

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

Daniel Wallace,

Plaintiff,

v.

Civil Complaint No. 1:05-cv-0678-SEB-VSS

INTERNATIONAL BUSINESS MACHINES CORPORATION;

RED HAT INC.;

NOVELL, INC.,

Defendants.

AFFIDAVIT

Plaintiff Daniel Wallace swears based upon personal knowledge and belief and under penalty of perjury that:

The [H.I.] document is a true and accurate copy of a document filed by INTERNATIONAL BUSINESS MACHINES CORPORATION in the United States District Court for the District of Utah in Cause No. 2:03CV-0294 DAK

Dated this 30<sup>th</sup> day of June, 2005.



Daniel Wallace, pro se

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH**

THE SCO GROUP, INC., a Delaware  
corporation,  
  
Plaintiff/Counterclaim-Defendant,  
  
-against-  
  
INTERNATIONAL BUSINESS  
MACHINES CORPORATION, a New York  
corporation,  
  
Defendant/Counterclaim-Plaintiff,

**COUNTERCLAIM-PLAINTIFF  
IBM'S AMENDED  
COUNTERCLAIMS  
AGAINST SCO**

**JURY TRIAL DEMANDED**

Civil No. 2:03CV-0294 DAK

Honorable Dale A. Kimball

Magistrate Judge Brooke C. Wells

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For its counterclaims herein, counterclaim-plaintiff International Business Machines Corporation (“IBM”), by and through its attorneys, upon personal knowledge as to its own actions and upon information and belief as to the actions of counterclaim-defendant The SCO Group, Inc. (“SCO”), avers as follows:

### **NATURE OF COUNTERCLAIMS**

1. These counterclaims arise from SCO’s efforts wrongly to assert proprietary rights over important, widely-used technology and to impede the use of that technology by the open-source community. SCO has misused, and is misusing, its purported rights to the Unix operating system developed originally by Bell Laboratories, then a research and development arm of AT&T Corp., to threaten destruction of the competing operating systems known as AIX, Dynix and Linux, and to extract windfall profits for its unjust enrichment.

2. IBM’s counterclaims also arise from SCO’s infringement of IBM copyrights and patents. Although SCO purports to respect the intellectual property rights of others -- and has instituted litigation against IBM for alleged failures with respect to SCO’s purported rights -- SCO has infringed and is infringing a number of IBM copyrights and patents.

### **JURISDICTION AND VENUE**

3. This Court has jurisdiction over IBM’s counterclaims pursuant to 28 U.S.C. §§ 1331, 1332(a)(1), 1338(a) and (b), 1367, 2201(a) and 2202 and 15 U.S.C. § 1125(a)(1).

4. The Court has diversity and supplemental jurisdiction over IBM's state law claims. The parties have complete diversity of citizenship, and the amount in controversy exceeds \$75,000, exclusive of interest and costs. IBM's Lanham Act, copyright and patent claims arise under federal law.

5. Venue is proper in this district, with respect to IBM's counterclaims, pursuant to 28 U.S.C. §§ 1391(b), 1391(c), and 1400(a) and (b).

#### **PARTIES**

6. Counterclaim-plaintiff IBM is a New York corporation with its principal place of business in the state of New York.

7. Counterclaim-defendant SCO is a Delaware corporation with its principal place of business in Utah County, Utah.

#### **BACKGROUND**

##### **A. Unix**

8. Unix is a name used to characterize a family of operating systems that share common characteristics and meet certain well-publicized "UNIX" standards. The earliest Unix operating system was built by software engineers at Bell Laboratories, the research division of AT&T.

9. Over the years, AT&T Technologies, Inc., a wholly owned subsidiary of AT&T, and its related companies licensed Unix operating systems for widespread enterprise use. AT&T's Unix software has been licensed to many thousands of persons or entities.

10. In 1993, AT&T sold its Unix assets -- then held by its subsidiary, Unix System Laboratories, Inc. ("USL") -- to Novell, Inc. ("Novell"). In 1995, Novell sold some,

not all, of its Unix assets to The Santa Cruz Operation, Inc., now known as Tarantella, Inc. (“Original SCO”), which is not affiliated with counterclaim-defendant SCO.

11. Counterclaim-defendant SCO played no role in the development of Unix. But it purports to have acquired Original SCO’s rights to Unix in 2001. Based upon the rights it purports to have acquired from Original SCO, SCO has undertaken the scheme described herein.

B. IBM and Unix

12. In the mid-1980s, IBM acquired broad rights to use Unix software pursuant to a series of agreements with AT&T Technologies, Inc. These agreements, referred to as the “AT&T Agreements”, include the Software Agreement (Agreement Number SOFT-00015) dated February 1, 1985, the Sublicensing Agreement (Agreement Number SUB-00015A) dated February 1, 1985, the Substitution Agreement (Agreement Number XFER-00015B) dated February 1, 1985, the letter agreement dated February 1, 1985, and the Software Agreement Supplement 170, as amended by a letter agreement dated on or about January 25, 1989. Copies of these agreements are attached hereto as Exhibits A - F, respectively.

13. In connection with the proper exercise of these and other rights previously obtained by IBM with respect to Unix, IBM began development of its own version of a Unix operating system, called AIX. Over the last two decades, IBM has expended tremendous resources on developing AIX, creating millions of lines of original code, incorporating it into its product lines and licensing the technology to thousands of customers worldwide. IBM continues to do so today.

14. Like IBM, Sequent Computer Systems, Inc. (“Sequent”) developed a version of a Unix operating system known as Dynix. IBM acquired Sequent by merger in 1999.

15. On October 17, 1996, after Novell and Original SCO acquired AT&T's rights to Unix, IBM obtained additional rights with respect to Unix software. Pursuant to an agreement known as Amendment X, entered into by IBM, Novell and Original SCO, IBM acquired, for example, the "irrevocable, fully paid-up, perpetual right to exercise all of its rights" under the AT&T Agreements. A copy of this agreement is attached hereto as Exhibit G.

C. Linux

16. Linux is an operating system that stems from a rich history of collaborative development. Linux is a dynamic and versatile operating system and is, for many, the operating system of choice.

17. The development of Linux began when an undergraduate student at the University of Helsinki, by the name of Linus Torvalds, set out to create a new, free operating system. In 1991, Linus Torvalds began developing the Linux kernel, the core of the operating system, and posting news of his project to internet newsgroups, along with a call for volunteers to assist in his efforts.

18. With the internet providing for a distributed collaboration, other programmers joined to create code making up the kernel. Linus Torvalds directed the collaboration to a version 1.0 release of the Linux kernel in 1994.

19. In the years that followed, thousands of developers, including developers at IBM, contributed to the further development of Linux. Version 2.4 of the Linux kernel was released in 2001. IBM owns valid copyrights in its contributions to Linux, as illustrated below.

20. The first commercial distribution of Linux was introduced in 1994 by Red Hat. Thereafter, other distributors, including SCO, introduced a number of commercial Linux

products, which typically comprise the Linux kernel, the applications that the kernel runs (which, with the kernel, comprise a complete operating system) and whatever else the distributor chooses to combine into an easily installable product.

D. Open-Source Software and the GPL

21. Linux is open-source software. Open-source software is free in the sense that it is publicly available, royalty free, and users have the freedom to run, copy, distribute, study, adapt, and improve the software.

22. Whereas traditional software licenses often reflect legal limitations restricting the use and reproduction of original works, the open-source community has taken a different approach to licensing. The open-source community, including SCO, resolved to license Linux so as to keep the source code publicly available. Due to the open-source nature of Linux, anyone can freely download Linux and many Linux applications and modify and re-distribute them with few restrictions.

23. There are a variety of open-source licenses, but the most popular is the GNU General Public License (the "GPL"), a copy of which is attached hereto as Exhibit H. The Linux kernel, and significant portions of the larger Linux operating system, are distributed under the GPL.

24. In fact, one of the most important decisions Linus Torvalds made was to develop the Linux kernel under the GPL and keep the source code freely distributable so others could build upon, modify, and develop programs for the operating system.

25. Whereas the licenses for most software are programs designed to limit or restrict a licensee's freedom to share and change it, the GPL is intended to guarantee a licensee's

freedom to share and change free software -- to make sure the software is free for all its users.

The GPL applies to any program whose authors commit to using it.

26. The GPL is designed to make sure that a licensee has the freedom to distribute copies of free software, receives source code or can get it if the licensee wants it, can change the software or use pieces of it in new free programs and knows the licensee can do these things.

27. The Linux kernel is subject to the GPL as it is comprised of programs and other works that contain notices placed by contributing copyright holders permitting distribution under the terms of the GPL. The Linux developers' public agreement to apply GPL terms expresses in a binding legal form the conscious public covenant that defines the open-source community -- a covenant that SCO itself supported as a Linux company for many years.

28. SCO accepted the terms of the GPL by modifying and distributing Linux products. By distributing Linux products under the GPL, SCO agreed, among other things, not to assert -- indeed, it is prohibited from asserting -- certain proprietary rights over any programs distributed by SCO under the terms of the GPL. SCO also agreed not to restrict further distribution of any programs distributed by SCO under the terms of the GPL.

E. SCO's Business

29. SCO was founded as Caldera, Inc. in 1994, approximately 25 years after the beginning of the development of Unix and three years after Linus Torvalds began the development of Linux, to develop Linux-based business solutions. In 1998, Caldera, Inc. sold its assets relating to its business of developing and marketing Linux to Caldera Systems, Inc., a newly formed corporation.

30. SCO began its business as a developer and distributor of the Linux operating system. By 2001, according to SCO, it led the world's largest Linux channel with more than 15,000 resellers worldwide.

31. SCO has developed and marketed software based on the Linux operating system and provided related services that enable the development, deployment and management of Linux-specialized servers and internet access devices that simplify computing. According to SCO, it was one of the first companies to tailor Linux open-source code from various sources into sound discrete products.

32. Specifically, SCO has distributed and/or redistributed a number of Linux products, including SCO Linux server, SCO OpenLinux Server, and SCO OpenLinux Workstation. SCO has also distributed SCO Volution Manager, a web-based management solution system for managing and maintaining established versions of Linux (as well as Unix operating systems). Although SCO purported to suspend its Linux distribution after the commencement of this action, SCO has continued to make Linux source code available for download through its website.

33. The viability of SCO's product offerings has depended in large measure upon the efforts of the open-source community in enhancing products and making them compatible for use across multiple software and hardware platforms. Indeed, SCO incorporated certain code licensed pursuant to the GPL into its proprietary Unix products. SCO has also relied on independent developers in the open-source community, such as Linus Torvalds, in order to release upgrades of SCO's Linux-based products.

34. In addition to distributing Linux products, SCO facilitated the adoption of Linux by providing education programs designed to help its customers to develop, deploy and administer Linux systems. Furthermore, SCO joined with other Linux vendors in UnitedLinux, an initiative to streamline Linux development and certification around a global, uniform distribution of Linux for business.

35. On May 7, 2001, Caldera Systems was merged into Caldera International, Inc. (described below), which changed its name to The SCO Group, Inc. in May 2003.

F. SCO's Open-Source Activities

36. Until it undertook the scheme described herein, SCO supported the open-source community. According to SCO, it fully embraced the open-source model.

37. SCO Linux products encompass a range of software that uses a number of different licensing schemes, including open-source licenses and, in particular, the GPL. Components of SCO's Linux products (such as OpenLinux), including the Linux kernel, have been developed and made available for licensing under the GPL and similar licenses, which generally allow any person or organization to copy, modify and distribute the software, without royalty, in any form, including source code.

38. Due to the open-source nature of many of SCO's software products and the licenses under which it has developed and distributed them, SCO's collection of trademarks constitutes its most important intellectual property.

39. At least until it undertook the scheme described herein, SCO contributed tools and technology to the open-source community. For instance, SCO incorporated open-source components in its product offerings to the betterment of its products, and gave away

CD-ROMs containing its Linux operating system at trade shows and allowed it to be freely downloaded over the internet to encourage interest.

40. In addition, SCO fostered, and regularly contributed to, multiple open-source development projects in order to enhance the capability of SCO's products and services. In fact, SCO's business model depended upon incorporating contributions from the open-source community into products that it open sourced.

41. SCO also fostered and supported the development of additional open-source and Linux enhancements through the Open Source Development Lab and through participation as a key member of many industry standard and open-source initiatives.

G. IBM and Linux

42. IBM is a participant in the open-source movement and has made a substantial investment in Linux business efforts over the last 5 years. IBM participates in a broad range of Linux projects that are important to the company and contribute to the open-source community.

43. Today, IBM has many Linux-related offerings: mainframes and servers that run Linux; memory solutions for Linux environments; a broad range of software offerings; services that include deployment of Linux-based e-business environments, migration of database applications and data to Linux systems, support for Linux-based cluster computing, server consolidation, and a 24-hour technical engineering support line. IBM has created a Linux Center of Competency that offers Linux training and support, applications testing, technical advice and a hands-on environment in which to evaluate Linux and Linux-based applications.

44. Like thousands of other developers, IBM has properly contributed source code to Linux under the GPL. In fact, SCO has included IBM contributions to Linux in Linux products that SCO has distributed under the GPL. Like all recipients of SCO's Linux distributions, IBM is entitled to the protections of the GPL with respect to the IBM contributions, as well as any other contributions, included in SCO's Linux distributions, of which IBM is a recipient.

H. Failure of SCO's Business

45. Although it completed an initial public offering, SCO, unlike IBM, has failed to establish a successful business around Linux. SCO's Linux business has never generated a profit. In fact, the company as a whole did not experience a profitable quarter until after it abandoned its Linux business and undertook its present scheme to extract windfall profits from Unix technology that SCO played no role in developing.

46. In an attempt to revive its faltering Linux business, SCO acquired rights to the Unix operating system originally developed by Bell Laboratories and undertook the unification of the Unix and Linux operating systems. On May 7, 2001, Caldera Systems was merged into Caldera International, Inc., a holding company formed to acquire the Server Software and Professional Services divisions of Original SCO, including Original SCO's rights to the Unix assets it acquired from Novell and the Unix variant developed by Original SCO.

47. Following its acquisition of Original SCO's Unix assets, SCO described its business plan as being to integrate its Linux-based products and services with its Unix-based products and services as a way of encouraging businesses to adopt the open-source, Linux-based operating systems.

48. In pursuit of this strategy, SCO designed SCO Linux to permit existing Unix-based users to migrate to Linux. In addition, SCO marketed and sold a number of Unix products, including UnixWare, SCO OpenServer, Reliant HA, and Merge, and Caldera's Global Professional Services assisted customers in developing and deploying unified Unix and Linux solutions through consulting and custom engineering services.

49. Like SCO's original Linux business, however, this enterprise failed. SCO has not been able to operate a successful, legitimate business concerning Linux and/or Unix. With apparently no other prospects, SCO shifted its business model yet again -- this time to litigation and threats of litigation, as is described below.

I. SCO's Scheme

50. SCO devised a scheme to profit from the Unix assets that it acquired from Original SCO, though those assets were in no way developed by SCO. Although most, if not all, of the AT&T Unix technology that SCO purports to own is generally known, available without restriction to the general public or readily ascertainable by proper means, SCO undertook to create fear, uncertainty and doubt in the marketplace in regard to SCO's rights in and to that technology.

51. Recognizing that there is little value in its Unix rights, SCO did not limit its scheme to that technology. Rather, SCO devised and executed a plan to create the false perception that SCO holds rights to Unix that permit it to control not only all Unix technology, but also Linux -- including those aspects generated through the independent hard work and creativity of thousands of other developers and long distributed by SCO itself under the GPL.

52. SCO undertook to carry out its scheme by, among other things, (a) bringing baseless legal claims against IBM and threatening to sue other companies and individuals, (b) conducting a far-reaching publicity campaign to create the false and/or unsubstantiated impression that SCO has rights to Unix and Linux that it does not have and that IBM and others have violated SCO's rights and (c) otherwise seeking to condition the market to believe that SCO has rights to Unix and Linux that it does not have and cannot properly enforce.

J. SCO's Lawsuit and Threats

53. On March 7, 2003, without any prior notice or warning that would have allowed IBM to understand SCO's claims and respond to them, SCO sued IBM alleging a host of meritless claims. In particular, SCO alleges that IBM has breached its contractual obligations to SCO by, among other things, incorporating and inducing others to incorporate SCO's intellectual property into Linux. In addition, SCO alleges that IBM has competed unfairly, interfered with SCO's contracts with others, and misappropriated SCO's trade secrets.

54. By its complaint, and the amended complaint it submitted on July 22, 2003, SCO asserts legal theories that are frivolous, such as that SCO has ownership rights with respect to all of the code in AIX. SCO seeks relief to which it is plainly not entitled, such as a permanent injunction terminating IBM's ability to possess and use the software products it licensed from AT&T Technologies, Inc., notwithstanding the fact that those rights are expressly "irrevocable" and "perpetual".

55. In addition to instituting litigation against IBM, SCO sent letters to 1500 of the world's largest corporations threatening litigation. In its letters, an example of which is attached hereto as Exhibit I, SCO states, "We believe that Linux infringes on our Unix

intellectual property and other rights". SCO further states, "We intend to aggressively protect and enforce these rights" against not only the companies involved with "the Linux development process" but also "the end user" companies using any Linux technology. SCO has made clear that it intends to bring legal action relating to Linux. For example, in a press conference on July 21, 2003, SCO stated that taking out a license with SCO was the "alternative to legal enforcement against Linux end-users".

K. SCO's Campaign of False Publicity

56. Following the commencement of its lawsuit against IBM and its barrage of letters threatening suit against others, SCO continued its campaign of falsehoods by further misrepresenting to the market the interplay of Unix, AIX, Dynix and Linux and SCO's and IBM's rights to these products.

57. SCO has repeatedly made false public statements to the effect that it has the right and authority to revoke, and has effectively revoked, IBM's right to use AIX, IBM's version of Unix. For example, on May 12, 2003, Chris Sontag, a Senior Vice President of SCO, stated publicly, SCO has "the right to revoke the AIX license", and on June 16, 2003, SCO announced publicly that it had "terminated IBM's right to use or distribute any software product that is a modification of or based on Unix System V source code". Indeed, in an interview given by SCO CEO Darl McBride to Peter Williams of vnunet.com on June 25, 2003, SCO falsely represented that its contractual rights to "pull" IBM's contract are "bullet-proof". SCO has made similarly false statements relating to Dynix.

58. By way of further example, SCO has falsely stated that it has the right to control the use by IBM of all of Unix and AIX technology and to control the use by all persons

and entities of Linux technology, which SCO contends is an illegal derivative of Unix. On June 16, 2003, SCO announced in a press release that “AIX is an unauthorized derivative of the Unix System operating system source code and its users are, as of this date, using AIX without a valid basis to do so”. A SCO letter to Linux users, dated May 12, 2003, states, “We believe that Linux is, in material part, an unauthorized derivative of Unix. . . . We believe that Linux infringes on our Unix intellectual property and other rights.”

59. SCO’s campaign has not been limited to press releases and public interviews. SCO has also propagated falsehoods about its and IBM’s rights in non-public meetings with analysts. SCO has solicited and participated in these meetings to misuse analysts to achieve wider dissemination of SCO’s misleading message about Unix, AIX and Linux and to damage IBM and the open-source movement. In a luncheon hosted by Deutsche Bank analyst Brian Skiba, on or about July 22, 2003, for example, SCO falsely stated that IBM transferred the NUMA code from Sequent to Linux without any legal basis to do so and that IBM’s actions were giving rise to about \$1 billion in damages per week. In an interview in June 2003 with Client Server News, SCO misrepresented to analysts that IBM has improperly released “truckloads” of code into the open-source community.

L. Novell’s Exercise of Rights

60. On June 9, 2003, in response to SCO’s actions, and pursuant to its obligations under Amendment X, Novell stated its belief that SCO has no right to terminate IBM’s Unix license which is perpetual and irrevocable, and Novell exercised its retained rights to Unix to put a stop to SCO’s misconduct. Under Section 4.16(b) of the Asset Purchase Agreement between Novell and Original SCO dated September 19, 1995 (“APA”), attached

hereto as Exhibit J, Novell directed SCO to “waive any purported right SCO may claim to terminate IBM’s [Unix] licenses enumerated in Amendment X or to revoke any rights thereunder, including any purported rights to terminate asserted in SCO’s letter of March 6, 2003 to IBM”. A copy of Novell’s June 9, 2003 letter is attached hereto as Exhibit K.

61. When SCO failed to take the actions directed by Novell, on June 12, 2003, Novell exercised its rights under Section 4.16(b) of the APA to waive and revoke, in SCO’s stead, any purported right SCO claimed to terminate IBM’s licenses. A copy of Novell’s June 12, 2003 letter is attached hereto as Exhibit L.

62. Notwithstanding the fact that IBM’s rights to Unix are expressly “irrevocable” and “perpetual” under Amendment X and the fact that Novell has exercised its right to waive, in any event, any contractual rights SCO claims IBM violated, SCO nevertheless purported to terminate IBM’s licenses on June 13, 2003. Moreover, even assuming (contrary to fact) that IBM’s rights were terminable, at no time prior to SCO’s purported termination did SCO comply with its obligations under the AT&T Agreements to identify the specific acts or omissions that SCO alleges constitute IBM’s breach, despite IBM’s demands that SCO do so.

63. Rather, SCO has continued to misrepresent that it can, or will, or has in fact revoked IBM’s right to use Unix, without disclosing that IBM’s rights to Unix are not terminable or that Novell has exercised its right to waive any contractual rights SCO claims IBM violated. In an interview with InformationWeek on or about June 12, 2003, for instance, SCO falsely stated that it has the right to revoke IBM’s license and order the destruction of every copy of AIX.

M. SCO's Refusal to Specify Its Claims

64. Rather than particularize its allegations of misconduct by IBM and others, SCO has obfuscated and altered its claims to foster fear, uncertainty and doubt about its rights and the rights of others. In letters dated April 2, 2003, and May 5, 2003, attached hereto as Exhibits M and N, respectively, IBM expressly asked SCO to advise IBM as to what SCO contends IBM has done in violation of any of its agreements, and what SCO contends IBM should do to cure such violations. SCO refused. In fact, SCO's counsel indicated, in an interview with Maureen O'Gara of LinuxGram, that it "doesn't want IBM to know what they [SCO's substantive claims] are".

65. SCO has obfuscated its claims and has hidden its supposed evidence because the evidence does not demonstrate the breaches and violations that SCO has alleged. Moreover, key developers and influence leaders in the open-source community, including leaders of Linux kernel development, have stated publicly that they are prepared immediately to remove any allegedly offending material from the Linux kernel. Rather than permit remediation or mitigation of its alleged injuries (which are non-existent), SCO has declined to reveal the particulars of the alleged violations in order to artificially and improperly inflate the price of its stock.

66. While refusing to supply IBM with meaningful specifics regarding the alleged breaches, SCO has shown its purported evidence to analysts, journalists and others who are interested in seeing it. For example, at a forum held in Las Vegas on August 17-19, 2003, SCO made a false and misleading presentation concerning its claims against IBM, in which SCO purported to disclose examples of its evidence of alleged misconduct by IBM.

N. SCO's Disparagement of AIX and Linux.

67. In addition to purporting to terminate IBM's rights to use AIX, SCO has disparaged AIX as "unauthorized". In a press release dated June 16, 2003, SCO's counsel stated that "SCO has the right to terminate IBM's right to use and distribute AIX. Today AIX is an unauthorized derivative of the Unix operating system source code and its users are, as of this date, using AIX without a valid license to do so". In the same press release, Darl McBride, SCO's Chief Executive Officer, stated that "IBM no longer has the authority to sell or distribute AIX and customers no longer have the right to use AIX software". SCO has made similarly false and disparaging statements relating to Dynix.

68. Here again, SCO's false and misleading statements have not been limited to AIX. In recognition of the fact that its claims against IBM are baseless, and in flat contradiction of the allegation of its original complaint (i.e., that this case is not about the relative merits of proprietary versus open-source software), SCO has now falsely stated, in effect, it owns and is entitled to collect royalties regarding Linux. For example, on July 21, 2003, McBride stated, on behalf of SCO, Linux infringes SCO's rights and, as "a viable alternative to legal enforcement" SCO is prepared to offer a license to SCO's Unix products that would, SCO says, permit lawful use of Linux.

69. SCO has misrepresented that IBM has infringed SCO's copyrights, and has threatened to sue IBM for copyright infringement, with respect to Linux. For example, at its 2003 SCO Forum, SCO represented that Linux is an unauthorized derivative of Unix, that IBM has infringed its rights in Linux and that SCO is entitled to damages and injunctive relief against IBM.