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Has SCO fired shot to start Linux war?

Hiring of David Boies raising eyebrows

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Operating systems vendor The SCO Group rarely makes waves, but three weeks ago it rocked the boats of Linux users and vendors.

Although no one fell overboard and the sea is relatively calm now, many are watching SCO, concerned it could unleash a storm on users and vendors that have grown fond of the peaceful Linux waters.

On January 22, SCO made headlines with its announcement that it had hired firecracker attorney David Boies and his law firm to protect its Unix intellectual property from possible violations, particularly from Linux developers.

SCO hasn't sued anyone. Yet.

"Bringing a person like Mr. Boies on board is certainly an indication that they plan to take this very seriously," said Brian Ferguson, a partner in McDermott, Will & Emery's intellectual property department, in Washington, D.C.

Boies, a partner at Boies, Schiller & Flexner, became famous in the IT world through his work as special trial counsel for the U.S. Department of Justice in its antitrust suit against Microsoft.

Because SCO's intentions are unclear, experts can't predict whether the company will prevail or fail in court, should it get litigious. But most agree that the Linux community had better get ready for a significant increase in legal challenges similar to the ones SCO may unleash.

"This is just the beginning; there's going to be a lot more of this," said Eric S. Raymond, president of the Open Source Initiative, a non-profit corporation that promotes the concept of open source software, such as Linux.

Open source software is, in general terms, that for which source code is available to users. By contrast, most commercial software vendors, such as Microsoft, rarely, if ever, disclose the source code of their programs, and normally forbid users from freely modifying, copying or distributing them. Some call this a "proprietary" approach to software licensing, to distinguish it from the approach of the open source and free software movements, which, while disagreeing on some things, concur that software ought to be free for users to copy, share, modify and redistribute. Neither the open source movement nor the free software movement demands that software be free of charge, a common misconception.

"What surprises me is that I thought the first assault would come from Microsoft. I didn't expect it would be some of our guys who would go over to the dark side," Raymond said, referring to the fact that SCO also sells Linux software.

The legal challenges could affect how Linux is developed, marketed, licensed, sold and used, implications of concern to Linux users, developers and vendors.

So why do some predict Tux, the official Linux penguin mascot, is headed for court? Some point to Linux's rising popularity, which could draw elements wanting to profit from its success by claiming intellectual-property misuse.

"As anything becomes more popular in an industry, it's going to open itself up to and become more of a potential target to holders of intellectual property," McDermott, Will & Emery's Ferguson said. "The Linux situation is a prime example of that."

The weak economy makes revenue-starved vendors more willing to file intellectual-property claims, said Ray Lupo, another partner in McDermott, Will & Emery's intellectual property department.

Some say that is SCO's case, which closed its 2002 fiscal year on Oct. 31 with a net loss of \$24.9 million, or \$1.93 per common share, on revenue of \$64.2 million. The stock's 52-week high is \$2.99. It closed Monday at \$1.18.

"I think they want to generate more revenue through IP licensing. But it would be insanity for SCO to try and say: 'We hold IP on every Unix-like operating system which has ever shipped and is in use right now,'" said Nat Friedman, co-founder and vice president of product development at Ximian, a Linux vendor.

Others, like the Open Source Initiative's Raymond, cite more twisted reasons for legal threats in general, such as sabotage.

"It's a real simple situation: they can't beat us competitively in the market, so they have to try it in the courts," Raymond said.

But SCO and others point back at the Linux community, saying it suffers from a largely-ignored yet significant problem of intellectual property violations, which they say hurts Linux's development.

"If the Linux community is really going to continue to grow, we can't keep ignoring this problem of intellectual property violations. We need to address it head on," said Chris Sontag, senior vice president of SCO's operating systems division.

It's unlikely Linus Torvalds considered any of these concerns when in 1991, while a university student, he set out to build a Unix-like operating system. At some point, he posted his code on the Internet and volunteers worldwide began to help him. Version 1.0 of the Linux kernel saw the light in 1994, and development continues in this fashion.

Right now, what is commonly known as Linux includes Torvald's Linux kernel as well as other essential operating system software, much from the GNU operating system from the Free Software Foundation (FSF), which is why Linux is sometimes referred to as GNU/Linux.

Observers say most legal challenges to Linux will hone in on two potential vulnerabilities, which also happen to be two of its core features: that its kernel is developed by a dispersed group of volunteers, which arguably makes it hard to monitor possible copyright violations; and that its kernel is distributed under the FSF's General Public License (GPL), which some say is ambiguous and vague.

By press time, Torvalds hadn't replied to several phone and e-mail requests for comment on these issues.

Regarding the Linux kernel's community of volunteer developers, an outsider could claim owning a Linux kernel component and sue anyone using a Linux product containing that component, said Brian Kelly, a Fenwick & West partner in Washington D.C. who specializes in IT intellectual property.

"It's hard to see that happening in any big fashion. But it's certainly a risk with any open source project, because you don't know where all the contributions are coming from and it's possible that any individual contributor could have misappropriated that code or contribution from somewhere else," Kelly said.

Claims of that kind have been made in the past couple of years, and in all cases have been proven bogus, said Bradley Kuhn, executive director of the FSF.

He does point out that it's not ideal that many people hold copyrights on the different components of the Linux kernel, a situation the FSF has tried to avoid by holding the copyrights to many of the GNU components.

"We have a clear chain of custody for that (GNU) software so we're quite immune to those kinds of claims. The Linux kernel, because of the way it was developed, and because its developers didn't feel that what the (FSF) did was the right approach, have left themselves open to that kind of attack" from opportunistic bounty hunters, he said. However, he feels confident that the Linux kernel copyrights are all in order.

But others argue that the GPL, under which the Linux kernel is distributed, is problematic.

"Many have commented that the GPL is very ambiguous and not very specific, leaving many things up in the air that could be potentially interpreted in many different ways, and I would agree with those characterizations," Sontag said.

This vagueness, he said, "can be problematic in cases when companies want to make contributions of certain things and maintain their

intellectual property on other things and hold some things in reserve. The GPL in some cases can be problematic as to how you go about sorting that out."

In a nutshell, acquirers of software distributed under the GPL -- including fee-based software and software that is free of charge -- have the right to run, copy, distribute, study, change and improve the software, a precondition of which is having access to the software's source code. And if they redistribute the software, they must share their changes. Thus, the GNU/Linux operating system, including Torvalds' kernel and its other components, has been used by others to create myriad versions of Linux, tailored to a wide range of user needs. Popular commercial versions include those from Red Hat and SuSE.

But it's not clear whether the developer of a proprietary commercial software product that uses in it a GPL-licensed component would thereby unintentionally turn its product into a GPL-licensed software, said Fenwick & West's Kelly.

"Eventually there's going to be some court cases interpreting the GPL itself," Kelly said. "But to date, there have been no decisions at all interpreting it or what it's supposed to mean ... or interpreting these ambiguities. And that's causing a good bit of uncertainty."

The FSF's Kuhn disagrees, saying the license is "completely enforceable and legally sound," and that ambiguities stem from U.S. and international copyright statutes, created hundreds of years before software. As for proprietary software vendors that choose to include GPL-licensed components within their products, they must abide by the GPL's provisions, he said.

The FSF trusts it will be able to keep the GPL out of court through active enforcement of its requirements and its non-litigious "diplomatic" and "friendly negotiation" approach to solving violations, Kuhn said.

Turning GPL aside, Kuhn does see a widespread disposition to shoot down free software products -- those whose licenses allow users freedom to copy, modify and redistribute them, whether they are free of charge or fee-based.

For now, it remains to be seen how SCO will proceed. The company "is the keeper of the core IP for Unix," and it intends to protect it, Sontag said. Unix was first developed by AT&T at its Bell Labs around 1969, and through a series of transactions and acquisitions over the years, the core Unix code now "resides with SCO," he said. (SCO's official legal name is still Caldera International, although the company has been calling itself The SCO Group since August 2002 and will adopt that as its official legal name if shareholders approve the change in an upcoming vote, a spokesman said. Caldera International bought SCO in May 2001, he said.)

In its statement two weeks ago, SCO billed itself as "the majority owner of Unix intellectual property" and its chief executive officer Darl McBride said sternly SCO "has full rights to license this technology and enforce the associated patents and copyrights."

To that end, SCO, based in Lindon, Utah, not only hired Boies but also created a new intellectual property division, SCOWare. It's telling that the first, and so far only, SCOWare licensing program addresses Linux.

Called SCO System V for Linux, the program will allow clients to license SCO's Unix System Shared Libraries to allow Unix applications to run on Linux. Previously, SCO hadn't made these shared libraries available outside of its operating systems, and it had come across cases of clients and developers using these libraries without permission, Sontag said.

This first program hasn't alarmed Linux enthusiasts. But by SCO's own admission, it's just the first to emerge from its nascent IP-protection initiative, and there's concern over what may follow.

Not even SCO knows yet, Sontag said. "I wish we could just say we know everything, but we're dealing with such a large problem with many areas and complexities that we can't say 'this is it' and be done -- I wish we could," he said. "I can empathize with the concerns of [the Linux community], but we don't know all the answers to what may or may not be of issue," as SCO assess its intellectual property.

Sontag admits SCO, as a Linux vendor, is in a conundrum.

"We want to see Linux succeed and grow," he said. "But we also have a significant amount of intellectual property in Unix, and in a number of cases we've seen so far, there's been some inappropriate use of our Unix technology."

All agree SCO has the right to protect its proprietary commercial products. However, most of those interviewed expressed skepticism over SCO's possible claims over the original Unix patents from the Bell Labs days, which many say may have lapsed or lost their effectiveness due to a lack of enforcement.

"I think those patents have pretty much expired at this point. I don't think they have much in the way of IP [in that area]. I think David Boies needs to find a better job now, because this one doesn't sound very exciting," Ximian's Friedman said.

Most observers say that if SCO gets litigious with the Linux community, which now includes big guns such as IBM, it stands to lose much more than it will gain, by way of animosity, bad blood and lengthy, costly court fights.

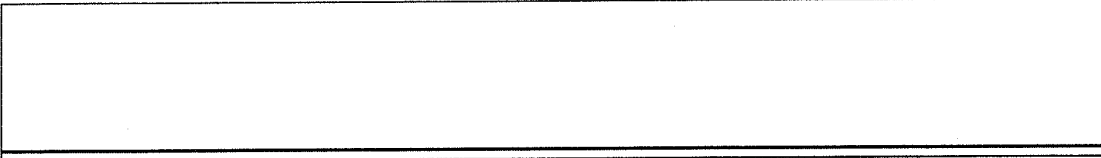
"They will hurt Linux and hurt themselves," Friedman said.

For starters, SCO will get hit with a mighty legal counteroffensive, courtesy of some of Linux's newer friends, which have deep pockets and many lawyers, most say.

"You can be certain that IBM and some of the larger companies will fight tooth and nail if they are approached on this, and they certainly have the legal army to do that. A company the size of IBM will come out with all cannons blazing," McDermott, Will & Emery's Lupo said.

Raymond puts it in blunter and more visual terms.

"There's a lot of big money and big guns who are going to find it in their selfish corporate interest to line up with the open source hackers," Raymond said. "I predict that if SCO attempts to levy patents or seek restraining orders against any of the Linux distributions, there will be a mob with pitchforks and torches at its door."



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