness.
2. Attached to SCO's reply as Exhibit A is a true and correct copy of the confidential Settlement Letter from which Red Hat quotes in its answer brief. Red Hat Br., p. 15 n. 5.
3. Attached to SCO's reply as Exhibit B is a true and correct copy of the operative GNU General Public License (GPL), Version 2, which Red Hat references in the Complaint. Complaint ¶¶ 22, 32.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on October 10, 2003, in Miami, Florida.



Mark J. Heise

FROM RL&F

(FRI) 10. 10' 03 17:16/ST. 17:04/NO. 4864902502 P 29

EXHIBIT A

BOIES, SCHILLER & FLEXNER LLP
NEW YORK WASHINGTON DC FLORIDA CALIFORNIA NEW HAMPSHIRE

September 23, 2003

**Privileged and Confidential
Settlement Communication***Via Facsimile*Mark G. Matuschak, Esq.
Hale & Dorr, LLP
60 State Street
Boston, MA 02109

Re: Red Hat v. SCO

Dear Mark:

I received your letter dated September 19, 2003, suggesting a possible resolution of this case. Contrary to the statement in your letter, SCO's position that there is no "actual controversy" between SCO and Red Hat is utterly consistent with its prior public statements that you selectively edited for use in the Complaint. Of course, if Red Hat is relying on statements other than the excerpts included in its Complaint for its "reasonable apprehension," we would be willing to review them and further discuss the issue.

Your suggestions of a proposed stipulation and also a covenant not to sue Red Hat's customers appear to SCO as nothing more than an after-the-fact effort to create an "actual controversy." SCO will not participate in such legal maneuvering. In fact, the request for a covenant not to sue Red Hat's customers highlights one of the significant defects in Red Hat's Complaint; namely, Red Hat does not have standing to seek an advisory opinion for these third parties.

If Red Hat sincerely wants to resolve this case on terms that are fair to it, its customers, and SCO, we are prepared to do so.

Very truly yours,


Mark J. Heise

MJH/vb

Exhibit "A"

FROM RL&F

(FRI) 10. 10' 03 17:16/ST. 17:04/NO. 4864902502 P 31

EXHIBIT B

GNU General Public License



[[Czech](#) | [English](#) | [Japanese](#)]

- [What to do if you see a possible GPL violation](#)
- [Translations of the GPL](#)
- [GPL Frequently Asked Questions](#)
- [The GNU General Public License \(GPL\) in plain text format](#)
- [The GNU General Public License \(GPL\) in Texinfo format](#)
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Version 2, June 1991

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To do so, attach the following notices to the program. It is safest to attach them to the start of each source file to most effectively convey the exclusion of warranty; and each file should have at least the "copyright" line and a pointer to where the full notice is found.

one line to give the program's name and an idea of what it does.
Copyright (C) yyyy name of author

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Also add information on how to contact you by electronic and paper mail.

If the program is interactive, make it output a short notice like this when it starts in an interactive mode:

Gnomovision version 69, Copyright (C) year name of author
Gnomovision comes with ABSOLUTELY NO WARRANTY; for details

type ``show w'`. This is free software, and you are welcome to redistribute it under certain conditions; type ``show c'` for details.

The hypothetical commands ``show w'` and ``show c'` should show the appropriate parts of the General Public License. Of course, the commands you use may be called something other than ``show w'` and ``show c'`; they could even be mouse-clicks or menu items--whatever suits your program.

You should also get your employer (if you work as a programmer) or your school, if any, to sign a "copyright disclaimer" for the program, if necessary. Here is a sample; alter the names:

Yoyodyne, Inc., hereby disclaims all copyright interest in the program ``Gnomovision'` (which makes passes at compilers) written by James Hacker.

signature of Ty Coon, 1 April 1989
Ty Coon, President of Vice

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CERTIFICATE OF SERVICE

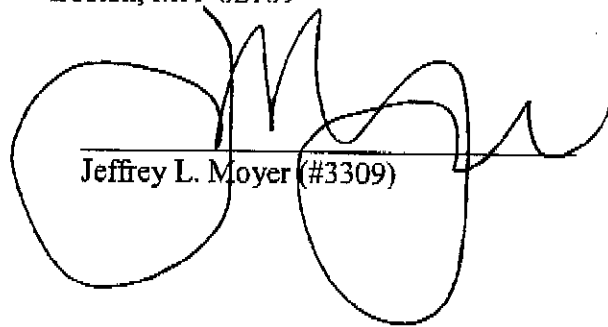
I hereby certify that on October 10, 2003 true and correct copies of the foregoing were caused to be served on counsel of record at the following addresses in the manner indicated:

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