

Patent Briefing

Open Software and IP Issues:

How Linux tried to be free, but got caught in a tangled web of IP rights

An operating system which started as a hobby and grew to challenge the dominance of Microsoft Windows, may be brought down to Earth by a tangle of lawsuits.

Loosely based on UNIX, (an operating system used for many years on mainframes and workstations), the first version of Linux was developed by Finnish programmer Linus Torvalds. Improved and expanded first by a small army of volunteers, then by commercial companies such as IBM, the software now has great commercial importance. Linux is "open-source" software, meaning that anyone can access the original source code and modify it as they wish, on condition that their modifications are also made available for others to use. This condition is part of a "General Public Licence" (GPL) as explained below.

Although it can be downloaded for free from the Internet, various companies - including giants like IBM and HP, as well as newer companies like Red Hat - are making money by selling hardware which runs Linux, application software which works under the operating system, or support services. For example, IBM reported Linux-related sales of more than \$2 billion in 2003. Corporations and institutions which previously used other operating systems such as Windows, are now turning to Linux as a cheaper alternative, a recent example being the city council of Munich.

This business is now threatened by a small company called SCO. SCO bought the intellectual property rights to one version of UNIX (over the years, many rival versions have been developed) and claims that Linux incorporates code which infringes these rights.

The three kinds of IP rights most applicable to computer software, are copyright, patents and trade secrets. Copyright generally protects only the specific code of a piece of software, although in the USA it has been extended to cover the so-called "look and feel" of software to a user. Patents can be used to cover the principles of operation behind software, such as file structures, sorting algorithms and so on. The patenting of computer software is more popular in the USA where even purely business-related features can be patented. By contrast, the UK and Europe only permits "technical" features to be patented, excluding most software unless it has an industrial or scientific use. Finally, trade secrets comprise knowledge which has been given to a third party under a condition of confidentiality, and thus may not be transferred elsewhere. This is similar to the concept of "breach of confidentiality" under UK law. SCO are claiming to own various copyrights in parts of UNIX which they say have been incorporated into Linux; SCO do not own any relevant patents, but they allege that IBM stole their trade secrets in making enhancements to Linux which are to be found in most copies of Linux now in use.

Unlike patents, copyright exists automatically upon creation of computer software, without requiring any application process. Likewise, trade secrets by definition are not officially registered. Bearing in mind the complex history of UNIX, which has gone through numerous versions over the years and ownership of which has changed hands many times, assessing the true ownership of the particular features SCO claims to own will be a lengthy and difficult process.

The litigation began in March 2003 when SCO sued IBM for breach of copyright and trade secrets. Then Red Hat (whose business depends on selling Linux-related software and services) sued SCO for false advertising and deceptive trade practice. Operating-system firm Novell then claimed to own the copyrights asserted by SCO, so SCO sued Novell for "slander of title". Shortly afterwards, SCO sued UNIX licensees DaimlerChrysler and car repair firm Autozone. These two companies had failed to certify that they were not using certain UNIX-related features within Linux. SCO have also written to 3,000 other companies threatening action on the same basis, including licensees of SCO's version of UNIX.

It may appear strange to sue one's own customers. Part of the reason may be that SCO's sales of UNIX had slowed to a trickle; however, they themselves also distribute Linux, and are therefore bound by the "General Public Licence" (GPL). The GPL is intended to ensure that Linux remains open-source. Anyone distributing Linux is automatically licensed under the GPL, obliging them to grant full rights to all source code. So logically, SCO have given up any claim to copyright infringement by any code included in Linux! Needless to say, SCO's actions lack credibility among the US business community and have earned the scorn of open-source advocates worldwide. Indeed, the recent "MyDoom" virus has been attributed as an assault by the open-source community upon SCO, as it was programmed to attack SCO's website.

Nevertheless, SCO just might succeed.

Many companies care little for the open-source movement or the GPL, and might be willing to pay a settlement fee to SCO to avoid litigation. Meanwhile, though, the major companies are continuing to fight. In July 2004, DaimlerChrysler won a bid to have most of SCO's case against them dismissed. IBM have announced that they hold 60 patents relevant to Linux, but that they do not propose to enforce them unless forced to defend themselves. The Autozone case has been put on hold pending the IBM, Red Hat and Novell cases. Meanwhile, despite fears that the planned European Software Directive may make it easier to enforce software patents within the EU, Munich city council have decided to go-ahead with the conversion to Linux.

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So far, Microsoft have stayed out of the fray. They stand to gain the most if SCO succeed in stopping the spread of Linux. Like IBM, they hold patents which could be enforced against marketers or users of Linux; however, to date they have been content to stay on the sidelines.

What are the implications of all this for UK companies? Firstly, that it is increasingly difficult to ignore copyright and patent rights in software. This applies to open-source software just as much to commercial software; in other words, just because software is "free" doesn't mean that it is outside the usual ambit of IP rights. Secondly, that even small companies need to be

concerned about what software they are using, and who owns the rights. (Whatever licence fees SCO make from the 3,000 companies targeted to date will doubtless be used to pursue many more alleged infringers). Thirdly, that companies with their own IP are in a better position to defend themselves. Whatever the attractions of the open-source concept, it may be prudent to seek protection for one's own ideas just in case. Fourthly, that enforcing IP needs to be judged in the wider business context: unless your business strategy revolves solely around extracting value from IP, the impact on your customers and general standing in the business world should be carefully considered.

For advice on computer and software patents and copyrights contact any of the IP attorneys listed below.



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