

## Caldera OpenLinux Licensing Complaints

Linux is an operating system that was initially created as a hobby by a young student, Linus Torvalds, at the University of Helsinki in Finland. In August of 1991 he released version 0.02 on the Internet and asked for volunteers to assist in its development. The Linux kernel is licensed exclusively under the General Public License (the GPL - a copy is included in the kernel COPYING file). Yggdrasil Computing began shipping "Linux" on CD-ROMs in December of 1992, other companies like WorkGroup Solutions ([www.wgs.com](http://www.wgs.com)) soon followed. The Linux kernel version 1.0 CREDITS file listed developers from [borland.com](http://borland.com), [novell.com](http://novell.com)<sup>1</sup>, and [microsoft.com](http://microsoft.com) among the earliest contributors. Linux® has been a registered trademark owned by Linus Torvalds since August of 1997. The trademark has been sublicensed exclusively "*for use in connection with computer programs using the open source code of the Linux operating system.*"<sup>2</sup> Consequently, any vendor that uses Linux in the name or labeling of their retail computer software products is conveying an *implied warranty* that the operating system source code will be available at no extra charge, that it can be used in other free software, and that the kernel source code is redistributable to others - free from the vendor's proprietary claims.

The SCO Group (SCO, formerly Caldera International) claims that Linux end users have to either purchase new non-refundable SCO IP licenses, or re-register their existing SCO Linux products and accept restrictions that are barred by the original GPL agreement. The new terms prohibit any Linux source code access, copying, or redistribution. SCO has unilaterally decided that their previous grant of license for Caldera and SCO retail Linux kernel products is now void and unenforceable.<sup>3</sup> Users that refuse the new terms face litigation. SCO is currently involved in five lawsuits. During the past year they have made a series of claims that appeared in press reports, threatening letters mailed to Linux end users, messages on their product support web site, and in their public filings with the SEC. Their claims simply don't "hold water" when compared to the known historical facts, and the evidence coming to light in their court cases. It has become increasingly obvious that SCO's new business plans depend upon a scheme to wrongfully deprive their retail customers of their rights under the existing software license agreements. None of the existing court cases involve a retail consumer of their Linux products.

Last year Caldera International, a supplier and vendor of Caldera OpenLinux and SCO Linux products, officially changed the company name to The SCO Group. First, they filed a very surprising annual report with the SEC. In that January 2003 report, they revealed that they merely served as an agent for Novell in collecting UNIX SVRx technology royalties. They explained that they only retain a 5 percent fee. Next they began making claims that the Linux operating system violated their company's intellectual property rights in UNIX. In March 2003 they filed a billion dollar lawsuit against IBM. They claimed that IBM had misappropriated SCO's trade secrets and their copyrighted UNIX source code for use in Linux. In May 2003 they claimed that SCO, not Novell, owned the exclusive rights to UNIX SVRx. They suspended sales of their Linux products and said:

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<sup>1</sup> Caldera's Ron Holt: [ron@novell.com](mailto:ron@novell.com) Kernel development, Linux 1.0 CREDITS file: 03/13/1994

<sup>2</sup> Caldera joined Linux International in 1995. See <http://tinyurl.com/yryl3> and the trademark license terms at: <http://tinyurl.com/327u3> also see "What are the license restrictions?" <http://li.org/whatislinux.php>

<sup>3</sup> In the case of a grant executed by two or more authors of a joint work, termination of the grant may be effected by a majority of the authors who executed it. 17 USC section 203 (a)(1).

SCO will continue to support existing SCO Linux and Caldera OpenLinux customers **and hold them harmless from any SCO intellectual property issues** regarding SCO Linux and Caldera OpenLinux products.<sup>4</sup>

That's completely false. Source code access, copying, and redistribution have become "SCO intellectual property issues". Caldera and SCO Linux source code licensees are merely being offered a free version of the new binary-only SCO IP license<sup>5</sup>:

**27. If I am running SCO Linux or Caldera OpenLinux do I need to obtain a SCO IP License?**

Yes. SCO will distribute a "no charge" IP License to all SCO Linux users. To receive this license, you must register your SCO Linux license on the website. If you already registered the SCO Linux license, you must update your registration to be eligible for the license. This special license is limited to the right to use SCO IP with SCO Linux and Caldera OpenLinux. **It is not valid for any other distribution of Linux.** Unlike the SCO IP License for a non-SCO Linux distribution, these licenses do not have to be registered after they are issued. The only registration required is the initial registration (or update) of the SCO Linux license.<sup>6</sup>

Caldera specifically targeted and marketed their Linux products to OEMs, resellers, and software developers who rely on the right to enhance and redistribute the products. Their attempts "to hold customers harmless" are actually designed to destroy the market for Linux goods and services. They are being disingenuous. That fact can be demonstrated by simply reading the public comments from Caldera's initial registration with the SEC:

"Any ruling by a court that these licenses are not enforceable, or that Linux operating systems, or significant portions of them, may not be liberally copied, modified or distributed freely, would have the effect of preventing us from selling or developing our products."<sup>7</sup>

For months the company has refused to identify any infringing source code, even when ordered to do so by the courts. In the meantime their CEO publicly said things like:

"The breadth of damage that's been done here, it's like cleaning up the Exxon Valdez... the code violation that is going on inside of Linux between derivative work, copyrighted work, it's not unsubstantial." Darl McBride speaking in *Internet Week*<sup>8</sup>

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"We then said there is roughly a million lines of code that tie into contributions that IBM has made, and that's subject to litigation that is going on." We have basically supplied that. *McBride speech at Harvard Law School, quoted in IBM's report on SCO's compliance with the Courts Order*<sup>9</sup>

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"SCO is contacting customers to either license or litigate" *McBride keynote speech at the cdXpo Conference*<sup>10</sup>

After their new SCO Source licensing business was challenged in the US and German courts, they granted their so-called "outside law firm" \$1 million in cash and 400,000 shares of stock, as part of a new partnership that aimed to extract licensing fees from

<sup>4</sup> <http://tinyurl.com/yssnt>

<sup>5</sup> See attachment 1 for a price list and a historical comparison to Unixware and OpenServer pricing.

<sup>6</sup> <http://tinyurl.com/uah8>

<sup>7</sup> <http://tinyurl.com/2lkqx>

<sup>8</sup> <http://tinyurl.com/2z37f> Internet Week interview

<sup>9</sup> <http://tinyurl.com/2h64g>

<sup>10</sup> <http://tinyurl.com/3dr2x>

Linux customers.<sup>11</sup> They seem to have abandoned all pretense of operating anything much more than a simple extortion racket. One of their largest investors, Baystar, has publicly called on the board of directors to discontinue their unprofitable UNIX product lines and focus "on the intellectual property process".<sup>12</sup>

The mystery surrounding SCO's claims recently started unraveling. First their counsel admitted for the record that "there is no trade secret in UNIX system files", and that nothing in Unix System V is a trade secret<sup>13</sup>. SCO has identified no more than around 3,700 lines of code in 17 AIX or Dynix files - all copyright IBM - that it alleges were improperly contributed for use in Linux. After publicly claiming that they owned *all* of the UNIX copyrights, and that Novell had slandered their title by suggesting otherwise, they asked the court to order Novell to assign the UNIX operating system copyrights which Novell still holds to SCO<sup>14</sup>. Then finally:

"The only copyright claim SCO has asserted against IBM is primarily for IBM's continuing use of AIX and Dynix after SCO terminated IBM's UNIX licenses. See Second Amended Complaint, Count V. **The Second Amended Complaint, however, does not contain a claim against IBM for copyright infringement arising out of its use, reproduction or improvement of Linux. With SCO's Second Amended Complaint being the final amendment and not containing a claim for infringement arising out of IBM's Linux Activities**, the need for IBM's Tenth Counterclaim seeking such a declaratory judgment is nil." from a SCO Motion dated 23 April 2004<sup>15</sup>

SCO has no business trying to restrict access to Linux source code on the basis of state law UNIX contract claims against IBM. They have no basis upon which to collect additional licensing fees from customers for non-existent trade secrets, or copyrights that are still held by Novell either. Unfortunately there are six thousand organizations with UNIX licenses, so this sort of thing could go on for quite some time. SCO still continues to claim that Linux contains UNIX System V source code. They have simply dropped the trade secret and copyright accusations against IBM. They are still demanding that all end users of Linux or UNIX submit to their new licensing fees and restrictions.

Caldera International acquired their UNIX assets from Novell through a third party – the Santa Cruz Operation (Old-SCO). The Santa Cruz Operation took over development of Novell's UnixWare product line in December 1995. They had a preexisting Unix System V product of their own, OpenServer 5.0, which was merged with Novell's UnixWare 2.0 as a contingent part of the deal with Novell (OpenServer 5 + UnixWare 2 = UnixWare 7). Under the Technology License Agreement (TLA), Santa Cruz owned the new merged product. In return, Novell obtained an ownership interest in the Santa Cruz Operation, and a license to use their derivative works. Caldera has managed development of both product lines since they purchased two of the Santa Cruz Operation's three divisions in May 2001.<sup>16</sup> Novell's TLA doesn't cover Caldera's subsequent work on either UnixWare

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<sup>11</sup> Lawyers don't usually acquire a proprietary interest in the cause of action or subject matter of litigation that the lawyer is conducting for a client. In fact, Boies, Schiller, and Flexner is being paid a retainer fee and is billing SCO at hourly rates, as well as a 20% "contingency fee" on windfall profits from their equity and any licensing sales. See <http://tinyurl.com/2z988> and <http://tinyurl.com/2qgyw>

<sup>12</sup> <http://tinyurl.com/32jc9>

<sup>13</sup> <http://tinyurl.com/28z3e> page 46 re: SCO Group Motion to Compel 5 December 2003

<sup>14</sup> <http://tinyurl.com/3ekmz>

<sup>15</sup> <http://tinyurl.com/2o8bx>

<sup>16</sup> The Santa Cruz Operation changed it's name then, and continues doing business today as Tarantella.

or OpenServer. Consequently, The SCO Group owns some copyrights in UnixWare and OpenServer as they have evolved since 2001. All System V-based operating systems conform to the same publicly available family of standards. Assuming that SCO wishes to delay and harass partners and other Linux end users, those copyrights could be used as the basis for claims of "non-literal" copying regardless of the outcome of the current title dispute with Novell.

In August 2003 another Linux supplier named Red Hat Software asked for a declaratory judgment of non-infringement regarding SCO's copyrights. SCO claimed that there was no controversy, or that all of the matters were before the court in the IBM case. They moved to dismiss. In December 2003, SCO published a pair of threatening letters which were rife with non-sequiturs, straw man fallacies, coercion practiced upon the UNIX source code licensees, and which raised issues that don't stand up to simple historical or legal scrutiny. At about that same time, Novell claimed that they still owned the relevant UNIX copyrights, and that Linux doesn't infringe upon them. SCO has since filed the slander of title lawsuit against Novell (January 2004), a UNIX licensing lawsuit against Daimler-Chrysler (Mar 2004), and a copyright infringement suit against a Red Hat Linux end user, Autozone (March 2004). After two failed attempts to compel SCO to provide them with specific information regarding any SCO proprietary source code in Linux, or in IBM's AIX and Dynix contributions to Linux, IBM has also asked for a declaratory judgment of non-infringement. SCO claims that those matters are before the court in the recently filed Autozone case. Regardless, none of these cases are entirely representative of the straightforward licensing issues involved with SCO's own retail Linux customers.

SCO could not prevail against their own Linux customers on the basis of the claims they have made in the other cases. In Autozone SCO says that Linux infringes upon their copyrights in Unix System V, that Autozone doesn't own the copyrights, and that Autozone doesn't have SCO's permission to use the materials. The courts have held that a broad grant of license from the copyright holder(s) is a defense against a claim of copyright infringement<sup>17</sup> While some of the issues in the other SCO cases are identical, none of the other parties have purchased retail Caldera OpenLinux or SCO Linux products or licenses. All of the parties - except Red Hat - are current or former UNIX product licensees.

Consumers could gather the following information by simply reading the outside of a retail Caldera Linux box<sup>18</sup> (see the enclosed scan of the Caldera OpenLinux 1.3 software package, copyright 1998). OpenLinux contained a version of the Linux kernel, Linux is cooperatively developed on a freelance basis by programmers working together worldwide, and that Linux delivered "**source code**". It said that the OpenLinux "**binaries**

<sup>17</sup> Bartsch v. Metro-Goldwyn-Mayer, Inc 391 F.2d 150 (2nd Cir.), cert. denied, 393 U.S. 826, 89 S.Ct. 86, 21 L.Ed.2d 96 (1968), Platinum Record Co., Inc. v. Lucasfilm, Ltd., 566 F. Supp. 226 (DNJ 1983), and Apple Computer Corp. v. Microsoft Corp., 35 F.3d 1435 (9th Cir. 1994).

<sup>18</sup> KSA 84-2-314 "(2) Goods to be merchantable must be at least such as (f) conform to the promises or affirmations of fact made on the container or label if any."  
KSA 50-639. Disclaimer or limitation of warranties; liabilities; Notwithstanding any other provisions of law, with respect to property which is the subject of or is intended to become the subject of a consumer transaction in this state, no supplier shall:  
(1) Exclude, modify or otherwise attempt to limit the implied warranties of merchantability as defined in K.S.A. 84-2-314, and amendments thereto, and fitness for a particular purpose, as defined in K.S.A. 84-2-315, and amendments thereto

**match the source code for easy development"**, and that it contained the "**Complete Linux Source Code With Integrated Programs and Tools**". It promised that OpenLinux was **Intel Binary Compatibility Specification-compliant (iBCS<sup>19</sup>) for running Intel-based UNIX programs**, and that it could be used as a **server for Intel-based UNIX programs**.

Novell used Linux as a royalty-free UNIX substitute for running applications. They had integrated it into their Corsair Project, which employed 16 full-time developers. They showcased that functionality at the company's 1994 Brainshare Forum<sup>20</sup>. It was also widely publicized in articles like the one entitled "**32-bit Novell desktop OS combines Unix, DOS 7**" by Anne Knowles, Mary Jo Foley, and Eric Smalley which appeared in the *May 16, 1994* issue of PCWeek magazine.<sup>21</sup> Santa Cruz Operation UNIX engineers and the Novell Unixware Product Manager discussed joint development and binary compatibility with Linux on Usenet months before the Santa Cruz Operation purchased any Unix assets from Novell.<sup>22</sup> The Novell Linux desktop client had already been demonstrated. Here is how the UnixWare Product Manager summed up the restrictions on the use of the UNIX System V Application Binary Interface Specification:

"cool. Get it, use it. **I have absolutely no problems with Linux** and don't intend to foment any more squabbling about this topic. If I had anything that resembled spare time, **I'd love to play with Linux. As more people learn Unix, the world becomes a better place in my mind.** I'd like to point out here, that **until Novell placed ELF in the public domain, this would not have been possible.** There will be some other interesting announcements in this vein in the coming months. Stay tuned."<sup>23</sup>

The Linux developers that had worked on Novell's Corsair team founded Caldera Inc. They left Novell when the decision was made to scale back the Corsair Project, and concentrate only on developing it's network browser. Caldera continued to market OpenLinux as a royalty-free generic version of UNIX. For example, a 1999 Caldera white paper titled "OpenLinux and Open Source"<sup>24</sup> "carefully and concisely" claimed: "**From a purely technical standpoint, Linux is just another variant of UNIX.**"

Beginning with Novell/USL, each of the proprietors of the former AT&T System V UNIX assets have supported Linux development. All of them did that while they still owned the same UNIX assets<sup>25</sup> that were later sold to Caldera. Another Caldera white paper titled "Our Social Contract with the Open Source Community"<sup>26</sup> claimed that: "Open Source is both a software development methodology and a community. As a good neighbor in the Open Source community, **Caldera Systems is committed to strengthen**

<sup>19</sup> iBCS is a System V UNIX ABI. "Applications developers can use the SCO UNIX System V/386 Release 3.2, Open Desktop(R), SCO XENIX 386, and AT&T UNIX System V/386 Release 3.2 development environments, and any of these development environments on AT&T UNIX System V/386 Release 4, to create applications for all iBCS Edition 2-compliant operating systems."

<http://tinyurl.com/354fa>

<sup>20</sup> <http://tinyurl.com/2vgf3> and <http://tinyurl.com/3fbcc>

<sup>21</sup> <http://tinyurl.com/2vm2k>

<sup>22</sup> <http://tinyurl.com/3bree>

<sup>23</sup> <http://tinyurl.com/2uxfm>

<sup>24</sup> <http://tinyurl.com/3dlmz>

<sup>25</sup> <http://tinyurl.com/2aotc> Some AT&T and UNIX Software assets were assigned to USL in June 1990.

<sup>26</sup> <http://tinyurl.com/2qt3h>

*and protect it.*" The various Caldera companies provided many such pledges.<sup>27</sup>

Consumers asked Caldera for UNIX features and were led to believe that Caldera would deliver Lasermoon Ltd. UNIX IP, and later the SCO UNIX IP as part of their OpenLinux products. That belief was based on official statements made before the OpenLinux product was released, their product labeling, and their subsequent conduct over the years. I'm not claiming that there is any non-GPL'ed UNIX source code in the Linux kernel, only that if there is, I have an *implied license* to use it and redistribute it despite any of the SCO Group's claims to the contrary. SCO's predecessors in interest were the Caldera companies, starting with Caldera Inc. founded in 1994<sup>28</sup>, and followed by Caldera Systems, Caldera Thin Clients<sup>29</sup>, Caldera Holdings, and Caldera International.<sup>30</sup> They sold all of these so-called "infringing" materials to other Linux distributors<sup>31</sup>, resellers, and software developers for at least a decade.<sup>32</sup> They were the leaders of a successful collaborative effort within the computer industry to standardize UNIX development around the Linux operating system, and the GNU General Public License. They claimed that they and their partners had obtained "all of the required licenses (POSIX.1, XPG4, etc) and an X/Open membership which would facilitate a fully GPL'ed effort<sup>33</sup>:"

Hello!

Appended is the text of a forthcoming announcement about **Open Linux - a project to push Linux through XPG4-95 and UNIX-95 branding**. We are gathering opinion from the main Linux developers (such as yourself) \*before\* it is released to various News Groups and mailing lists.

If you feel *that you could contribute to this effort*, or that *what we are doing could contribute to your work*, please let us know. **This is the start of a huge collaborative effort which is widely seen as the way forward for UNIX.**

#### **Open, GPL'ed Development.**

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This is an Open Development **which will result in a Branded UNIX which will be freely distributed on the Internet in source and binary forms**. We would welcome constructive comments about this development.

**If you would like to contribute to this project**, we would very much like to hear from you. Please contact **Ian Nandhra (ian@caldera.com)** for more details.

**This is a real opportunity to change and re-define the UNIX industry.**

Enjoy!

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<sup>27</sup> "We at Caldera understand clearly that the GPL is (as Torvalds insists) one of the best design decisions in Linux. The GPL has enabled the huge and successful Internet based effort that has built Linux over the last three years. We are trying not to step on any toes! **Far from having any proprietary designs on Linux, we have been, and intend to continue to be, active in contributing to Linux development on the net under the GPL.**" <http://tinyurl.com/2jvq7>

<sup>28</sup> <http://tinyurl.com/2lhdw> comes from Caldera's Initial SEC Registration

<sup>29</sup> Caldera Thin Clients (Lineo) was sold to Motorola. The SCO IP license applies to embedded devices.

<sup>30</sup> <http://tinyurl.com/yqooy> comes from Caldera's SEC Reorganization Plan

<sup>31</sup> Linux distributors Lycoris <http://tinyurl.com/3cfnw> and Lindows <http://tinyurl.com/2xqaf> are licensees.

<sup>32</sup> For example, their ABI letter identifies the ioctl.h file copyright 1993 – before Caldera Inc. was incorporated. It is used in all of the 2.0, 2.2, and 2.4 series Linux kernels that they marketed.

<sup>33</sup> See the article Caldera Open Linux seeking POSIX and FIPS Certification for the Linux OS! <http://tinyurl.com/24c6d> <http://tinyurl.com/2r5el> and <http://tinyurl.com/2zyhv>

"By developing and publishing source code over the Internet, **Caldera and the Linux community are changing the way that an X/Open branded UNIX 95 operating system is developed and distributed,**" said Bryan Sparks, President and CEO of Caldera, Inc.

Ransom Love, Vice President of Marketing and Sales for Caldera, added, "**Our customers are pleased with the capabilities of Caldera's first product, the Caldera Network Desktop, and are now asking us to provide the X/Open brand,** localization, and additional technologies.

**Caldera Open Linux, scheduled for release in Q3 1996, will be published freely with full source code via the Internet to individuals and organizations seeking stable, UNIX systems solutions.** Caldera plans to achieve: POSIX.1 (FIPS 151-2) in Q3 1996; XPG4 Base 95 (POSIX.2, FIPS 186) by Q4 1996; and **X/Open brand for UNIX 95 based on the Single UNIX Specification (formerly known as SPEC 1170) during 1997.**

**Caldera will collaborate with developers in the Internet and Linux communities to develop and refine technologies that add specific functionality that Caldera's customers are requesting.**<sup>34</sup> In addition to publishing the source code for Caldera Open Linux, Caldera will provide a significant percentage of net revenues from the product back to the Internet and Linux communities through funding for future technology development.

Caldera is also collaborating with mainstream industry software vendors (ISVs) who are porting their products to Caldera's platform. **Caldera and its partners are delivering products that provide Internet and UNIX systems capabilities at commodity pricing.**

When Caldera introduced the "*OpenLinux*" brand on their Internet site, the product information page explained:

**The Caldera OpenLinux Product line is a multi-tasking, multi-user operating system that gives you the power and reliability of UNIX on a personal computer.** OpenLinux is Caldera's "distribution" or package of Linux, surrounded with utilities, graphical interfaces, installation procedures, third party applications and much more.

**OpenLinux is a brand that users, resellers and ISV's alike can count on** to provide a stable and functional base for their computing solutions. ...

**Caldera added "Open" to its product line to emphasize that the operating system source code is open, so you can see exactly how the operating system works.** Caldera is setting a commercial "standard" on how Linux is distributed and integrated into commercial solutions.<sup>35</sup>

Caldera started a collaborative effort to change the way a "UNIX" operating system was authored and licensed. They asked for others to contribute to that effort. For SCO to now claim - as it does - that Linux is an unauthorized derivative of UNIX on the basis of mere "elements" of similarity with the industry standard UNIX interface specifications, or that the GPL is unconstitutional<sup>36</sup> because of commodity or free pricing is logically inconsistent, thoroughly deceitful, and an unconscionable act designed to prevent their customers from deriving the material benefits of their purchases.

In a 1999 Reviewers Guide to OpenLinux 2.3 the company claimed that:

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<sup>34</sup> An implied license will arise where "(1) a person (the licensee) requests the creation of a work, (2) the creator (the licensor) makes the particular work and delivers it to the licensee who requested it, and (3) the licensor intends that the licensee-requester copy and distribute his work." *Lulirama*, 128 F.3d at 879 (quoting *IAE*, 74 F.3d at 776).

<sup>35</sup> <http://tinyurl.com/2x26r>

<sup>36</sup> <http://www.thescogroup.com/ibmlawsuit/AnswerAmendCC.10-24-03.pdf>

Linux is provided to the public in what have been termed "distributions," because the "distributor" did little more than download the kernel and various packages from the Internet, burn some CDs, and sell them.

- OpenLinux differentiates itself from "distributions" in the following ways:**
- **Caldera Systems "scrubs" the source code so that the customer can customize the operating system without obtaining patches and fixes from the Internet or the distributor.<sup>37</sup>**

Caldera was scrubbing the code, and distributing it commercially for years after the acquisition of the Lasermoon and Santa Cruz Operation UNIX technology. The development of the benchmark "Linux Standard Base Sample Implementation" was headed up by Caldera. It's not plausible that a million lines of unauthorized source code could have gone in unnoticed. Their CEO says that "open source" will destroy the industry. He says that copyright inherently includes protection of a profit motive, but he fails to mention that the exchange of copyrights under the terms of the GPL is a recognized form of financial gain.<sup>38</sup> He also doesn't mention that retail consumers have already purchased this otherwise free Linux software from The SCO Group. We did that because they publicly claimed that all of the work for "UNIX standards compliance" and a unified UNIX and Linux API/ABI<sup>39</sup> was already in their products, or soon would be. We expect them to honor the terms of their commercial licensing agreements with us.

Like most developers and enthusiasts, I have retail Linux products from several other suppliers including Red Hat, SuSE, Mandrake, and Debian<sup>40</sup>. These new SCO IP licenses would cost me thousands and are of somewhat dubious value. They don't actually convey any new software, and there are no objective diagnostic tests that a consumer can perform to determine if they have any real need for one. The SCO IP License web page simply claims:

Since the license pertains to SCO IP that the end user already received in the unauthorized Linux distribution, the SCO license doesn't include a media kit.<sup>41</sup>

I'm not convinced that I've received anything in a SCO product without authorization, or that I should pay for its use in other vendors products. Not only is SCO defrauding their retail customers by attempting to deprive them of their right to copy and redistribute the non-infringing portions of the Linux kernel source code, but they refuse to specify what this "IP" license actually covers. This suggests that they are misrepresenting their status, and selling non-refundable licenses for something that doesn't actually exist. SCO presents their end users with a limited set of options. Here is a typical example:

28. I have Linux servers deployed in my organization. What options do I have besides purchasing a SCO IP license?

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<sup>37</sup> <http://tinyurl.com/2aj86>

<sup>38</sup> The term "financial gain" includes receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works. -- 17 USC section 101

<sup>39</sup> <http://tinyurl.com/3ykqj> "An API/ABI [application binary compatible] layer is very compelling for partners. Customers will have the choice of whether they want to migrate to Linux or Unixware."

<sup>40</sup> Debian is a popular trademark. Debian supports the HURD, NetBSD, FreeBSD, and the Linux operating system kernels. Caldera didn't have to brand their products as "OpenLinux" they chose to for a reason.

<sup>41</sup> No prophet is ever honored in his own land. UNIX was developed for use on the Digital Equipment Corp. PDP family of minicomputers. In 1987 Ken Olsen, the founder of DEC suggested that "UNIX is snake oil." SCO is certainly marketing "SCO IP" as if it were. <http://tinyurl.com/2db4v>

There are 3 options for you to evaluate:

- \* You have the option to do nothing, adopt a "wait and see" attitude, and risk whether SCO may enforce its intellectual property rights with you.
- \* You can replace all servers, desktop and embedded uses of Linux with an alternative legal operating system.
- \* You can obtain SCO IP Licenses.

SCO is committed to protect and defend its intellectual property and believes that the most cost effective remedy is to purchase the necessary SCO IP License. However, the action you take should be based on the recommendation of your own legal counsel.<sup>42</sup>

This is a case of "throwing the baby out with the bath water". Many UNIX-derived operating systems such as X86 Solaris and the BSDs are available for free download and use. Instead of adopting one of those, I've chosen to pay SCO ample consideration for a scrubbed distribution of the Linux source code. Now they refuse to name a single non-infringing line of their OpenLinux kernel source code which remains available for continued use or redistribution in one of my products. Linux is comprised of thousands of text files. Even if the 2.4 Linux kernel actually did have one million lines of infringing source code, that would still leave well over 1.4 million lines of non-infringing source code. Chris Sontag, senior vice president of the company's SCOsource intellectual property division, admitted: "*It is possible to produce a distribution that does not infringe SCO copyrights.*"<sup>43</sup> Despite the fact that they claimed OpenLinux differentiates itself because *the customer can customize the operating system*, SCO offers a binary-only license as their sole remedy for reasons that can only be anticompetitive in nature.

Nothing prevents SCO from revealing the copyrighted portions of the Linux kernel source code which they claim are somehow *unauthorized* or encumbered with their UNIX IP. They have refused to do that because they claim that they are bound by confidentiality obligations. Under the terms of the AT&T UNIX licenses, SCO has already destroyed the basis for that sort of confidential relationship. SCO made every line of the Linux source code available to the public without any restrictions.<sup>44</sup> Nonetheless, SCO has played this role to the hilt by demanding a written certification from all of the UNIX source code licensees. This unprecedented certification process required the licensees to speculate whether or not they were using a version of Linux that might somehow violate SCO's undisclosed copyrighted UNIX ABI "elements". They threatened the UNIX licensees with revocation of their rights for failure to comply, and have subsequently sued Daimler-Chrysler for choosing to use lower cost competing technology.

The central question is whether or not SCO can disclaim their previous grant of license, or the implied warranties concerning the qualities which they claimed their retail Linux products possessed. SCO would like to characterize federal copyrights, or some sort of "magic UNIX licensing", as the central issues, but these are ordinary retail transactions that should be governed and construed under our state commercial codes and consumer protection laws. Customers want SCO to be held to the same standard of accountability as

<sup>42</sup> <http://tinyurl.com/uah8>

<sup>43</sup> <http://tinyurl.com/2qjl9>

<sup>44</sup> The AT&T SOFT-XXXXX Agreements section 7.06(a) If information relating to a SOFTWARE PRODUCT subject to this Agreement at any time becomes available without restriction to the general public by acts not attributable to LICENSEE or its employees, LICENSEE'S obligations under this section shall not apply to such information after such time. <http://tinyurl.com/28ex5>

any other vendor for the claims that were clearly visible on the labels of their retail products, and the other legally binding representations that they made to the buying public.

Distributing SCO's copyrighted UNIX source code without their permission should be a federal copyright violation. But it was SCO that licensed and sold their own branded versions of these so-called "infringing" products to Kansans under the GNU General Public License. They claimed that on a purely technical basis they were UNIX distributions, suitable for running, serving, and even developing UNIX programs. In order to prevail SCO must show: (1) that it owns a valid copyright, and (2) that the defendant copied protectable elements of the copyrighted work without permission.<sup>45</sup> Even SCO admits that they authorized the copying and redistribution. They simply claim that after a decade of using the GPL themselves, that it is unenforceable or doesn't somehow apply to them. It should be noted that they lack any other valid grant of license from the hundreds of other Linux kernel copyright owners which would have permitted them to make and distribute these commercial Linux products.

Their behavior simply doesn't square with the business plan that they announced to customers when they acquired the UNIX product lines from the Santa Cruz Operation:<sup>46</sup>

**Caldera's "Unifying UNIX with Linux for Business"** strategy unifies:

1. The existing UNIX business channel with Linux;
2. **The large, robust UNIX applications base with Linux;**
3. The largest existing UNIX customer base in the world with Linux.

Copyright is simply a personal property right. It is subject to various state laws and regulations that govern the ownership, inheritance, or transfer of personal property. Subject to certain statutory exceptions, the owner of a copyright has the exclusive right "to do" or "to authorize" certain things, i.e. the making of copies, the making of derivative works, and to distribute copies of the work to the public by sale or other transfer of ownership, or by rental, lease, or lending<sup>47</sup>. Here is an excerpt from the Linux kernel COPYING file:

"When we speak of free software, we are referring to freedom, not price. Our General Public Licenses are designed to make sure that you have the freedom to distribute copies of free software (and charge for this service if you wish), that you receive source code or can get it if you want it, that you can change the software or use pieces of it in new free programs; and that you know you can do these things.

To protect your rights, we need to make restrictions that forbid anyone to deny you these rights or to ask you to surrender the rights. These restrictions translate to certain responsibilities for you if you distribute copies of the software, or if you modify it.

For example, if you distribute copies of such a program, whether gratis or for a fee, you must give the recipients all the rights that you have. You must make sure that they, too, receive or can get the source code. And you must show them these terms so they know their rights."

SCO doesn't claim that they or their predecessors didn't own the necessary rights to

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<sup>45</sup> MITEL, INC. v. IQTEL, INC., 124 F.3d 1366 (10th Cir. 1997), Feist Publications Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991); Country Kids, 77 F.3d at 1284.

<sup>46</sup> See SCO's investor relations site <http://tinyurl.com/3a8np>

<sup>47</sup> 17 USC section 106.

license the use of the software that they have sold to consumers. If that were the case, they might be expected to take action to perfect their own rights or title, or at least indemnify their customers. They don't claim that their customers misunderstood the provisions or import of Caldera's GPL licensing, or their pledges about UNIX and Linux unification and standardization. When customers ask them pointed questions about the licenses governing their portion of the OpenLinux distributions, they change the subject and talk instead about the sale of their copyrights, transfers of their title, or say that they never placed an affirmative written notice in Linux.<sup>48</sup> Despite their company's public undertakings to lead the way in open collaborative GPL'ed UNIX development, they now claim they never really meant to do any of those things. Whatever they meant by the term "UNIX", it wasn't intended to be similar to AT&T, SCO, IBM, SGI, or even royalty-free BSD products. While those other parties have always been free to use the UNIX-derived ABIs without paying the SCO Group any royalties, the SCO Group now claims they never intended for their paying Linux customers to use them. They demand that we remove any infringing elements from Linux files, but then fail to list a solitary example<sup>49</sup>

Negation or limitation of the implied warranty of merchantability for their open source Intel-based UNIX ABI conformant products is inoperative to the extent that such a construction is unreasonable.<sup>50</sup> Portraying the normal everyday licensed uses of these Linux® products as a radical new form of federal copyright infringement is just that - unreasonable. SCO hasn't shown any misappropriated code because they can't. They've licensed it all to their retail Linux customers already.

I have included some research material in the attachments to help support the propositions already stated here: (1) SCO doesn't own the exclusive rights to distribute System V UNIX source code. (2) There were no copyright restrictions on the UNIX ABI specifications. (3) Even though they do own some copyrights, they have already expressly granted their customers licenses to copy and distribute their portions of the Linux kernel source code. (4) Even if the courts rule that SCO's licenses are voidable, and that their copyright ownership claims are valid, that still leaves the matter of the *implied licenses for UNIX* that were granted by SCO and each of their predecessors in interest.

In the meantime, the construction of a software license agreement isn't inherently a federal issue.<sup>51</sup> The value of the royalty free software which bears the UNIX-derived ABI elements (either in Linux, Coherent<sup>52</sup>, FreeBSD, NetBSD, or etc.) doesn't amount to \$75,000, which is a required element in establishing diversity of jurisdiction.

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<sup>48</sup> Section 204 of the Copyright Act invalidates attempted transfers of copyright ownership made without a writing. 17 U.S.C. § 204(a). However, section 101 of the Act excludes non-exclusive licenses from the definition of "transfer of copyright ownership." 17 U.S.C. § 101. **A non-exclusive license may be granted orally or simply arise from the conduct of the parties.** Nelson-Salabes, Inc. v. Morningside Development, LLC, 284 F.3d 505, 514 (4th Cir. 2002); Johnson v. Jones, 149 F.3d 494, 500 (6th Cir. 1998); Lulirama Ltd., Inc. v. Axxcess Broad. Serv., 128 F.3d 872, 879 (5th Cir. 1997); IAE, Inc. v. Shaver, 74 F.3d 768, 775 (7th Cir. 1996); Effects Assocs., Inc. v. Cohen, 908 F.2d 555, 558 (9th Cir. 1990).

<sup>49</sup> <http://tinyurl.com/36v18>

<sup>50</sup> KSA 84-2-316

<sup>51</sup> For example, the National Commissioners have offered Uniform State Licensing Laws such as UCITA .

<sup>52</sup> Coherent cited and used the System V ABI specifications [inc tar.gz](http://inc.tar.gz) e.g. see include/sys/errno.h.

UNIX is a registered trademark of The Open Group in the United States and other countries. <http://www.opengroup.org/> The SCO Group does not own UNIX, or control its specifications.

Linux is a registered trademark of Linus Torvalds, and is exclusively sublicensed by the Linux Mark Institute <http://www.linuxmark.org/>. Linux specifications are managed by the Free Standards Group. <http://www.freestandards.org/> The Linux Kernel is Copyright (c) Linus B. Torvalds under the terms of the General Public License (GPL). The SCO Group does not own Linux or control its specifications.

The Linux kernel archives are available at: <http://www.kernel.org/pub/linux/kernel/>

Information about various Linux distributions is available at: <http://distrowatch.com/>

Mr. Frank Sorenson keeps a nearly complete record of the various court papers from all the SCO Groups lawsuits: <http://sco.tuxrocks.com/>

Mr. Dennis Ritchie has made many of the USL v BSDi court papers available on a Bell Laboratories web page: <http://cm.bell-labs.com/cm/cs/who/dmr/bsd/bsdisuit.html>

5 attachments

Best Regards,

1. A SCO IP Price List
2. Who Owns UNIX?
3. The BSD Settlements
4. The Copyright Forfeitures
5. A Linux ABI History

Harlan L. Wilkerson