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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

THE SCO GROUP, INC. **a Delaware Corporation** **Plaintiff,** **v.** **AUTOZONE, INC.** **a Nevada Corporation** **Defendant.**	**Civil Action File No.** **CV-S-04-0237-RCJ-LRL**

DEFENDANT AUTOZONE, INC.'S MOTION TO STAY OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT

Defendant AutoZone, Inc. ("AutoZone") moves this Court for an Order staying all proceedings or, in the alternative, directing Plaintiff The SCO Group, Inc. ("SCO") to amend its

Complaint to provide a more definite statement. The grounds in support of AutoZone's Motion are set forth in detail in the attached Memorandum of Law.[1]

This 23rd day of April, 2004.

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By: _____

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[1] As the record in this matter reflects, AutoZone has filed concurrently with the present Motion a Motion to Transfer Venue. AutoZone respectfully requests the Court to initially consider AutoZone's Motion to Transfer Venue and then, if the Court deems it appropriate, consider the present Motion. In the event the Court grants AutoZone's Motion to Transfer Venue, the Court may defer the present Motion to the United States District Court for the Western District of Tennessee.

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MEMORANDUM OF LAW

Plaintiff The SCO Group, Inc. ("SCO") alleges in its Complaint that Defendant AutoZone, Inc. ("AutoZone") has infringed copyrights that SCO purports to own in a computer operating system known as UNIX through AutoZone's use of a competing operating system known as Linux. To prevail on its claim, SCO must establish two elements: (1) that it owns valid and enforceable copyrights in UNIX; and (2) that the Linux operating system infringes those rights.

Both of these elements are already at issue in three prior filed federal court lawsuits. Whether SCO owns copyrights in the UNIX operating system is the sole issue in an action SCO filed against Novell, Inc. ("Novell") in Utah last January. Whether Linux infringes any copyrights SCO purports to own in UNIX is a central issue in a lawsuit SCO filed against IBM in Utah last year, and it is the central issue to be decided in a declaratory judgment action that Linux distributor Red Hat, Inc. ("Red Hat") filed against SCO in Delaware last August.

The resolution of each of these prior filed actions will significantly clarify, if not resolve, SCO's claims against AutoZone. Staying SCO's claims will thereby avoid duplicative litigation and save the parties and the court significant time and expense that may ultimately prove to be unnecessary. Recognizing the same, Judge Robinson, to whom Red Hat's case was assigned in Delaware, recently stayed that case *sua sponte* pending resolution of the *IBM* case. *Red Hat v. SCO*, Mem. Order (attached to Appendix of Exhibits to Motion to Stay or, in the Alternative, for a More Definite Statement ("Appendix") as Ex. A), at 4. In reaching this conclusion, she wrote: "It is a waste of judicial resources to have two district courts resolving the same issue, especially when the first filed suit in Utah [i.e., IBM] involves the primary parties to the dispute." *Id.* at 5. Judge Robinson's conclusion applies with even greater force in the present case because AutoZone operates Red Hat Linux. AutoZone therefore submits that this case should be stayed pending resolution of the *Red Hat* litigation.

In the event this Court determines that the case should move forward on a parallel track with the prior filed cases, AutoZone requests, in the alternative, that the Court order SCO to amend its Complaint to provide AutoZone with a more definite statement of SCO's claim. SCO's Complaint broadly alleges that AutoZone's distribution and copying of Linux infringes SCO's alleged rights in UNIX; however, it is impossible to tell from the face of the Complaint how AutoZone's actions infringe any rights in UNIX or what portions of Linux or UNIX are at issue. Without a more definite statement of the factual basis for SCO's claims, AutoZone cannot legitimately evaluate or answer the claims. AutoZone also cannot determine whether affirmative defenses are available that, if submitted to the Court in the form of Rule 12 or Rule 56 motions, could dispose of the litigation before the need to engage in costly and time consuming discovery. For these reasons and the reasons set forth more fully below, AutoZone respectfully requests that the Court grant this Motion.

FACTUAL BACKGROUND

A. UNIX and Linux Operating Systems

1. UNIX

"UNIX" is a name used to identify a number of related computer operating systems that meet a publicized UNIX standard. *See SCO v. IBM*, Counterclaim-Plaintiff IBM's Second Am Counterclaims Against SCO (attached to Appendix as Ex. B) ¶ 8. Bell Laboratories, then the research arm of AT&T, created the first version of UNIX. *See SCO v. IBM*, Compl. (attached to Appendix as Ex. C) ¶ 8; *Unix Sys. Labs., Inc. v. Berkeley Software Design, Inc.*, No. 92-1667, 1993 WL 414724, at *1 (D.N.J. Mar. 3, 1993). Over the years, AT&T licensed various versions of the UNIX operating system to third parties, including a proprietary version AT&T created that is known as UNIX System V. *See* Appendix Ex. C ¶¶ 8-9. Today, UNIX operating systems are some of the most prominent operating systems for servers used by Fortune 500 companies and other large enterprises in the United States. In 1993, AT&T assigned its copyrights in UNIX to Novell. As discussed in further detail below, Novell transferred certain rights related to the UNIX operating system to SCO in 1995.

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2. Linux

"Linux" is the name given to a computer operating system that stems from the collaborative development of thousands of computer programmers worldwide. Conceived in 1991 by Linus Torvalds, then a graduate student at the University of Helsinki, the idea behind Linux was to create a robust computer operating system that would be available free of charge for anyone to use, change and further distribute.

Using the Internet to facilitate contributions and collaboration, the first version of the "Linux kernel" – the core of the operating system – was released in 1994. Red Hat released the first commercial distribution of Linux later that same year. In the years that followed, programmers from around the world contributed to the continued development and improvement of the Linux kernel, resulting in the release of Linux kernel versions 2.4 in 2001 and 2.6 in 2003.

Linux is referred to as "open source" software because Linux users are provided not only the object code for the software, but also the source code. Source code is programming code that a programmer experienced in the language in which the program is written can read and change. Object code is source code that has been translated into a series of 1s and 0s that can be read by a computer but not by humans. *Unix Sys. Labs.*, 1993 WL 414724, at *2. The owners of most proprietary operating systems (such as Microsoft Windows), do not provide their users with access to the source code. Accordingly, if a user wants to make a change to the functionality of the software, the user must pay the owner to make the change, or live without it. Linux licensees, on the other hand, are permitted to modify and enhance the source code.

Over the past several years, Linux has become a viable alternative to UNIX based operating systems. Because of the vast difference in pricing between UNIX and Linux and the competitive functionality of the systems, a substantial number of companies are now switching from UNIX to Linux. These companies include AutoZone, which, as discussed below, switched its domestic in-store servers from UNIX to Linux in 2002.

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B. Current Litigation Involving UNIX and Linux

Linux's widespread displacement of UNIX has led to the filing of a number of lawsuits that are relevant to this Court's consideration of SCO's claims against AutoZone. These lawsuits are addressed in turn below.

1. ***SCO Group, Inc. v. Novell, Inc.*, No. 2:04CV00139 (D. Utah filed Jan. 20, 2004)**

On September 19, 1995, Novell entered into an Asset Purchase Agreement (the "APA") with a predecessor of SCO. *SCO v. Novell*, Compl. (attached to Appendix as Ex. D) ¶ 1. Pursuant to the APA, SCO alleges that Novell assigned to SCO certain UNIX copyrights. *Id.* ¶¶ 1, 17. Novell contends that it specifically excluded from the scope of this transfer any of its copyrights in UNIX. *SCO v. Novell*, Mem. in Supp. of Mot. to Dismiss (attached to Appendix as Ex. E), at 2.

On October 16, 1996, Novell and SCO executed an amendment to the APA (the "Amendment"). *Id.* SCO has publicly stated that the Amendment transferred to SCO's predecessor all of Novell's copyrights in the UNIX code. Appendix Ex. D ¶¶ 1, 17. Novell has publicly challenged SCO's assertions and has stated that it still owns the copyrights in the UNIX code that it owned when the APA and the Amendment were executed. *See* Appendix Ex. E.

On January 20, 2004, SCO filed a slander of title action against Novell in state court in Utah. Appendix Ex. D ¶ 1. Novell removed the case to federal court and then filed a motion to dismiss SCO's claims on the grounds, *inter alia*, that neither the APA nor the Amendment transferred any copyrights in the UNIX source code to SCO. *SCO v. Novell*, Notice of Removal (attached to Appendix as Ex. F); Appendix Ex. E at 4-10. SCO has filed a motion to remand the case to state court and has opposed Novell's motion to dismiss. *SCO v. Novell*, Mot. to Remand (attached to Appendix as Ex. G); Pl.'s Memo. in Opp'n to Def.'s Mot. to Dismiss (attached to Appendix as Ex. H). The motions are scheduled for oral argument on May 11, 2004. *SCO v. Novell*, Am. Notice of Hearing (attached to Appendix as Ex. I), at 1.

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2. *SCO Group, Inc. v. Int'l Bus. Mach. Inc.*, No. 2:03CV294 (D. Utah, filed Mar. 25, 2003)

SCO filed suit against IBM in state court in Utah on March 6, 2003, and IBM removed the case to federal court on March 23, 2003. SCO's original claims were for, *inter alia*, misappropriation of trade secrets SCO purported to own in certain UNIX source code and breach of contract based on alleged violations of IBM's licenses with AT&T for the UNIX System V source code. Appendix Ex. C. According to SCO, which claims to be the successor in interest to AT&T's rights under the licenses, IBM breached the licenses by improperly contributing rights SCO claims to own in UNIX System V source code to Linux.

SCO did not identify in its Complaint either the UNIX or the Linux code allegedly at issue, so IBM served SCO with discovery requests in June 2003 aimed at eliciting this information. *See SCO v. IBM*, Order Granting Intern'l Bus. Mach.'s Mots. to Compel Disc. and Reqs. to Prod. of Docs. (entered December 12, 2003) (attached to Appendix as Ex. K). SCO failed to fully identify the code in response to IBM's requests. *Id.* at 2. Accordingly, IBM filed two motions to compel SCO to identify the code. *Id.* at 1. The court granted IBM's motions in an Order dated December 12, 2003. *Id.* As part of its Order, the court ordered SCO to provide IBM with an identification of "the source code(s) that SCO is claiming form the basis of their [sic] action against IBM." *Id.* at 2. The court also scheduled a hearing on February 6, 2004, to evaluate the sufficiency of SCO's responses. *Id.* at 3.

SCO served IBM with additional documents and information prior to the hearing, but IBM disputed that SCO had produced everything the court ordered it to produce. *SCO v. IBM*, Order Re. SCO's Mot. to Compel Disc. and IBM's Mot. to Compel Disc. (entered March 3, 2004) (attached to Appendix as Ex. L), at 2. Two days before the hearing, SCO dropped its trade secrets claims, but maintained its claims that IBM had contributed code to Linux in violation of the UNIX System V source code licenses for which SCO claims to be the successor in interest and added a claim for copyright infringement. *See SCO v. IBM*, Second Am. Compl. (attached to Appendix as Ex. J). In

an Order dated March 3, 2004, the Court found that SCO had not complied in full with the court's December 12 Order and ordered SCO "[t]o fully comply within 45 days of the entry of this order with Court's previous order dated December 12, 2003." Appendix Ex. L at 2.[2]

On March 29, 2004, IBM filed a Second Amended Counterclaim in which IBM requests a declaration from the court that "IBM does not infringe, induce the infringement of, or contribute to the infringement of any SCO copyright through its Linux activities, including its use, reproduction and improvement of Linux, and that some or all of SCO's purported copyrights in UNIX are invalid and unenforceable." Appendix Ex. B ¶ 173. SCO's claims of copyright ownership in the UNIX System V operating system and its allegations that one or more versions of Linux infringe those rights are therefore now directly at issue in *IBM*.

3. *Red Hat, Inc. v. SCO Group, Inc.*, No. 1:03CV772 (D. Del. Filed Aug. 4, 2003)

Red Hat is the country's best-known independent distributor of Linux software. On August 4, 2003, Red Hat sued SCO in the United States District Court for the District of Delaware seeking a declaratory judgment that SCO's purported UNIX copyrights are unenforceable and that Red Hat's use or distribution of Linux does not infringe any purported UNIX copyrights owned by SCO. *Red Hat v. SCO*, Compl. (attached to Appendix as Ex. M) ¶¶ 71 – 74.

SCO moved to dismiss Red Hat's claims on ripeness grounds. *Red Hat v. SCO*, Opening Br. in Supp. of its Mot. to Dismiss (attached to Appendix as Ex. N), at 1. In support of its motion, SCO contended that "[t]he previously filed SCO v. IBM Case addresses most, if not all, of the issues of copyright infringement and misappropriation." *Id.* at 15. SCO therefore argued: "[i]f these issues are decided against SCO in that case, then Red Hat's lawsuit becomes unnecessary." *Id.*

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[2] The 45 day time period for SCO to comply with the court's order expired on April 19, 2004. AutoZone does not know what, if any, additional documents or information SCO produced to IBM. However, if SCO's production mirrored its prior productions, IBM still does not have an identification from SCO of the specific lines of UNIX System V code that SCO claims to be at issue in that case.

The Court recently denied SCO's motion to dismiss. Appendix Ex. A at 1. However, in apparent agreement with SCO's admission that the IBM case involves substantially similar issues, the Court *sua sponte* stayed the *Red Hat* case pending resolution of *IBM*.[3] *Id.* at 4.

C. SCO's Claims Against AutoZone

1. AutoZone's Business and Computer Systems

AutoZone is the nation's leading retailer of automotive parts and accessories, operating approximately 3,300 stores nationwide. AutoZone has servers in its corporate headquarters in Memphis and in each of its retail store locations.

AutoZone formerly used SCO's proprietary "OpenServer" version of UNIX as the operating system for its servers. In 2001, SCO told AutoZone that it would no longer be offering support for its OpenServer product. AutoZone was therefore forced to switch to a new operating system, either one offered by SCO (UnixWare) or an alternative system.[4] AutoZone elected to switch to Linux. AutoZone completed the transition of its domestic in-store servers to Linux in the second half of 2002.

2. SCO's Complaint Against AutoZone

Throughout most of 2003 and early 2004, SCO issued open threats to the Linux end user community that it would be supplementing its lawsuit against IBM with a lawsuit against an end user – presumably in hopes that such threats would coerce Linux users into signing unnecessary license agreements with SCO. *See* Appendix Ex. M ¶ 42. Based upon publicly available information, SCO's threats do not appear to have generated any meaningful licensing activity. SCO thus carried through on its threat and filed the present action against AutoZone.

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[3] On April 20, 2004, Red Hat moved the Court to reconsider its decision to stay the case. Whether Red Hat's motion is granted or not is inconsequential as it relates the present case. For the reasons set forth below, the key issues in *Red Hat* are the same as the key issues in this case. Accordingly, this case should be stayed even if the *Red Hat* case moves forward. This case should also be stayed pending resolution of the *IBM* and *Novell* cases.

[4] SCO apparently changed its mind later because, according to its website, it is continuing to sell the OpenServer product. *See* http://www.thescogroup.com/products/openserver507/.

Broadly described, SCO's Complaint asserts that AutoZone's internal use, distribution, and copying of the Linux operating system infringes copyrights that SCO purports to own in the UNIX operating system. However, the precise nature of SCO's copyright claims cannot be ascertained with any reasonable degree of certainty from the allegations of the Complaint itself.

ARGUMENT AND CITATION OF AUTHORITIES

A. The Court Should Stay this Case Pending Resolution of Previously Filed Actions

This Court possesses the inherent discretion to stay this case. *Clinton v. Jones*, 520 U.S. 681, 706 (1997) ("The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket."). As this Court has previously explained, "[e]very court has the inherent power to stay causes on its docket with a view to avoiding duplicative litigation, inconsistent results, and waste of time and effort by itself, the litigants and counsel." *Stern v. United States*, 563 F. Supp. 484, 489 (D. Nev. 1983).

The Ninth Circuit recognizes that a district court's discretion to stay proceedings has particular application where another action is pending that addresses specific issues raised in the current action.

> [A] trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case. This rule . . . does not require that the issues in such proceedings are necessarily controlling of the action before the court.

Mediterranean Enters., Inc. v. Ssangyong Corp., 708 F.2d 1458, 1465 (9th Cir. 1983) (quoting *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979)). The interests to consider in the determination of whether to stay the proceedings under such circumstances include:

> [T]he possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.

Filtrol Corp. v. Kelleher, 467 F.2d 242, 244 (9th Cir. 1972); *see also Cohen v. Carreon*, 94 F. Supp. 2d 1112, 1115 (D. Or. 2000) (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)).

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Here, consideration of the relevant issues demonstrates that the Court should stay the present case pending resolution of the *Novell*, *IBM* and *Red Hat* cases because those cases will address, and may resolve, the seminal elements of SCO's copyright infringement claim against AutoZone.[5]

1. The Court Should Stay this Case Pending Resolution of *SCO v. Novell*

The first element necessary to establish a claim for copyright infringement is ownership of a valid copyright. *Miracle Blade, LLC v. Ebrands Commerce Group, LLC*, 207 F. Supp. 2d 1136, 1148-49 (D. Nev. 2002); *see also Unix Sys. Labs.*, 1993 WL 414724, at *12 ("In order to prevail [on claims of copyright infringement], Plaintiff must prove that it has a valid copyright in the UNIX [source] code."); *Johnson Controls, Inc. v. Phoenix Control Sys., Inc.*, 886 F.2d 1173, 1175 (9th Cir. 1989). In the analogous context of patent infringement litigation, federal courts have recognized that a stay of proceedings is appropriate when issues of the ownership or validity of a patent are at issue in a previously filed, pending action.[6] For example, in *Gen-Probe, Inc. v. Amoco Corp.*, CNS sued Gen-Probe claiming ownership rights in certain Gen-Probe patents. 926 F. Supp. 948, 951 (S.D. Cal. 1996). Subsequently, Gen-Probe sued Amoco, CNS, and the Regents of the University of California for allegedly infringing, or inducing the infringement of, the same patents purportedly owned by Gen-Probe that were the subject of the previously filed CNS/Gen-Probe case. *Id*

In the later case, Amoco filed a motion to stay the proceedings pending the resolution of the CNS/Gen-Probe case because the issue of ownership asserted in the previous case was an essential

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[5] Under the doctrine of defensive collateral estoppel, SCO will be estopped from litigating against AutoZone issues that were decided against SCO in the previously filed cases. However, because AutoZone is not a party to the previously filed cases, AutoZone may challenge issues decided in SCO's favor in the other cases. *See Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313 (1971) (setting forth rule that once a patent has been declared invalid via judicial inquiry, collateral estoppel prevents the patentee from further litigation involving the patent against other defendants, unless the patentee can demonstrate that it did not have a full and fair chance to litigate the validity of its patent in the earlier case).

[6] The analysis regarding patents is equally applicable to copyrights because the plaintiff must establish ownership or validity in both patent infringement and copyright infringement cases. *See Miracle Blade*, 207 F. Supp. 2d at 1148-49; *Viskase Corp. v. Am. Nat'l Can Co.*, 261 F.3d 1316, 1323 (Fed. Cir. 2001) ("[A]n invalid claim can not be infringed."); *Ryobi N. Am., Inc. v. Emerson Elec. Co.*, 22 F. Supp. 2d 1025, 1027 (E.D. Mo. 1998) ("A patent can only be infringed if it is valid.").

element of Gen-Probe's claim against Amoco. *Id.* at 963. Amoco argued that "if CNS were to succeed in its claims against Gen-Probe, Gen-Probe would be deprived of any ownership interest in the patents in suit, and would lack standing to complain even of Amoco's current acts of infringement." *Id.* After citing the factors in *Filtrol*, 467 F.2d at 244, governing whether to grant a stay, the district court agreed with Amoco and stayed the case until the conclusion of the CNS/Gen-Probe litigation and the resolution of whether Gen-Probe owned the patents at issue in the infringement claim. *Gen-Probe*, 926 F. Supp. at 963-64.

The same situation exists in the present case. As set forth above, the UNIX copyrights that are the subject of SCO's claims against AutoZone are squarely at issue in SCO's lawsuit against Novell.[7] If Novell succeeds in establishing that SCO has no ownership interest in the UNIX copyrights, SCO would lack standing to assert any claims of copyright infringement against AutoZone related to the UNIX copyrights. *See id.* Allowing the *Novell* case to mature to judgment before the same issue is considered in this case will save this Court and the parties substantial time, money and effort, and will reduce the risk of inconsistent judgments. *Stern*, 563 F. Supp. at 489; *Filtrol*, 467 F.2d at 244.

Stay of SCO's lawsuit against AutoZone pending resolution of the *Novell* litigation would cause no prejudice to SCO because SCO already has full opportunity to litigate the ownership issue in *Novell* – a case SCO filed for the very purpose of resolving this issue. SCO's claims against AutoZone are therefore properly stayed pending resolution of the *Novell* case.

2. The Court Should Stay this Case Pending Resolution of *SCO v. IBM* and *Red Hat v. SCO*

The second element necessary to establish a claim for copyright infringement is infringement of the copyright "by invasion of one of the exclusive ownership rights." *Miracle Blade*, 207 F. Supp. 2d at 1148-49; *see also Johnson Controls*, 886 F.2d at 1175. In the present case, SCO alleges that AutoZone has infringed SCO's copyrights in connection with AutoZone's implementation of

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[7] The issue of SCO's ownership of the UNIX copyrights is also being contested in *Red Hat v. SCO* and *SCO v. IBM*. *See* Appendix Ex. M ¶¶ 71 – 74; Appendix Ex. B ¶ 173.

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"one or more versions of the Linux operating system." Compl. ¶ 21. As set forth above, the issue of whether Linux infringes copyrights SCO purports to own in UNIX is already directly at issue in both the *IBM* and *Red Hat* cases. Accordingly, it would be "a waste of judicial resources" for this Court to consider SCO's claims while the *IBM* and *Red Hat* cases are pending. Appendix Ex. A at 5. AutoZone therefore submits that this Court should stay the present action pending resolution of the *IBM* and *Red Hat* cases.

B. In the Alternative, the Court Should Direct SCO to Amend its Complaint to Provide AutoZone with a More Definite Statement of SCO's Claims

Federal Rule of Civil Procedure 8(a) requires each pleading to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). Rule 8 "requires that a complaint must give the opposing party 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Underwood v. Archer Mgmt. Servs., Inc.*, 857 F. Supp. 96, 97 (D.D.C. 1994) (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)). "If the complaint is 'too general,' then it will not provide fair notice to the defendant." *Davis v. Olin*, 886 F. Supp. 804, 808 (D. Kan. 1995).

To state a claim for copyright infringement, a plaintiff must plead ownership of a valid copyright and infringement of that copyright by the defendant. *See Miracle Blade*, 207 F. Supp. 2d at 1148-49; *see also Johnson Controls*, 886 F.2d at 1175. Therefore, a plaintiff must allege the copyright at issue and the acts of alleged infringement to plead a claim for copyright infringement.

Prior to filing an answer, a defendant can move for a more definite statement of the claim if the complaint fails to specify the allegations in a manner that provides sufficient notice of the plaintiff's claims. Fed. R. Civ. P. 12(e). In copyright cases involving computer programs, a plaintiff must plead more than simply the name of the infringing program or system. *See Shepard's McGraw-Hill, Inc. v. Legalsoft Corp.*, 769 F. Supp. 1161, 1162 (D. Colo. 1991) (granting motion for more definite statement regarding complaint that identified only the name of allegedly infringing software program).

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In the present case, SCO has done little more in its Complaint than claim that it owns the copyright in UNIX and broadly plead that unidentified sections of Linux infringe those rights in unidentified ways. SCO has failed to provide even a modicum of information that would allow AutoZone to determine which of the myriad "Copyright Materials" identified in the Complaint have been infringed and how they might have been infringed.

SCO begins its Complaint by listing copyright registrations it purports to own for thirty reference manuals, programmer's guides, and other written documentation related to UNIX. Compl. ¶ 15. The Complaint therefore appears to be headed in the direction of alleging that AutoZone has somehow infringed these written materials. However, after listing the materials, SCO does not specifically mention the materials again in the Complaint. Moreover, based upon the allegations of the first paragraph of the Complaint, SCO's claims appear to be about the infringement of computer code and not reference manuals. Compl. ¶ 1 ("Defendant uses one or more versions of the Linux operating system that infringe on SCO's exclusive rights in its proprietary UNIX System V operating system technology"). Why these written materials are referenced at all is a mystery that cannot be unraveled from reviewing the allegations of the Complaint itself. AutoZone is entitled to an identification of whether SCO is alleging that AutoZone has infringed the copyrights in these materials, and, if so, how.[8]

After discussing the foregoing printed materials, SCO's Complaint changes course and begins discussion of copyrights SCO purports to own in the source code, or the structure, sequence

[8] SCO defines these written materials as part of the "Copyrighted Materials" that includes various versions of the UNIX code. Compl. ¶ 15. SCO broadly alleges that "parts or all of the Copyrighted Material has been copied or otherwise improperly used as the basis for creation of derivative work software code...." *Id.* ¶ 20. It is impossible to tell from the Complaint whether SCO is alleging that AutoZone has made physical copies of some or all of the thirty written manuals and other materials, whether SCO is alleging that the written materials were used by some third party as the inspiration for the creation of Linux, or whether SCO is alleging some other infringement of these materials. If SCO is alleging that AutoZone has made physical copies of the written materials, SCO's Complaint is indefinite because it does not allege which written materials AutoZone has allegedly copied. If SCO is alleging that the written materials served as the inspiration for Linux, SCO's claims would be subject to dismissal under the Copyright Act because the copying of ideas is not actionable under the Copyright Act. 17 U.S.C. § 102(b).

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and organization of the source code, for "many categories of UNIX System V functionality." Compl. ¶¶ 17-19. SCO alleges that Linux infringes all or parts of this code or organization of code, but SCO does not say where or how. Compl. ¶ 20. The closest SCO comes to addressing these issues is in Paragraph 19, in which SCO states that the UNIX code at issue relates to functionality in UNIX that includes -- *but is not limited to* – the following areas:

> System V static shared libraries; System V dynamic shared libraries; System V inter-process communication mechanisms including semaphores, message queues, and shared memory; enhanced reliable signal processing; System V file system switch interface; virtual file system capabilities; process scheduling classes, including real time support; asynchronous input/output; file system quotas; support for Lightweight Processes (kernel threads); user level threads; and loadable kernel modules.

Compl. ¶ 19.

Although this list of functionality appears at first glance to provide valuable information regarding the basis for SCO's claims, closer review reveals that this information does nothing to apprise AutoZone of the nature or basis of SCO's claims. For the sake of brevity, AutoZone will not attempt to address each of these areas of functionality herein. AutoZone will address only SCO's references to the System V static and dynamic libraries, which serve as useful examples of AutoZone's point.

Static and dynamic shared libraries are repositories of software functions and routines that can be used by application developers to perform common tasks. *See SCO v. IBM*, Am. Compl. (attached to Appendix as Ex. O) at ¶¶ 44-45. Functions provided by shared libraries range from simple tasks, such as converting a letter from lower case to upper case, to more complex tasks such as opening a new window inside UNIX's graphical user interface. *Id.* UNIX System V's shared libraries include code that accomplishes these tasks as well as thousands of additional tasks. SCO cannot legitimately claim copyright protection in the code that accomplishes all of these functions because much of this code is plainly not copyrightable. For example, the code in UNIX shared libraries that converts a letter from lower case to upper case is simple code whose expression is

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dictated entirely by function. Such code is not copyrightable as a matter of law. 17 U.S.C. § 102(b); *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 704-05 (2d Cir. 1992) ("[W]e conclude that those elements of a computer program that are necessarily incidental to its function are similarly unprotectable.") Thus, SCO's broad references to the functionality of UNIX's shared libraries does nothing to reasonably apprise AutoZone of the copyrights SCO claims to own in UNIX.

SCO's reference to Linux Versions 2.4 and 2.6 in the next paragraph of its Complaint adds even greater uncertainty regarding the nature and basis of SCO's claims related to static and dynamic shared libraries. Version numbers 2.4 and 2.6 refer to particular versions of the Linux kernel, the core software that is central to the overall Linux operating system. Most of the functionality contained within the UNIX shared libraries is not included in these versions of the Linux kernel. For example, code that opens a window inside UNIX's graphical user interface is not part of either of the Linux kernels SCO references in its Complaint. Since most of the functionality of the UNIX shared libraries is not included in (and cannot be performed by) these versions of the Linux kernel, the code for these functions could not have been infringed by the Linux kernel. SCO's references to UNIX's shared libraries therefore adds greater confusion, not greater clarity, regarding the nature and basis of SCO's claims of copyright protection and infringement.

There is no reason for SCO to have been so obtuse in its pleading, unless SCO is intentionally trying to avoid identifying the nature and basis of its purported claims. The Linux code is freely available to anyone to examine, and SCO has been in possession of the code for years. Indeed, SCO was a distributor and developer of Linux code until *after* it filed its lawsuit against IBM last year. SCO therefore has substantial familiarity with, and can readily identify, the lines, files, or organization of Linux code that it claims infringes UNIX, and SCO can likewise readily identify the corresponding lines, files, or organization of UNIX that SCO claims to be infringed.

With such identification, AutoZone can research and determine whether the identified materials are the subject of SCO's UNIX copyrights, were copied from UNIX, or were properly and independently developed by the open source software community. Such identification is further

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imperative at this stage of the proceedings because it enables AutoZone to determine the applicability of specific affirmative defenses, including laches, fair use, abandonment, equitable estoppel, and whether any of SCO's claims are subject to dismissal or judgment under Rules 12 or 56. Conversely, without such identification, AutoZone will be in the untenable position of having to guess which of the millions of lines of Linux source code, or worse yet, which organizational elements within those millions of lines of code, are the subject of SCO's claims. Rule 8 does not require defendants in federal court litigation to engage in such guessing games. *See Davis,* 886 F. Supp. at 808.

In other circumstances, AutoZone might elect to respond to SCO's Complaint as best AutoZone could without clarification of SCO's claims in confidence that it could later ascertain this information from SCO in discovery. However, SCO's "hide-the-eight-ball" tactics in the *IBM* case leave AutoZone with little realistic belief that SCO will voluntarily identify the basis for its claims without this Court's intervention. SCO filed its Complaint against IBM more than a year ago; yet, at least as of April 18, 2004, SCO still had not provided IBM with any reasonable identification of its claims.

If this case moves forward prior to the conclusion of the *Novell*, *IBM* and *Red Hat* cases, AutoZone submits that it should not have to face the same ambiguities regarding the nature of SCO's claims that IBM has had to face. If SCO wishes to be a plaintiff, it should provide AutoZone with a clear, direct explanation of each of its infringement claims so that AutoZone can frame proper responsive pleadings.

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CONCLUSION

For the foregoing reasons, AutoZone requests that the Court stay this case pending the resolution of the *Novell*, *IBM* and *Red Hat* cases or, in the alternative, direct SCO to amend its Complaint to provide a more definite statement of its claims.

This 23rd day of April, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing **DEFENDANT AUTOZONE, INC.'S MOTION TO STAY OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT** upon all counsel of record by depositing copies of the same in the United States mail with adequate postage affixed thereon, or hand-delivered, addressed as follows:

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This 23rd day of April, 2004.

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