

SETTLEMENT AGREEMENT

This Settlement Agreement is entered into between UNIX System Laboratories, Inc. ("USL"), a Delaware corporation, and The Regents of the University of California (the "University"), a California corporation.

Recitals

1. USL contends it is the owner of the intellectual property rights in portions of certain computer operating system software (the "UNIX System").

2. USL and USL's predecessor in interest, the American Telephone and Telegraph Co. ("AT&T"), have licensed the University to use certain versions of UNIX® system software, prepare derivative works therefrom, and to distribute such works according to the terms of the parties' license agreements.

3. The University has developed operating system software which it has released to third parties (the "BSD Releases"). Portions of the BSD Releases were developed independently by University personnel and others and portions of said releases were derived from versions of the UNIX System licensed to the University.

4. Pursuant to license agreements with the University, USL has incorporated material derived from the BSD Releases in versions of the UNIX System.

5. In July of 1991, the University made a public distribution of certain operating system software known as the Second Networking Release ("Net2").

6. USL has brought an action against the University, the individual members of the Board of Regents of the University (the "Individual Regents"), and Berkeley Software Design, Inc. ("BSDI") in the United States District Court for the District of New Jersey, Civil No. 92-1667 (the "Federal Action") alleging inter alia that Net2 infringes USL's copyright in the UNIX System.

7. The University has brought an action in the Superior Court of the State of California, Alameda County, Case No. 717864-3 (the "State Action"), alleging that USL has failed to comply with certain provisions of its license agreements with the University in connection with USL's distribution of UNIX System software and seeking a declaratory judgment that the University's distribution of Net2 did not violate USL's rights.

8. The University wishes to issue another BSD Release ("4.4 BSD(Lite)") that may be publicly distributed to third

parties free of any claim by USL of restrictions on its use or further distribution.

9. The parties wish to settle and compromise all of USL's claims against the University and the Individual Regents relating to distribution of Net2 and all of the University's claims against USL relating to the UNIX System and the BSD Releases in accordance with the terms and conditions set forth herein.

Definitions

The following definitions apply to terms used in this Settlement Agreement:

1. **Restricted Files** are files contained in Net2 which USL contends contain materials from the UNIX System and/or use or disclose methods and concepts contained in the UNIX System and whose further distribution is restricted pursuant to this Settlement Agreement. A list of the Restricted Files is attached as Exhibit A.

2. **UNIX Derived Files** are files contained in Net2 or 4.4 BSD(Lite) which contain material USL contends is derived from or based upon the UNIX System, but which USL has agreed may be freely distributed subject to the terms of this Settlement

Agreement. The UNIX Derived Files include 23 files from 4.4 BSD(Lite) which, prior to the execution of this Settlement Agreement, USL has reviewed and approved for inclusion in the 4.4 BSD(Lite) release. A list of the UNIX Derived Files is attached as Exhibit B.

3. **Unrestricted BSD Files** are: all files which are contained in Net2 other than the Restricted Files and the UNIX Derived Files.

4. **BSD Derived Materials** are computer files or documents which the University contends are derived from the BSD Releases which are contained in the UNIX System or are otherwise distributed by USL. A list of the BSD Derived Materials is attached as Exhibit C.

5. **Joint Press Release** is the document attached as Exhibit D.

6. **USL Copyright Notice** is a notice in the following form:

© UNIX System Laboratories, Inc. All or some portions of this file are derived from material licensed to the University of California by American Telephone and Telegraph Co. or UNIX System Laboratories, Inc. and are reproduced herein with the permission of UNIX System Laboratories, Inc.

7. **University Copyright Notice** is a notice in the following form:

Copyright © 1982, 1986, 1988
The Regents of the University of California
All Rights Reserved.

8. **University Acknowledgment** is the following statement:

Portions of this document are derived from software developed by the University of California, Berkeley, and its contributors.

Terms of Settlement Agreement

1. **Incorporation of Sections.** The "Definitions" set forth above are incorporated into and are made a part of this section entitled "Terms of Settlement Agreement."

2. **Exchange of Materials for Inspection.**

a. At or prior to the execution of this Settlement Agreement, the University shall deliver to USL a true and authentic copy, in text form, of each of the files listed on Exhibits A and B of this Settlement Agreement.

b. Prior to the execution of this Settlement Agreement, USL shall have delivered to the University, subject to restrictions on use and disclosure, a true and authentic copy of System V, Release 4.0 of the UNIX System. The University shall return such copy upon or prior to execution of this Settlement Agreement.

3. Distribution and Use of Software.

a. The University agrees that it shall not make any further distributions of the Restricted Files. The University also agrees to take reasonable steps to encourage all persons who have obtained access to Net2 to substitute 4.4 BSD(Lite). Such encouragement shall include issuing the Joint Press Release attached as Exhibit D, notifying all University Net2 licensees of the availability of 4.4 BSD(Lite) and providing with said notification a copy of the Joint Press Release, posting the Joint Press Release and a notice on the Internet network about the availability of 4.4 BSD(Lite), and making known 4.4 BSD(Lite)'s availability when inquiries are made; in all such instances, the University shall recommend the substitution of 4.4 BSD(Lite) for Net2. The University agrees to mail a copy of the Joint Press Release to its Net2 licensees within thirty (30) days of the execution of this Settlement Agreement.

b. The University agrees that USL may undertake an effort to advise persons of USL's contention that the Restricted Files may contain material which is proprietary to USL and which may not be copied, distributed, used, or further disclosed without express written permission of USL and that they have a three (3) month grace period within which to cease internal use of the Restricted Files by converting to 4.4 BSD(Lite) or otherwise. USL agrees that it shall take no action based upon the use of such files during the grace period against any person who ceases to make further distribution or disclosure of any material contained in the Restricted Files, including any methods and concepts contained therein, upon receiving such notice and who ceases internal use of the Restricted Files within the three month grace period.

c. USL agrees that it shall take no action against any person who utilizes any methods and concepts in the Restricted Files which as of this date have become available to the general public by acts not attributable to the University, its employees or students. Nothing in this provision shall limit USL's rights against a third party arising out of a breach of any license agreement with USL or AT&T.

d. The University agrees that to the extent 4.4 BSD(Lite) contains any material contained in the UNIX Derived Files, the files in which such matter is contained will include,

in text form, the USL Copyright Notice and list of restrictions on use and distribution of the software required by section 2.e of this Settlement Agreement.

e. Without waiving any of its proprietary rights therein, USL agrees that UNIX Derived Files listed in Exhibit B, or any material therein, may be freely distributed by the University and may be freely reproduced and redistributed by others without payment of any royalties or fees and without execution of any license agreement with USL and/or the University, provided such files or portions thereof include, in text form, a USL Copyright Notice and the same list of restrictions on use and redistribution of the software presently contained in the Net2 version of the file. Attached as Exhibit F is a copy of said notice which has been agreed upon by the parties.

f. USL agrees that it shall affix the University Copyright Notice and the University Acknowledgment to the files listed in Exhibit C in the following manner:

(i) USL shall prepare a notice advising all licensees of UNIXWARE 2.0 that all or part of the files listed in Exhibit C are derived from materials licensed to UNIX System Laboratories, Inc. by the University of California and should be

deemed to contain the University Copyright Notice and the University Acknowledgment (the "Notice").

(ii) A printed copy of the Notice shall be distributed with all copies of UNIXWARE 2.0 distributed prior to January 31, 1995.

(iii) All copies of UNIXWARE 2.0 distributed prior to April 30, 1994 shall contain at least one "readme" file, in the root directory, setting forth the text of the Notice.

(iv) All copies of UNIXWARE 2.0 distributed after April 30, 1994 shall contain a "readme" file setting forth the text of the Notice in each directory containing any of the files set forth in Exhibit C, other than the .mk files, that does not contain a copy of the University Copyright Notice and the University Acknowledgment.

(v) In any future release of the UNIX System issued following the issuance of UNIXWARE 2.0, USL shall include the University Copyright Notice and the University Acknowledgment in all of the files listed in Exhibit C, other than the .mk files (the "Files"). In all events, USL shall include the

University Copyright Notice and the University Acknowledgment in all such Files in any copies of UNIXWARE 2.0 distributed after January 31, 1995. If any such File contains a copyright notice reflecting publication by the University at some date earlier than the dates appearing in the University Copyright Notice, USL shall not delete the reference to such earlier date(s) of publication, but shall include those dates in addition to the later dates reflected in the University Copyright Notice.

g. In any future release of the UNIX System issued following the issuance of UNIXWARE 2.0, USL shall include the University Acknowledgment in all .mk files listed on Exhibit C. In all events, USL shall include in any copies of UNIXWARE 2.0 distributed after January 31, 1995 the University Acknowledgment in all such .mk files.

h. USL agrees that it shall affix the University Copyright Notice on and include the University Acknowledgment in any future editions of the publications listed in Exhibit E and any new publications, documentation, instructions, books, pamphlets, or electronic or written communication of any kind including those for UNIXWARE 2.0, which include the BSD Derived Materials (the "New Publications"). If any such New Publications

have already been printed for UNIXWARE 2.0 without the University Copyright Notice and without the University Acknowledgment, USL shall reprint or amend them in such a way as to include said Notice and Acknowledgment.

i. USL agrees that it shall take no action based on the use or distribution by any person of material contained in the Unrestricted Files.

4. **Joint Press Release.** The parties agree to the issuance of the Joint Press Release within fifteen (15) days of the execution of this Settlement Agreement and to issue or authorize no statements which are inconsistent therewith.

5. **Stipulations.** Upon execution of this Settlement Agreement, the parties shall instruct their respective attorneys to enter into a stipulation in the United States District Court for the District of New Jersey, consenting to the vacatur of the orders and decisions entered in the Federal Action on March 3 and 30, 1993 denying USL's motion for a preliminary injunction and to the dismissal of the Federal Action, with prejudice and without costs to any party.

6. **State Action Dismissal.** Within fifteen (15) days following execution of this Settlement Agreement, the University shall file a dismissal of the State Action, with prejudice.

7. **Further Participation in Litigation.** The University agrees that it will not actively assist or support BSDI's defenses or counterclaims in the Federal Action or the efforts of any other party who asserts in any action the right to copy, use, or disclose to non-licensees of USL any of the material contained in the Restricted Files or the invalidity of USL's proprietary rights in the UNIX System. However, nothing in this provision shall prohibit the University from responding to any discovery permitted a third party under federal or state law or from defending any claim that may be asserted against the University or the Individual Regents.

8. **Releases.**

a. USL hereby releases the University and the Individual Regents, their agents, servants, employees, predecessors, successors, parents, subsidiaries, affiliates and any other persons acting on their behalf, from any and all claims, whether known or unknown, arising out of or relating to the University's development and distribution of Net2 and any other matter that was the subject of any of the claims asserted by USL in the Federal Action.

b. The University hereby releases USL, its agents, servants, employees, predecessors, successors, parents, subsidiaries, affiliates and any other persons acting on their

behalf from any and all claims, whether known or unknown, arising out of or relating to USL's distribution of the UNIX System or any other products, documents or materials (including specifically any claim that USL failed to provide adequate recognition or proper notice in such products, documents or materials), or any other matter which was the subject of any of the claims asserted by the University in the State Action.

c. USL and the University waive the provisions of California Civil Code section 1542, which provides as follows:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

9. The University's Representations and Warranties.

a. The University hereby represents and warrants that the execution, delivery, and performance of this Settlement Agreement has been duly authorized by all necessary action, and that the individual who executes this Settlement Agreement on the University's behalf is duly authorized to do so.

b. The University hereby represents and warrants that the files delivered to USL pursuant to Section 2(a) of this

Settlement Agreement are true and authentic copies of such files as included in Net2 or 4.4 BSD(Lite).

c. The University hereby represents and warrants that, to the best of its knowledge, information, and belief, with the exception of the UNIX-Derived files, 4.4 BSD(Lite) does not contain any material or methods and concepts (other than methods or concepts that have become available to the general public by acts not attributable to the University, its employees or students) contained in (i) the Restricted Files or (ii) any other UNIX System Software which is proprietary to USL. The University further represents and warrants that, to the best of its knowledge, information, and belief, to the extent 4.4 BSD(Lite) contains material distributed with the UNIX System which is not proprietary to USL, the University has been authorized to include such material in 4.4 BSD(Lite) by the owner of the rights thereto. In the event the University learns that 4.4 BSD(Lite) contains any materials which would violate any of the terms of this paragraph, the University shall so notify USL, promptly remove such material from future distributions of 4.4 BSD(Lite), and take appropriate action to advise persons who have received copies of 4.4 BSD(Lite) to remove such materials from their copies.

10. USL's Representations and Warranties.

a. USL hereby represents and warrants that the execution, delivery, and performance of this Settlement Agreement has been duly authorized by all necessary action, and that the individual who executes this Settlement Agreement on USL's behalf is duly authorized to do so.

b. USL hereby represents and warrants that the software delivered to the University pursuant to Section 2(b) of this Settlement Agreement is a true and authentic copy of System V, Release 4.0 of the UNIX System.

11. Counterparts. This Settlement Agreement may be executed in one or more counterparts, and by the parties hereto in separate counterparts, each of which shall be deemed to be an original but all of which taken together shall constitute one and the same Settlement Agreement.

12. Fees and Costs. Each party to this Settlement Agreement shall pay its own costs and attorney's fees.

13. Non-Admission. This Settlement Agreement shall not constitute or be construed as an admission of liability by one party to the other or to any third party.

14. **Successors and Assigns.** The burdens and benefits of this Settlement Agreement shall be binding upon the respective successors and assigns of USL and the University.

15. **Confidentiality.** Subject to the parties' agreement to issue the Joint Press Release, the parties agree to keep the contents of this Settlement Agreement confidential. The parties shall not provide a copy of this Settlement Agreement to anyone other than to those select employees of the parties and, in the case of USL, its parent, Novell Corporation, which have a legitimate need for access to this Settlement Agreement. This provision shall not preclude either party from disclosing the contents of this Settlement Agreement as necessary to inform others of the settlement, the restrictions on further use and distribution of Net2, and the parties' agreement regarding the use of 4.4 BSD(Lite). This provision shall not preclude the University from producing a copy of this Settlement Agreement if required to do so by federal or state law nor shall it preclude the parties from generally describing this Settlement Agreement in terms consistent with the Joint Press Release.

16. **Effect on UNIX Software License Agreements.** This Settlement Agreement shall not relieve either party of its respective rights and obligations pursuant to the existing UNIX software license agreements between the University and AT&T or USL, nor shall it alter any of the terms of such agreements.

17. **Amendments.** This Settlement Agreement may be amended only by a written instrument executed by all the parties hereto.

18. **Entire Agreement.** This Settlement Agreement, including the Exhibits attached hereto, constitutes the entire agreement of the parties hereto with respect to the allegations and issues raised in the Federal Action and the State Action and supersedes any and all prior agreements of the parties, oral and written, with respect to the allegations and issues raised in said Actions.

DATED: 2/4/94

UNIX SYSTEM LABORATORIES, INC.

By: 

Title: SENIOR CORPORATE COUNSEL

DATED: 2/4/94

APPROVED AS TO FORM

By: 

Burton I. Levine, Esq.

Title: Senior Corporate Counsel,
UNIX System Laboratories,
Inc.

DATED: February 4, 1994

THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA

By: 

JOSEPH CERNY

Title: PROVOST FOR RESEARCH

DATED: February 4, 1994

APPROVED AS TO FORM

By: 

MARY E. MACDONALD, Esq.

Title: Attorney for The Regents of
the University of
California