

Now They Own It, Now They Don't: SCO Sues Novell to Stay Afloat

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February 5, 2004

The SCO licensing campaign—which has been all bark and no bite since its introduction by way of threatening letters to the Fortune 1500 last summer—lost a wheel last month, and is now headed for the wall.

From the beginning of this irresponsible attack on the freedom of free software, SCO has promulgated public positions about the nature of its supposed rights that conflicted with facts known to the free software community, and relied upon legal positions that were untenable given the real state of facts. SCO supposedly responded to demands to see *some* evidence of code copied from Sys V Unix into the Linux program, first in a public presentation in August and then in a court filing in January. But both “demonstrations” actually showed that SCO was claiming copyright infringement in material whose copyright it didn't own. Now, a new party has begun casting serious legal doubt on SCO's ownership of the rights on which it bases its demands for license fees, to the complete destruction of SCO's licensing campaign. The new party raising fundamental legal doubt about SCO's copyrights is SCO itself.

1 You Can't Sue Over What You Don't Own

The SCO Group claims to hold copyrights in AT&T's implementations of Unix as a consequence of a conveyance by Novell to SCO's predecessor in interest, Caldera. Novell and SCO have disagreed throughout about the

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meaning and effect of the asset purchase transaction. The most relevant document, the purchase agreement, is a matter of public record, having been attached to IBM's answer to SCO's complaint in the lawsuit brought by SCO against IBM. At a minimum, Novell claims—and the document seems on its face to show—that Novell retains an independent right to license the copyright and other legal interests conveyed by the agreement.

Novell's claim to an independent right to license the Unix technology at issue has been invoked twice since the start of the controversy. Novell renewed licenses to IBM and Silicon Graphics originally granted by AT&T that permitted the production and distribution of the two vendors' "flavors" of Unix, thus cancelling "revocations" of those licenses supposedly issued by SCO. Those two licenses were side issues: SCO is trying to destroy free software as a competitor, not AIX and Irix. But Novell's acquisition last quarter of SuSE AG—Europe's leading commercial distributor of free software, including the Linux kernel—threatens the complete overturning of SCO's licensing program. If Novell indeed holds residual rights for itself in what SCO claims are its exclusive rights, Novell can distribute Linux through SuSE without any theoretical liability to claims from SCO. And because the Linux program is distributed under GPL, anyone who got code from Novell/SuSE has the right to distribute it to anyone else, under GPL, without limitation.

So on January 20th, SCO sued Novell in Utah state court, on a claim of "slander of title," seeking a judicial declaration that SCO owns exclusive rights in the copyrights it has threatened to enforce against Linux users. That lawsuit, in which SCO has demanded jury trial, will ultimately require a Utah jury to decide the meaning of the asset purchase agreement and associated documents, in a dispute between SCO and Utah's largest high-tech employer, Novell. If SCO can't carry its burden of proof in that action, and convince the jury it has asked for that Novell has no rights in Unix, its whole campaign is over, and SCO's destiny is dissolution.

2 You Can't Threaten B, C, and D While Litigating With A

Even if one is unsympathetic to SCO, one can't help but feel sorry for the quandary its lawyers faced in deciding whether to sue Novell. Had they not done so, their client's ultimate fate would have been sealed. But suing Novell destroys SCO's licensing campaign for the present just as fully.

Put yourself in the position of a General Counsel whose client has received threatening letters from SCO demanding that the client take a license for the use of the Linux program. As I have argued in past essays on this controversy, there are strong legal reasons for rejecting the demand for a license anyway. But now SCO's pitch to the GC has become well-nigh impossible: "Pay us money," SCO is saying, "because sooner or later, after we win a lawsuit against Novell in the Utah courts, we will turn out to own some copyrights on which you might be infringing." For the GC whose task it is to protect the shareholders' assets, the answer is simple: "Come back when you've won that lawsuit, and we'll talk." After all, there's no downside for the GC's client in waiting to see what happens in *SCO v. Novell*. Usually, when the target of a license demand shows a determination to wait out the claimant, the claimant says "If you ignore my demand, you're engaged in intentional copyright infringement, and that's a no-no. When I sue you the judge won't like you, and the Copyright Act says I get double damages." But SCO itself has put the ownership of the relevant copyrights in doubt by suing over them, and no judge would hold that it is intentional infringement to refrain from taking a license while the plaintiff itself scrambles to show it owns what it is trying to sell.

Many of the large, sophisticated enterprises who are the targets of SCO's efforts responded to their claims last summer by taking copies of the Linux program, under GPL, from SCO's own FTP server, where the code remained publicly available. They therefore have an auditable license from SCO to use, copy, modify and redistribute the code about which SCO continues to threaten legal action. For such enterprises, which now can also get a copy of the same program, under the same license, from Novell, any action by SCO to bring a copyright infringement claim would be particularly foolish.

"Judge," such an enterprise would tell the court in the event of a lawsuit, "SCO and Novell disagree about who wound up with the power to license these copyrights, even if they are somehow infringed. They're suing one another in the Utah courts over that. But I have here copies of the supposedly infringing work I got from SCO with a license that says I can use, copy, modify and redistribute, as well as copies I got under the same terms from Novell. So no matter who wins that action I have a license that lets me freely use, copy, modify, and redistribute. Judge, can I go home now?" That's a pretty strong defense. Given that the first party sued would also have the benefit of the \$10 million legal defense fund administered by the Open Source Development Lab, the prospects that SCO

can convince neutral parties to take licenses under existing circumstances are slim at best.

3 Where the Buck Stops

By bringing the action against Novell, SCO has 'fessed up to yet another fundamental weakness in the tissue of non-truths, half-truths, and exaggerations that constitute its attack on the freedom of free software. It has given the targets of its licensing campaign the clearest possible reason for remaining on the sidelines, and by doing so it has triggered the forces that are going to bring this nuisance to an end.

If SCO's licensing campaign fails to generate the revenues SCO has been predicting for potential investors—because it turns out that SCO never owned what it claimed to be legally entitled to force others to license—SCO and its principals will have plenty to answer for, and not just to its shareholders, but to the SEC as well. It is not good practice to attempt to force people to buy from you what you may not own. It is even worse practice to mislead investors into thinking that they will benefit from such sales without disclosing that you may not own what you are trying to sell. Now that SCO itself has begun unraveling this aspect of the situation, the end is in sight. The winter of SCO's discontent is likely to give way to a glorious summer for open source software.