

# SCO GROUP v. IBM: THE FUTURE OF OPEN-SOURCE SOFTWARE

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## I. INTRODUCTION

What started as a contract dispute between Caldera Systems, Inc. (“Caldera”), and International Business Machines Corporation (“IBM”) has blossomed into a massive legal effort with the potential to change the entire open-source software movement.<sup>1</sup> Developers of open-source software, which is largely defined by the success of the Linux operating system, had envisioned bringing reliable software to everyone at little or no cost. But legal action may derail that vision. Caldera, which now operates as the SCO Group (“SCO”), claims that IBM illegally introduced parts of its copyrighted Unix software into open-source Linux, thus creating copyright infringers out of every Linux distributor, developer, and user. SCO’s legal actions have recently expanded beyond its suit against IBM, and it is now threatening to sue companies that use Linux without paying a Unix licensing fee. Given the proliferation of Linux throughout the business world, the outcome of this case could have a wide-ranging impact. At a minimum, this case will delineate the future course for open-source software.

## II. LINUX BACKGROUND

Linux is an operating system designed to function like the Unix operating system, while at the same time avoiding some of the technical and legal problems that Unix presented.<sup>2</sup> The primary “problem” with Unix concerns its ownership, which means that its use, distribution, and

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1. For a general statement describing the open-source movement, see Free Software Foundation, Inc., at <http://www.gnu.org/fsf/fsf.html> (last visited Feb. 13, 2004). The Free Software Foundation’s mission statement is as follows:

The Free Software Foundation (FSF), founded in 1985, is dedicated to promoting computer users’ right to use, study, copy, modify, and redistribute computer programs. The FSF promotes the development and use of free (as in freedom) software—particularly the GNU operating system (used widely today in its GNU/Linux variant)—and free (as in freedom) documentation. The FSF also helps to spread awareness of the ethical and political issues of freedom in the use of software.

*Id.*

2. Evan P. Schultz, *Is the Future Free?*, LEGAL TIMES IP MAGAZINE, Oct. 13, 2003, at 15.

development are all subject to regulation by its owner.<sup>3</sup> SCO, in fact, owns the rights to sell Unix and has the ability to license those rights to a number of different companies.<sup>4</sup> In turn, these licensees develop their own variations of Unix, often called “flavors,” that they then sell to their customers.<sup>5</sup> Until relatively recently, Linux could not compete with the functionality of the different flavors of Unix, and therefore, Linux was not seen as a viable alternative.<sup>6</sup> This situation changed, however, as more and more groups began supporting Linux and putting their time and money behind its development. Thanks in part to both the efforts of technology companies like IBM and to overall cost advantages, Linux is now a direct competitor of Unix and has overtaken the use of Unix in a number of different business computing applications.<sup>7</sup>

From a legal perspective, the premier achievement of the Linux development effort was devising a way to avoid being proprietary. The source code for Linux is freely available to everyone, hence its characterization as “open-source.” At the heart of all Linux systems is “the kernel,” which is developed by individuals, companies, and organizations working on their own time, with their own money.<sup>8</sup> What makes this system of development and free availability possible is the GNU<sup>9</sup> Project’s General Public License (“GPL”), which is the legal framework that protects most open-source software today.<sup>10</sup> The purpose of the GPL is to ensure that all computer code licensed under it remains open for everyone to see and modify.<sup>11</sup> It works by making its terms mandatory for those who distribute or modify software covered by the GPL and by requiring that any modifications be made available to the public for free.<sup>12</sup> This means that every developer and distributor of Linux must agree to the terms of the GPL, and, should they change the

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3. Ownership is seen as a problem because, when software is owned, the owner typically restricts the rights of developers and users to alter, copy, or redistribute a program. Thus, the end user is ultimately limited in his use to what the owner will allow. “Free software,” as open-source software is sometimes called, solves this problem by allowing users much more freedom with the software. For an extensive listing of the freedoms allowed and a definition of what constitutes “free software,” see Free Software Foundation, *The Free Software Definition*, at <http://www.gnu.org/philosophy/free-sw.html> (last visited Feb. 13, 2004).

4. Reuters News Service, *SCO Approached Google About Linux License* (Jan. 9, 2004), available at <http://www.forbes.com/markets/bonds/newswire/2004/01/09/rtr1205268.html>.

5. See SCO’s Amended Complaint at ¶ 28, *Caldera Sys., Inc. v. Int’l Bus. Machs. Corp.* (D. Utah 2003) (No. 03-CV-0294), available at <http://www.thescogroup.com/ibmlawsuit/amendedcomplaintjune16.html> [hereinafter SCO’s Amended Complaint].

6. *Id.* at ¶¶ 82–84.

7. Linux Online, Inc., *What is Linux*, at <http://www.linux.org/info/index.html> (last visited Feb. 13, 2004).

8. *Id.*

9. GNU is a recursive acronym which stands for “GNU’s Not Unix.” See The GNU Project and the Free Software Foundation, *GNU’s Not Unix!*, at <http://www.gnu.org/home.html> (last visited March 31, 2004).

10. Linux Online, Inc., *supra* note 7.

11. See Schultz, *supra* note 2.

12. See Free Software Foundation, Inc., *GNU General Public License*, Linux Online, Inc., Version 2, ¶ 5, at <http://www.linux.org/info/gnu.html> (June 1991).

kernel, make any changes known to the public.<sup>13</sup> This disclosure requirement prevents any innovations from being kept secret and allows developers to take advantage of the previous developer's work. In this sense, the GPL allows Linux development to be self-propagating; any advancements are shared with the public so that others might advance the development even further.

While Linux is called open-source, which means its source code is freely-distributed and available to the general public, it is not necessarily "free" in terms of price. In fact, several companies have emerged as profit-making Linux distributors either by charging a fee for service and support or by selling the hardware on which Linux can run.<sup>14</sup> These companies are now considered direct competitors to most Unix distributors, and it is this competition between Linux and Unix distributors that is fueling SCO's current legal battles.

### III. *SCO v. IBM*

IBM has developed and marketed its own version of Unix, dubbed AIX Unix, since the mid-1980s.<sup>15</sup> This development occurred pursuant to a number of different agreements with AT&T Technologies, Inc., the original owner and developer of Unix.<sup>16</sup> These agreements were maintained as subsequent owners purchased the rights to Unix. Eventually, SCO purchased Unix and as a result became party to the agreements.<sup>17</sup> However, SCO has recently purported to have canceled these agreements<sup>18</sup> —the same agreements that now form the center of SCO's lawsuit against IBM.<sup>19</sup>

On March 6, 2003, SCO filed a lawsuit against IBM in Utah state court, initially citing four causes of action: misappropriation of trade secrets, unfair competition, interference with contract, and breach of contract.<sup>20</sup> The number of causes was later amended to six,<sup>21</sup> but each of the causes was based on one main action: IBM's alleged incorporation of SCO's proprietary UNIX code into the open-source Linux operating

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13. *Id.*

14. See, e.g., Dan Orzech, *Can You Make Money Selling Linux? Try \$3.5 Billion*, CIO Information Network, at <http://www.cioupdate.com/news/article.php/1574431> (Jan. 24, 2003) ("Linux itself may be available for free, says [Hewlett Packard's Linux director Judy] Chavis, 'but customers who are running their businesses on it are willing to pay for the value-add of services and support.'").

15. IBM's Amended Counterclaims at ¶ 12, *Caldera Sys., Inc. v. Int'l Bus. Machs. Corp.* (D. Utah 2003) (No. 03-CV-0294), available at <http://www.thescogroup.com/ibmlawsuit/ibmamendedcounterclaims.pdf> [hereinafter IBM's Amended Counterclaims].

16. *Id.*

17. *Id.* at ¶ 15.

18. *Id.* at ¶ 57.

19. *Id.* at ¶ 53.

20. SCO, *SCO Files Suit Against IBM*, at <http://www.thescogroup.com/ibmlawsuit/> (last visited Feb. 4, 2004).

21. See SCO's Amended Complaint, *supra* note 5, at ¶¶ 103–70.

system.<sup>22</sup> According to SCO's amended complaint, "[a]s a result of IBM's wholesale disregard of its contractual and legal obligations to SCO, Linux 2.4.x and the development Linux kernel, 2.5.x, are filled with UNIX source code, derivative works and methods. As such, Linux 2.4.x and Linux 2.5.x are unauthorized derivatives of UNIX . . . ."<sup>23</sup> SCO initially claimed over \$1 billion in damages, but later amended this figure to claim over \$3 billion total.<sup>24</sup> The trial date is set for March 11, 2005.<sup>25</sup>

IBM filed a countersuit in response to SCO's allegations, claiming that SCO is currently violating some of IBM's copyrights and patents.<sup>26</sup> IBM also asserts that it had expanded its agreements with a previous owner of Unix and had acquired the "irrevocable, fully paid-up, perpetual right to exercise all of its rights" under the previous Unix licensing agreements.<sup>27</sup> Under such a theory, SCO would not have the right to cancel the agreements they have purportedly terminated. IBM's counterclaim also points out that SCO was itself a modifier and distributor of Linux and, as such, was required to acquiesce to the terms of the GPL.<sup>28</sup> From IBM's point of view:

By distributing Linux products under the GPL, SCO agreed, among other things, not to assert . . . 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.<sup>29</sup>

Thus, if SCO is found to have implicitly agreed to the terms of the GPL by distributing Linux, then SCO may not have a basis to assert infringement claims against anyone. For its part, SCO has denied "the applicability or enforceability of the GPL,"<sup>30</sup> which may force the courts to determine the ultimate validity of the GPL.

#### IV. SCO'S OTHER BATTLES

In addition to the lawsuit against IBM, SCO has also begun to pursue other alleged violators of its intellectual property rights. One of its most notable, and arguably one of its most controversial, actions was

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22. IBM's Amended Counterclaims, *supra* note 15, at ¶ 53.

23. SCO's Amended Complaint, *supra* note 5, at ¶ 4.

24. SCO's Amended Complaint, *supra* note 5, at Prayer for Relief.

25. Michael Singer, *SCO to Expand its Lawsuit Beyond Linux*, INTERNETNEWS.COM, at <http://www.internetnews.com/dev-news/article.php/3110981> (Nov. 19, 2003) [hereinafter *SCO to Expand*].

26. IBM's Amended Counterclaims, *supra* note 15, at ¶ 2.

27. *Id.* at ¶ 15.

28. *Id.* at ¶ 28.

29. *Id.*

30. SCO's Answer to IBM's Amended Counterclaims at ¶ 108, *SCO Group, Inc. v. Int'l Bus. Machs. Corp.* (D. Utah 2003) (No. 03-CV-0294), available at <http://www.thescogroup.com/ibmlawsuit/AnswerAmendCC.10-24-03.pdf>.

the mailing of notices to over 1,500 companies that currently use Linux.<sup>31</sup> These notices stated that use of the Linux operating system violated SCO's rights as a copyright holder, and SCO further offered to sell licenses to the alleged violators to remedy the infraction.<sup>32</sup> The cost of the license was around \$700-per-server, and the notice stated that those who refused the offer could face litigation.<sup>33</sup> This risk of litigation has forced some companies to reevaluate their positions on Linux, but it has not yet had a major impact on Linux sales.<sup>34</sup>

In a situation that is intimately related to the dispute with IBM, SCO has initiated legal action against Novell, Inc. ("Novell"), filing a slander of title lawsuit against the company on January 20, 2004.<sup>35</sup> SCO alleges that Novell improperly filed copyright registrations for Unix technology that is already covered by SCO's copyrights, and that Novell made false public statements regarding the ownership of Unix.<sup>36</sup> Novell previously owned the rights to Unix, and SCO claims that it gained the rights to Novell's copyrights through an asset purchase agreement executed at the time Novell sold Unix to SCO.<sup>37</sup> For its part, Novell claims that the UNIX copyrights were never part of the asset transfer agreement, and that it would be impossible for SCO to demonstrate that it has any ownership whatsoever in the copyrights.<sup>38</sup> Novell recently acquired a major Linux distributor, SuSE Linux,<sup>39</sup> so its interest in SCO's claims goes well beyond the slander of title lawsuit. If Novell is able to prove that it still owns the Unix copyrights, SCO would no longer have a basis upon which to sue Linux users, causing significant damage to its case against IBM.

## V. RESPONSES TO SCO'S ACTIONS

It need hardly be said that reactions to SCO's legal forays have not been positive within the Linux community. *Business Week* recently

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31. David Bank, *SCO to Sue a Major User of Linux*, WALL ST. J., Nov. 19, 2003, at B9, available at 2003 WL-WSJ 68128837.

32. *Id.*

33. *Id.*; *SCO to Expand*, *supra* note 25 (quoting SCO Group CEO Darl McBride as saying, "SCO is contacting customers to either license or litigate.").

34. Jim Kerstetter, *The Most Hated Company in Tech*, BUSINESSWEEK ONLINE, at [http://businessweek.com/magazine/content/04\\_05/b3868104\\_mz063.htm](http://businessweek.com/magazine/content/04_05/b3868104_mz063.htm) (Feb. 2, 2004) (noting Linux server sales were up 49.8% from a year ago as compared with 2% growth for the rest of the market).

35. SCO's Complaint Against Novell at ¶ 8, SCO Group, Inc. v. Novell, Inc. (Utah Dist. Ct. 2004) (Civil No. 040900936), available at [http://www.thescogroup.com/novell/complaint\\_filing\\_jan\\_20\\_2004.pdf](http://www.thescogroup.com/novell/complaint_filing_jan_20_2004.pdf) [hereinafter SCO's Complaint Against Novell].

36. Alex Wolfe, *SCO Targets Novell in Slander Suit*, INTERNETNEWS.COM, at <http://www.internetnews.com/bus-news/article.php/3301341> (Jan. 20, 2004).

37. SCO's Complaint Against Novell, *supra* note 35, at ¶ 1.

38. Letter from Jack L. Messman, Chairman and CEO, Novell, Inc., to Darl McBride, Chairman and CEO, The SCO Group, Inc. (May 28, 2003), at [http://www.novell.com/licensing/indemnity/pdf/5\\_28\\_03\\_n-sco.pdf](http://www.novell.com/licensing/indemnity/pdf/5_28_03_n-sco.pdf).

39. See Stephen Shankland, *Novell Offers Legal Protection for Linux*, CNET NEWS.COM at <http://news.com.com/2100-7344-5139632.html> (Jan. 13, 2004).

dubbed SCO “The Most Hated Company in Tech,” and numerous hackers have attacked SCO.<sup>40</sup> The so-called MyDoom virus, which was one of the fastest spreading computer viruses to date, was viewed by some as an escalation of the “Linux War,” in that it was designed to launch a denial-of-service attack on SCO’s website.<sup>41</sup> But aside from such extra-legal techniques, Linux users and developers are also taking steps to defend themselves legally.

The Open Source Development Labs (“OSDL”) is a global consortium of companies dedicated to accelerating the use of Linux computing.<sup>42</sup> In addition to providing technical support for testing and developing software and educating its members about advancements in the Linux community, OSDL has established a special fund to help pay legal fees for litigation threatened by SCO against Linux users.<sup>43</sup> The fund’s goal is to raise ten million dollars through donations from individuals, organizations, and companies.<sup>44</sup> As of January 2004, OSDL had received more than three million dollars in pledges for the fund from companies such as Intel and IBM.<sup>45</sup> While the protocols for companies requesting funds have not been fully developed as of this writing,<sup>46</sup> the threshold for access to the funds is intended to be low, in keeping with OSDL’s desire to see relevant issues relating to SCO’s claims contested in the courts.<sup>47</sup>

Legal protection for Linux users is also coming from some of the companies selling Linux. Novell recently expanded its open-source offerings through its acquisition of SuSE Linux and began offering its Linux customers legal protection for using the operating system.<sup>48</sup> In a copyright infringement lawsuit, Novell will indemnify its Linux customers for up to \$1.5 million, or a factor of 1.25 of the customer’s software purchase price.<sup>49</sup> Additionally, Hewlett-Packard (“HP”) offers its Linux customers indemnification from SCO lawsuits involving

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40. Kerstetter, *supra* note 34.

41. See Jeordan Legon, *Experts: Vicious Worm ‘Linux War’ Weapon*, CNN.com at <http://www.cnn.com/2004/TECH/internet/01/27/mydoom.spread/index.html> (Jan. 28, 2004).

42. Open Source Development Labs, Inc., OSDL Mission, at [http://www.osdl.org/about\\_osdl/](http://www.osdl.org/about_osdl/) (last visited Feb. 4, 2004).

43. Open Source Development Labs, Inc., *OSDL Establishes \$10 Million Legal Fund to Address SCO’s Ongoing Threat to Sue Linux Customers* at [http://www.osdl.org/newsroom/press\\_releases/2004/2004\\_01\\_12\\_beaverton.html](http://www.osdl.org/newsroom/press_releases/2004/2004_01_12_beaverton.html) (last visited Jan. 12, 2004). The fund will also be used to cover the legal fees of Linus Torvalds, the creator of Linux. *Id.*

44. *Id.*

45. See also Michael Singer, *Intel Chips in for Linux Defense*, INTERNETNEWS.COM at <http://www.internetnews.com/dev-news/article.php/3297961> (Jan. 12, 2004) [hereinafter *Intel Chips*].

46. Open Source Development Labs, Inc., *OSDL Legal Defense Fund FAQ*, at [http://www.osdl.org/about\\_osdl/legal/lldf/lldf\\_description.html](http://www.osdl.org/about_osdl/legal/lldf/lldf_description.html) (last visited Feb. 18, 2004).

47. *Intel Chips*, *supra* note 45 (quoting Nelson Pratt, OSDL marketing director, as saying, “we’re just intending to make sure the issues emanating from SCO are contested in a court of law and, once settled, will have an impact across the entire industry.”).

48. See Shankland, *supra* note 39.

49. *Id.* ¶ 4.

intellectual property rights, so long as certain conditions are met.<sup>50</sup> These offers of indemnification are likely to put pressure on other Linux distributors to offer similar protections. In lieu of offering indemnification, another major Linux distributor, Red Hat, Inc. (“Red Hat”) has decided to turn the tables on SCO, and has sued for declaratory judgment that Red Hat is not using SCO’s code.<sup>51</sup>

## VI. POTENTIAL IMPLICATIONS FOR THE FORESEEABLE FUTURE

It does not appear as though any of the questions surrounding *SCO v. IBM* will be easily settled. Most of the main players have enough funding to sustain the enormous costs that are sure to accompany such a legal battle, and the issues involved are too important for either side to concede. The way in which the story will progress depends, in large part, on which of the legal questions is decided first. If SCO fails to show that it owns the copyrights to Unix, then the rest of the controversies will lose most of their importance. SCO has not made any patent or trademark claims and has yet to assert such intellectual property rights. In addition, the trade secret claims that SCO is asserting against IBM will not likely affect others in the Linux community. Thus, its only legal claims against developers and end-users of Linux lie within the realm of copyright.<sup>52</sup> As the copyright issue goes, so too will the majority of SCO’s legal bases for claims of infringement.

More important, and possibly more troubling to the open-source community, are the legal questions involving the validity of the GPL. The courts could potentially invalidate the GPL, regardless of the ultimate outcome of the suit against IBM, since SCO’s case is not wholly dependent on the issue. This would have an enormous effect on the development of all types of open-source software. At the same time, the courts may dodge the issue entirely or even affirmatively validate the GPL, both of which could be seen as positive outcomes for the open-source community. Even though the GPL issue is of somewhat secondary importance to SCO’s case against IBM, a decision on that issue is perhaps most important to the rest of the world.

## VII. CONCLUSION

The impact that the legal battle between SCO and IBM will have on Linux and the development of open-source software is yet to be

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50. Hewlett Packard, Inc., *HP Indemnifies Linux Customers Against SCO Lawsuit, Frequently Asked Questions*, ¶ 5, at <http://h10018.www1.hp.com/wwsolutions/linux/download/sco-indemnify-qa.pdf> (Sept. 24, 2003) (discussing conditions such as direct purchase of Linux software from HP, use on HP hardware, and HP service contract support).

51. Schultz, *supra* note 2, at 15.

52. For a more detailed analysis of SCO’s legal posture, see Eben Moglen, *Questioning SCO: A Hard Look at Nebulous Claims*, Open Source Development Labs, at [http://www.osdl.org/docs/osdl\\_eben\\_moglen\\_position\\_paper.pdf](http://www.osdl.org/docs/osdl_eben_moglen_position_paper.pdf) (last visited Feb. 13, 2004).

determined. It is clear, however, that the case is one to keep a close eye on, for it has the potential to derail the momentum that has been building behind the open-source movement. Linux has become big business for a number of companies, and it continues to grow in terms of economic and technological importance. The outcome of this case may change all of that, which is why it is of such concern to so many people. In resolving the dispute between SCO and IBM, a jury may ultimately be dictating the future of open-source software.