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IBM vs. SCO: Now it's IBM's turn

Feb. 22, 2006

[Updated Feb. 23] -- For months, years, it's all been about what SCO could discover about IBM, Linux, and Unix. The shoe's on the other foot now, as the US District Court in Utah has revealed that IBM has launched discovery motions against Microsoft, Sun Microsystems, Hewlett-Packard, and BayStar Capital.

In general, IBM is looking for detailed information about each company's recent dealings with The SCO Group. This includes their financial relationships, and any access or use of Unix source code by their programmers.

During March, each of the companies must give depositions on their SCO business relationships. All four have had close partnerships with SCO in the last few years.

In the summer of 2003, Microsoft started buying what would amount to approximately \$16.6 million worth of SCO's Unix licenses. Although a Microsoft spokesperson claimed at the time that, "There is absolutely no correlation between the IBM suit and our IP license with SCO," many people saw this as proof that Microsoft was bankrolling SCO's lawsuit in an attempt to stall Linux's growth.

That October, BayStar Capital put together a \$50 million investment in SCO. Rumors quickly spread that Microsoft had been behind this investment. Both companies denied this story. However, a leaked memo showed that there was a connection between the companies and in March, 2004, BayStar finally confessed that Microsoft had midwived its SCO investment.

BayStar's investment in SCO would end badly, though, after the Larkspur, Calif. investment firm tried to take SCO over. It was BayStar's intention to have SCO completely drop its Unix and software business and focus all its resource on its IBM and Linux litigation.

After battling with SCO management, BayStar finally gave up in June 2004. SCO and BayStar continued to fuss with each other, though, until that August. In the end, SCO still ended up profiting from the deal.

What IBM wants from both BayStar and Microsoft is to see "All communications or agreements with" each other and other companies, such as the Royal Bank of Canada, which also invested for a short time in SCO, and Everyones Internet Ltd., a Web-hosting company that had a brief moment of fame as the one company that signed an IP agreement with SCO to use Linux.

Sun and SCO Group currently have a good working relationship and have had one for years.

Sun also paid SCO in 2003 approximately \$13.3 million for Unix SVR4 (System V Release 4) code licensing rights, which was, at the time, said to be used for drivers for Solaris on Intel. As part of the deal, Sun also received a warrant to buy as many as 210,000 shares of SCO stock at \$1.83 per share.

Because of this deal, Sun has also been accused of paying SCO's way to sue IBM and Linux supporters. In April 2005, Sun would start open-sourcing Solaris, which is based in part on SVR4 Unix, with SCO's blessing.

Sun spokesman Brett Smith has said the company was being extremely careful to ensure that its Unix intellectual property is "very clean."

"We've always made sure we're very aboveboard," Smith said. "We've made sure the i's are dotted, the t's are crossed." Before the 2003 contract was signed, Sun had spent \$82 million acquiring rights to use Unix, Smith said. Among Sun's privileges is the right to show Solaris's underlying source code to customers, SCO said.

Scott McNealy was asked (at a Nov. 15, 2004 press conference introducing Solaris 10), "What proprietary code had to be taken out of Solaris in preparation for open sourcing it?" McNealy responded by saying that the process of open sourcing Solaris actually started five years ago [or in 1999].

"There were hundreds of encumbrances to open sourcing Solaris. Some of them we had to buy out, others we had to eliminate. We had to pay SCO more money so we could open the code -- I couldn't say anything about that at the time, but now I can tell you that we paid them that license fee to expand our rights to the code," McNealy said, referring to the February 2003 expanded Unix SVR4 license rights purchase from the SCO Group.

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Because of these developments, IBM now wants information about "restrictions or prohibitions on Sun employees having access to any UNIX product, including, but not limited to, its source code." In addition, IBM wants to know about any "discussions of business opportunities between SCO and Sun."

Sun spokesperson Joanne Kising said that the company would have no comment on the subpoenas that were handed to it by IBM on Tuesday as part of the SCO Group lawsuit against Big Blue.

A Microsoft spokesman responded to *Linux-Watch.com* later in the day Wednesday with the following statement:

"We haven't been served but understand we will be shortly.

"SCO's suit against IBM is an issue between those two companies, now in the hands of the court. Microsoft is not involved in any way with or contributing to SCO's current actions with IBM or other industry actions.

"As in other cases, we will respond to proper discovery in due course. It's important to note, however, that Microsoft, like many other companies, receives literally hundreds of requests for third-party discovery for cases in which it has no involvement."

Neither HP nor BayStar returned calls in time for this article.

In the case of HP, which is an active SCO partner and ships its main operating system, OpenServer, on its server hardware, IBM wants to know about HP's Unix contract licensing and if there's any connection between HP's Linux indemnification program and SCO.

Mike Anderer, a veteran software developer and entrepreneur (Realm) who wrote the now-famous "Halloween X" document and helped arrange BayStar's \$50 million investment in the SCO Group, responded to a *Linux-Watch* query late Wednesday night via email.

"I do not think these subpoenas surprised anybody, I think all the lawyers expected them," Anderer wrote. "I suspect that they just waited until the last minute so they could get the maximum amount of information ... Once Discovery closes and the depositions are completed, it will probably be reduced to a bunch of procedural moves over the next 9-12 months, leading up to a court date (assuming the case survives all the procedural moves, which at least some of the claims probably will survive until the court date -- just a guess on my part).

"At that point, I guess everybody evaluates their position and the risk of any type of loss, and maybe they will settle on the way to the courthouse. I do not think any court case is a sure thing and the stakes are so large I cannot imagine even IBM not wanting to at least trying to settle, but who knows?"

For further details and PDF copies of IBM's subpoenas, see this story on Groklaw.

-- by Steven J. Vaughan-Nichols and Chris Preimesberger

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