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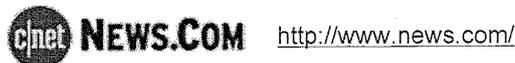


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IBM takes issue with SCO Unix suit

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IBM began hitting back Friday against a SCO Group lawsuit that charges Big Blue with misappropriating Unix trade secrets and using them in Linux.

"We got a copy of the complaint this morning. Based on what we've seen of it, it's full of allegations with no supporting facts," said Mike Fay, vice president of communications for IBM's systems group.

Though Fay didn't comment on the specifics of the suit, the tone of IBM's statement indicates the computing giant won't knuckle under quickly to SCO's lawsuit and associated demands.

"I would bet that IBM isn't going to take this sitting down," said Brian Ferguson, an intellectual-property attorney at McDermott Will & Emery. "I would expect they will bring out the A-team of lawyers and aggressively defend themselves against this and potentially assert their own intellectual property."

SCO filed a suit Thursday seeking more than \$1 billion in damages from IBM for allegedly using Unix intellectual property to improve Linux in violation of IBM's license agreement with SCO. The suit alleges that IBM misappropriated SCO trade secrets, interfered with business, breached its contract with SCO, and competed unfairly.

The suit could affect SCO's relationship with Linux seller SuSE, whose version of Linux is the foundation of the UnitedLinux products SCO uses.

"We at SuSE were greatly disappointed to learn of the SCO Group's recent actions...While we strongly believe that this does not impact Linux, we are concerned that these actions are not in the best interest of customers, partners and the Linux community," SuSE CEO Richard Seibt said. "Accordingly, we are currently re-evaluating our relationship with the SCO Group."

SCO's stock leapt on Friday, closing up 89 cents, or 40 percent, to \$3.10 on the news. IBM's rose 83 cents, or 1 percent, to \$77.90. Bruce Perens, an open-source advocate, said the increase in SCO's stock price illustrates his belief that the company's suit is a ploy to make SCO look more enticing to would-be acquirers, potentially including IBM itself. "I really strongly feel this suit is not meant to go anywhere in court. It's really just a prelude for an acquisition," Perens said.

For its suit, SCO hired attorney David Boies of Boies Schiller and Flexner, who prosecuted the U.S. Justice Department's antitrust case against Microsoft and represented Al Gore in the vote-counting controversy in the presidential election

Uphill battle

Legal observers and analysts said SCO likely will have an uphill struggle with its lawsuit and that the implications aren't good for the rest of SCO's business selling Unix and Linux products.

"These are difficult claims to win on...Trade secret theft is extremely difficult to prove in court," Ferguson said. "When you have a copyright or trade secret claim, you have to show access of original, copyrighted material. (SCO) will have to show IBM engineers working on the Linux side had that kind of access and used that access to develop the Linux side of IBM's development."

SCO's likely strategy is to "start up at the top and take out the biggest defendant out there--IBM in this case--hope it gets a quick settlement, and use that money to get a settlement with smaller companies down the line," Ferguson said.

Secondary effects of the suit likely won't help SCO's other business, said George Weiss, research director at Gartner.

SCO is likely to damage its relations with its network of sales partners that customize its software and build it into computers used by "replicated sites"--companies such as McDonald's that have numerous similar branches.

"There's a fear that SCO is using this as a means of either selling the company or desperately attempting to find some other business model as an alternative to their current software business," Weiss said. "I would advise SCO (Unix) users that they should have a contingency plan or migration plan to an alternate platform."

In a brief news conference Friday, SCO Chief Executive Darl McBride denied the company is going down the path of Intergraph, which once made workstations but now specializes in software. In 2002, Intergraph's income from operations was \$10 million, but its net income including legal settlements was \$378 million.

"Are we turning into an Intergraph, where that is the only thing we're going to do? No, that is not the path we're going down," McBride said. Specifically, the company's "SCO X" strategy, which will bear its first fruit this summer, "is really about taking our core operating system technologies and moving them forward," he said.

SCO, formerly Caldera International and Caldera Systems, is the inheritor of the Unix intellectual property that first was created at AT&T. Linux, which works in many ways identically to Unix, is created by a group of open-source programmers with assistance from IBM, Intel, NEC, Hewlett-Packard, Oracle and other companies. Red Hat, SuSE, SCO and others sell versions of Linux; the foundation of SCO's Linux is SuSE's product.

SCO in January announced SCOsource, its strategy to seek licensing revenue more aggressively from Unix intellectual property the company owns. And the plan is moving quickly, beginning with a mechanism by which companies may license supporting Unix software "libraries" that let programs written for SCO Unix run on computers that actually use the Linux operating system.

Among claims in SCO's lawsuit is the allegation that "IBM is affirmatively taking steps to destroy all value of Unix by improperly extracting and using the confidential and proprietary information it acquired from Unix and dumping that information into the open-source community," the suit said. "IBM's tortious conduct was also intentionally and maliciously designed to destroy plaintiff's business livelihood and all opportunities of plaintiff to derive value from the Unix software code in the marketplace."

Linux's rapid maturity--for example, growing up to work on large multiprocessor servers--is evidence of the presence of Unix intellectual property, the SCO suit said. "It is not possible for Linux to rapidly reach Unix performance standards for complete enterprise functionality without the misappropriation of Unix code, methods or concepts to achieve such performance, and coordination by a larger developer such as IBM," the suit said.

On Thursday, SCO also sent a letter to IBM Chief Executive Sam Palmisano that said if IBM doesn't cease breaching its SCO contract, SCO will terminate IBM's right to ship its version of Unix, called AIX, on June 13.

IBM and SCO differ on details of what led up to the suit.

"We have been talking with IBM about SCOsource (since) the December time frame. We reached an impasse. This is the culmination of those negotiations," McBride said of the suit.

But IBM's Fay told a different tale. "It's worth pointing out that SCO never approached us to raise the complaint, and they didn't tell us in advance they were going to file a lawsuit," he said.

Shock waves

The shock waves from the suit began traversing the computing industry Friday as companies evaluated the effects.

"If SCO is successful in this suit against IBM or obtains a favorable settlement, every single other supplier (of Linux) is an open target," McDermott's Ferguson said.

Gartner's Weiss agreed. "If IBM buckles and SCO wins this case, it could cause a negative impact to the Linux community in general," he said. Having proprietary components within Linux "pollutes all the spirit and the meaning of what the open-source community is."

McBride said the company's legal action--thus far--is only with IBM. "This is not about the Linux community or us going

after them. This is not about UnitedLinux. This is about contractual violations we are alleging IBM has made," he said.

Two companies quick to say they're not affected by SCO's actions are Sun Microsystems and HP, the No. 1 and No. 2 sellers of computers running versions of Unix.

"HP did a complete buyout of Unix licensing from SCO," HP spokesman Brian Garabedian said. "We have a perpetual license rather than per copy license for HP-UX...We don't believe we have any exposure to the SCO lawsuit."

Sun, too, bought out its Unix license, said John Loiacono, vice president of Sun's operating platforms group.

"We bought our Unix license out....We are unencumbered for all things," including Sun's version of Linux, he said.

And Loiacono wasn't reluctant to seek gains from SCO's moves. "For people looking at the issues at hand, we are a safe harbor. We have absolute rights to our technology," he said.

The SCO litigation has affected Sun's shifting Linux strategy, Loiacono said. "We're changing our strategy around Linux (but) we're pausing because we're trying to figure out what the implications of this are going to be," he said.

Red Hat said it's not affected by SCO's suit--at least not in the near term. "The claims that have been asserted by SCO against IBM do not involve Red Hat," said Mark Webbink, Red Hat's chief legal counsel.

"We take the issues of intellectual property very seriously," Matthew Szulik, chief executive of Red Hat, said in an interview. "We have never believed that copyrights, trademarks or patents are things that should be infringed or treated loosely."

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