

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

THE SCO GROUP, INC.,

Plaintiff,

v.

DAIMLERCHRYSLER CORPORATION,

Defendant.

04-056587-CK



Civil Act

Oakland County JUDGE RAE LEE CHABOT
SCO GROUP INC V DAIMLERCHR

Honorable Rae Lee Chabot

Joel H. Serlin (P20224)
Barry M. Rosenbaum (P26487)
SEYBURN, KAHN, GINN, BESS AND
SERLIN, P.C.
Attorneys for Plaintiff
2000 Town Center, Suite 1500
Southfield, MI 48075
(248) 353-7620

James P. Feeney (P13335)
Thomas S. Bishoff (P53753)
Stephen L. Tupper (P53918)
DYKEMA GOSSETT PLLC
Attorneys for DamilerChrysler
Corporation
39577 Woodward Avenue,
Suite 300
Bloomfield, MI 48304-2820
(248) 203-0700

AFFIDAVIT OF WILLIAM BRODERICK

WILLIAM BRODERICK, being duly sworn, deposes and says:

1. I am the Director of Software Licensing at the SCO Group, Inc. ("SCO"), and I submit this affidavit based on my personal knowledge and in opposition to DaimlerChrysler Corporation's ("Daimler") Motion for Summary Disposition. If sworn as a witness, I can testify competently to the facts stated herein.

2. I have been employed by SCO as the Director of Software Licensing since May 2001. I have been involved in sales and licensing of the UNIX software for SCO

RECEIVED FOR FILING
OAKLAND COUNTY CLERK
2004 JUN 17 A 10:03
CLERK

and its predecessors since 1991. Generally, my responsibilities include managing all software licensing activities, including reviewing and monitoring licensees' compliance with the obligations of their respective license agreements.

The License Agreement with Daimler

3. SCO is the exclusive licensor of software licenses for its version of the UNIX computer operating system.

4. UNIX is a computer operating system that serves as a link between computer hardware and the various software programs (applications) that run on the computers.

5. UNIX was originally developed by AT&T Bell Laboratories ("AT&T") and was licensed to various companies, such as International Business Machines and Hewlett-Packard, Inc., through various license agreements, for their use in commercial applications.

6. The UNIX license agreements restrict the licensees' use of UNIX and protect AT&T's retained rights.

7. Through a series of corporate acquisitions, SCO presently owns all right, title, and interest in and to UNIX and all related license rights.

8. On September 2, 1988, Chrysler Motors Corporation, a predecessor in interest to Daimler, and AT&T Information Systems, Inc. entered into a Software Agreement, numbered SOFT-01341 ("License Agreement"), by which Daimler obtained certain limited rights to use UNIX and UNIX System V source code (collectively "UNIX"). Attached as Exhibit A is a true and correct copy of the License Agreement.

9. The License Agreement is still in effect and has not been terminated by any party.

10. The License Agreement governs Daimler's internal use of UNIX.

11. Section 2.01 of the License Agreement provides:

[SCO]¹ grants to LICENSEE a personal, nontransferable and nonexclusive right to use in the United States each SOFTWARE PRODUCT identified in the one or more Supplements hereto, solely for LICENSEE'S own internal business purposes and solely on or in conjunction with DESIGNATED CPUs for such SOFTWARE PRODUCT. Such right to use includes the right to modify such SOFTWARE PRODUCT, and to prepare derivative works based on such SOFTWARE PRODUCT, provided that any such modification or derivative work that contains any part of a SOFTWARE PRODUCT subject to this Agreement is treated hereunder the same as such SOFTWARE PRODUCT. [SCO] claims no ownership-interest in any portion of such a modification or derivative work that is not part of a SOFTWARE PRODUCT.

See Exhibit A, § 2.01.

12. The License Agreement defines Software Product to include UNIX. *See* Exhibit A, § 1.04 and Schedule pages 1-7.

13. The License Agreement defines Designated CPU as "any CPU listed as such for a specific SOFTWARE PRODUCT in a Supplement to this Agreement." *See* Exhibit A, § 1.03.

14. At the same time the parties executed the License Agreement, Daimler licensed a Cray, XMP/14se, serial number 511, located at Technical Computer Center, 12800 Oakland Avenue, Highland Park, Michigan 48288, as the Designated CPU under the Agreement ("Software Agreement Supplement No. 1"). *See* Exhibit A, Software Agreement Supplement Number 1.

15. Under the License Agreement, Daimler agreed to limit its right to export UNIX. Section 4.01 of the License Agreement provides:

LICENSEE agrees that it will not, without the prior written consent of [SCO], export, directly or indirectly, SOFTWARE PRODUCTS covered by this Agreement to any country outside of the United States. LICENSEE also agrees that it will obtain any and all necessary export licenses for any such export or for any disclosure of a SOFTWARE PRODUCT to a foreign national.

Exhibit A, § 4.01.

16. Under the License Agreement, Daimler agreed to maintain the confidentiality of UNIX. Section 7.05(a) provides:

(a) LICENSEE agrees that it shall hold all parts of the SOFTWARE PRODUCTS subject to this Agreement in confidence for [SCO]. LICENSEE further agrees that it shall not make any disclosure of any or all of such SOFTWARE PRODUCTS (including methods or concepts utilized therein) to anyone, except to employees and contractors of LICENSEE to whom such disclosure is necessary to the use for which rights are granted hereunder. LICENSEE shall appropriately notify each employee to whom any such disclosure is made that such disclosure is made in confidence and shall be kept in confidence by such employee. If information relating to a SOFTWARE PRODUCT subject to this Agreement at any time becomes available without restriction to the general public by acts not attributable to LICENSEE, its contracts or employees of either, LICENSEE's obligations under this section shall not apply to such information after such time.

Exhibit A, § 7.05(a).

17. Daimler also agreed to prevent others from using or having access to UNIX. Section 2.06 of the License Agreement provides:

No right is granted by this Agreement for the use of SOFTWARE PRODUCTS directly for others, or for any use of SOFTWARE

¹ "SCO" is substituted for "AT&T" throughout the quotations of the Licensing Agreement herein because SCO is AT&T's successor-in-interest to the license as well as the intellectual property rights protected therein.

PRODUCTS by others, except LICENSEE'S contractors pursuant to Section 2.02, unless such uses are permitted for a particular SOFTWARE PRODUCT by a specific provision in the Schedule for such SOFTWARE PRODUCT. For example, use of a SOFTWARE PRODUCT in a time-sharing service or a service-bureau operation is permitted only pursuant to such a specific provision.

Exhibit A, § 2.06.

18. Daimler further agreed in the License Agreement not to assign or transfer

UNIX. Sections 7.08 and 7.09 of the License Agreement provide:

Neither this Agreement nor any rights hereunder, in whole or in part, shall be assignable or otherwise transferable by LICENSEE and any purported assignment or transfer shall be null and void.

Except as provided in Section 7.05(b), nothing in this Agreement grants to LICENSEE the right to sell, lease or otherwise transfer or dispose of a SOFTWARE PRODUCT in whole or in part.

Exhibit A, §§ 7.08 and 7.09.

19. To monitor compliance with the terms of the License Agreement, including those listed above, Daimler agreed to provide certified assurances of its compliance with the Agreement to SCO. Section 2.05 of the License Agreement provides:

On [SCO's] request, but not more frequently than annually, LICENSEE shall furnish to [SCO] a statement, certified by an authorized representative of LICENSEE, listing the location, type and serial number of all DESIGNATED CPUs hereunder and stating that the use by LICENSEE of SOFTWARE PRODUCTS subject to this Agreement has been reviewed and that each such SOFTWARE PRODUCT is being used solely on DESIGNATED CPUs (or temporarily on back-up CPUs) for such SOFTWARE PRODUCTS in full compliance with the provisions of this Agreement.

Exhibit A, § 2.05.

20. Section 2.05 requires Daimler to certify a list of Designated CPUs.

21. Section 2.05 further requires Daimler to certify that its use of UNIX fully complies with each provision of the License Agreement.

22. In the event Daimler stops using UNIX, the License Agreement permits Daimler to terminate the License Agreement by certifying that it has discontinued using UNIX and that it has returned or destroyed all copies of UNIX. Section 6.02 provides:

LICENSEE may terminate its rights under this Agreement by written notice to [SCO] certifying that LICENSEE has discontinued use of and returned or destroyed all copies of SOFTWARE PRODUCTS subject to this Agreement.

Exhibit A, § 6.02.

23. Under Section 6.02, Daimler's mere cessation of the use of UNIX does not terminate the License Agreement.

24. Even if Daimler ceases to use UNIX *and* properly terminates the License Agreement, its obligation to maintain the confidentiality of UNIX remains in effect. Section 7.06 provides:

The obligations of LICENSEE, its employees and contractors [to maintain confidentiality] under Section 7.05(a) shall survive and continue after any termination of rights under this Agreement or cessation of a SUBSIDIARY's status as a SUBSIDIARY.

Exhibit A, § 7.06.

Daimler's Migration to Linux

25. When Daimler first entered into the License Agreement, Daimler and many other companies relied on UNIX as the core operating system to run their computers.

26. More recently, however, an operating system known as Linux, which was first publicized in 1991, has been transformed from a non-commercial operating system

into a commercial operating system. Neither SCO, Daimler, nor the original parties to the License Agreement could have contemplated the use of Linux as a commercial operating system at the time they entered into the License Agreement.

27. SCO claims that, in material respects, Linux is a variant, derivation, and/or modification of UNIX.

28. Daimler has utilized Linux since at least October 2002.

29. SCO believes that Daimler and many other licensees of UNIX have violated the terms of their license agreements by, among other things, improperly copying, modifying, using, and distributing UNIX or parts or derivatives of UNIX in connection with the creation, and use of Linux.

30. SCO has sought assurances and certifications from over 750 licensees of UNIX regarding their compliance with the terms of their license agreements.

SCO's Requests for Certification of Compliance with the License Agreement

31. On December 18, 2003, I wrote to the Chief Executive Officer of Daimler requesting assurances and certifications from Daimler regarding the computers subject to the License Agreement and Daimler's full compliance with the provisions of the License Agreement (the "SCO Letter"). Attached hereto as Exhibit B is a true and correct copy of the SCO Letter.

32. In accordance with Section 2.05, the SCO Letter requests that Daimler assure and certify as follows ("the SCO Requests"):

1. You have held, at all time, all parts of the Software Products (including methods and concepts) in confidence for SCO.
2. You have appropriately notified each employee to whom you have disclosed the Software Products, and taken steps to assure that such disclosure was made in confidence and must be

kept in confidence by such employee. Please provide evidence of your compliance with this obligation. This evidence may include, but not be limited to, nondisclosure agreements, employee policies or manuals, or other such evidence of compliance.

3. Neither you nor your employees with access to the Software Products have contributed any software code based on the Software Products for use in Linux or any other UNIX-based software product.

4. Neither you nor your employees have used any part of the Software Products directly for others, or allowed any use of the Software Products by others, including but not limited to use in Linux or any other UNIX-based software product.

5. Neither you nor your employees have made available to export, directly or indirectly, any part of the Software Products covered by this Agreement to any country that is currently prohibited from receiving supercomputing technology, including Syria, Iran, North Korea, Cuba, and any other such country, through a distribution under the General Public License for Linux, or otherwise.

6. Neither you nor your employees have transferred or disposed of, through contributions to Linux or otherwise, any part of the Software Product.

7. Neither you nor your employees have assigned or purported to assign, any copyright in the Software Products to the General Public License, or otherwise for use in Linux or another UNIX-based software product.

See Exhibit B at 2-3.

33. The License Agreement does not provide a time period within which a certification under Section 2.05 is required to be provided following such a request.

34. The SCO Letter demanded that Daimler respond to the SCO Requests within 30 days.

35. If a licensee is in compliance with all the requirements of the License Agreement, and there is a policy in place at the licensee that tracks and controls the

handling of third-party software, and the licensee's employees are kept informed of the License Agreement's requirements, then 30 days is more than sufficient time for a licensee to provide the certification requested by SCO.

36. Daimler failed to provide any assurances or certifications or to otherwise respond to the SCO Letter within 30 days.

37. On March 3, 2004, 75 days after the SCO Letter was sent, SCO commenced a lawsuit to enforce its rights under the License Agreement.

38. Section 2.05 and the SCO Requests are the most practical way for SCO to monitor and ensure compliance with the License Agreement.

39. Daimler's refusal to respond in a timely manner is very prejudicial to SCO. There are thousands of licensees of UNIX SCO had made good-faith attempts to contact over 750 of those licensees to secure assurances of their compliance with the terms of their licenses. If each licensee disregards the request or unilaterally determines that it may respond whenever it wants, SCO may have to spend extraordinary resources and potentially commence hundreds of court actions to enforce its rights. It would be impracticable and costly for SCO to have to sue each one to obtain basic assurances of performance.

Daimler's Untimely Response to SCO's Request for Certification

40. On April 6, 2004, more than a month after SCO's Complaint was filed and 110 days after the SCO Letter was sent, Norman A. Powell, Senior Manager of Tech Services at Daimler, provided a response to the SCO Letter (the "Daimler Response"). Attached hereto as Exhibit C is a true and correct copy of the Daimler Response.

41. The Daimler Response, however, neither responds to the SCO Requests nor provides the assurances and certifications required by Section 2.05 of the License Agreement.

42. The Daimler Response does not list any Designated CPUs and does not certify that Daimler is in full compliance with the provisions of the License Agreement. The Daimler Response provides only that because Daimler has not used UNIX for seven years, it does not need to list any Designated CPUs and is in compliance with the License Agreement. The Daimler Response states:

On behalf of DaimlerChrysler Corporation, I hereby certify that, as of the date indicated above, there is no DESIGNATED CPU, or any CPU, on which the SOFTWARE PRODUCT licensed under the subject Agreement is being used. This has been the case for more than seven years. *As a result*, no list of the location, type and serial number of any DESIGNATED CPU is relevant or possible.

I further certify that DaimlerChrysler Corporation's use of the SOFTWARE PRODUCT licensed under the subject Agreement has been reviewed. No SOFTWARE PRODUCT licensed under the subject Agreement is being used or has been used for more than seven years, and *as a result* DaimlerChrysler Corporation is in full compliance with the provisions of the subject Agreement.

The terms DESIGNATED CPU, CPU, and SOFTWARE PRODUCT are used in this letter with the meanings defined in the subject Agreement. I represent that I am authorized by DaimlerChrysler Corporation to make this certification.

Exhibit C (emphasis added).

44. The License Agreement does not condition Daimler's certifications upon Daimler's current use of UNIX.

45. Even if Daimler has stopped using UNIX, it still must provide the assurances and certifications required by Sections 2.05 and 6.02 of the License

Agreement, including a list of Designated CPUs and a certification of its full compliance with the confidentiality, termination and other provisions of the Licensing Agreement.

46. Daimler has never sought to terminate the License Agreement by notifying SCO and certifying that it has ceased using UNIX and has returned or destroyed all copies of UNIX.

Daimler's Failure to Provide a List of Designated CPUs

47. The Daimler Response states that the list of Designated CPUs is not relevant. That is incorrect. There are several reasons why the list of Designated CPUs is important and relevant, regardless of whether Daimler is still using UNIX.

48. One of SCO's most important assets is the intellectual property consisting of its UNIX technology. SCO implements significant measures to ensure that it can control the dissemination of that intellectual property and utilize it to generate revenue.

49. One such measure is requiring that licensees identify the specific computer on which they will install and utilize the UNIX technology.

50. Knowing the specific computers hosting UNIX technology allows SCO to track the dissemination of its intellectual property.

51. By requiring licensees to identify CPUs running UNIX, the License Agreement implements another level of control by requiring the licensees themselves to control the use and dissemination of UNIX technology.

52. In addition, part of the license fee is based on the number of CPUs on which a licensee installs SCO's UNIX technology. By imposing additional cost per Designated CPU, the License Agreement further incentivizes licensees to control the dissemination of UNIX technology.

53. Requiring licensees to track and notify SCO of the Designated CPUs also permits SCO to properly earn a fair revenue stream from a licensee's use of UNIX technology.

54. In addition, if a licensee does not know which computers are licensed for UNIX technology, it will be difficult, if not impossible, for that licensee to ensure that the technology was properly maintained and controlled, rather than copied, or transferred, or removed by a departing employee in violation of the terms of the License Agreement.

55. Requiring licensees to certify the Designated CPUs, even if UNIX technology is no longer in use, or the formerly Designated CPUs are no longer in use, allows SCO to track a licensee's prior use, compare it to the permitted use and paid-for use, and determine if the licensee properly disposed of the UNIX technology at the time it terminated its use of UNIX.

56. Daimler was fully aware of its obligations to maintain current and accurate identifications of the licensed Designated CPUs. On April 14, 1992, Daimler entered into two supplements to the License Agreement to change the Designated CPUs. Software Agreement Supplement Number 2 provided for the deletion of the Cray XMP/14se, Serial Number 511, in Highland Park, Michigan, which was the original Designated CPU under the License Agreement, and replaced it with a Cray Y-MPZE/216, Serial Number 1604, also in Highland Park, Michigan. Attached hereto as Exhibit D is a true and correct copy of the Software Agreement Supplement Number 2.

57. On the same date, Daimler entered into Software Agreement Supplement Number 3, which deleted as a Designated CPU the Cray Y-MP2E/216, Serial Number 1604, in Highland Park, Michigan, and replaced it with a Cray X-MP8i/464, Serial

Number 1702, in Auburn Hills, Michigan. Attached hereto as Exhibit E is a true and correct copy of Software Agreement Supplement Number 3.

58. The Daimler Response fails to provide any information about these Designated CPUs. That failure prevents SCO from determining where the UNIX technology resided last, whether Daimler properly controlled it or properly disposed of it, and whether it properly paid for its use.

Daimler's Failure to Certify Compliance with Other Requirements of the License Agreement

59. The Daimler Response also fails to meet the other certification requirements of Section 2.05. Merely by stating that it no longer uses UNIX, Daimler provides no information about its compliance with all the provisions of the License Agreement.

60. The SCO Requests are intended to obtain Daimler's certification of full compliance with the other provisions of the License Agreement.

61. The SCO Requests are derived from or directly track provisions of the License Agreement. For example, SCO Requests 1 and 2 directly track the confidentiality obligations of § 7.05(a). Request 2 also seeks evidence of the compliance with the confidentiality obligations and proposes, but does not demand, what types of evidence may be available. Requests 3 and 4 track and combine the obligations of §§ 2.01, 2.02, 2.06 and 7.07. Because SCO believes UNIX technology is wrongfully being used in connection with Linux, it specifically asks Daimler about such use. Request 5 directly tracks § 4.01. Request 6 directly tracks § 7.09 and Request 7 directly tracks § 7.08. Because the transfer of UNIX technology to Linux is relevant, SCO directly asks Daimler about Linux.

62. Daimler employees, engineers and technicians have had access to and worked on UNIX source code and technology for over 15 years.

63. It is my understanding that in order to exercise their rights under the License Agreement, Daimler personnel would have gained a detailed understanding of UNIX source code and the methods and concepts contained therein.

64. Daimler personnel have used that knowledge and expertise to modify UNIX to meet Daimler's commercial needs.


65. Daimler is now using Linux, a product that SCO contends wrongfully incorporates its intellectual property rights in UNIX technology.

66. Daimler's certification that it is not currently using UNIX says nothing about whether it exported UNIX, whether it assigned UNIX, whether it transferred UNIX or any derivation of UNIX, or whether it properly maintained the confidentiality of UNIX and provided the appropriate notification to its employees regarding these confidentiality obligations.


William Broderick



Sworn to before me this
15 th day of June, 2004


Notary Public

9601001/Daunler Chrysler/SCO Broderick Affidavit

BETTY MEDINA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires July 31, 2006