

Linux Suit Heats Up: IBM/Red Hat Give SCO a Hot Foot

By Charles King

On August 4, 2003, Red Hat announced that it filed a formal complaint against SCO with the purpose of demonstrating that Red Hat's technologies do not infringe upon any intellectual property of SCO and to hold SCO accountable for its "unfair and deceptive actions." Red Hat also established the Open Source Now Fund, whose purpose will be to cover legal expenses associated with infringement claims brought against companies developing software under the GPL license and non-profit organizations supporting the efforts of those companies. Red Hat pledged \$1 million to fund in this initiative.

On August 6, IBM responded to SCO's amended complaint by countersuing SCO on a range of issues, stating that SCO's scheme is "an attempt to profit from its limited rights to a very old UNIX operating system by introducing fear, uncertainty, and doubt into the marketplace." IBM's counterclaims include:

- SCO has violated the GNU General Public License, under which it accepted Linux contributions and distributed Linux;
- SCO has improperly claimed the right to revoke IBM's UNIX license for AIX, and by doing so has interfered with the company;
- SCO has directly infringed upon four IBM patents relating to SCO's commercially available UnixWare, Open Server, SCO Manager and Reliant HA clustering software products.

IBM is seeking compensatory and punitive damages, and an injunction requiring SCO to refrain from misrepresenting its rights and to cease further infringement of IBM's patents. At the time of this report, SCO had not responded to IBM's countersuit.

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Industry trade shows offer a multitude of publicity opportunities, and this week's LinuxWorld event in San Francisco was no exception. Shortly after SCO announced formal plans for an Intellectual Property License for Linux (with prices starting at a mere \$699 per processor for single CPU systems), Red Hat rolled out the guns for a bit of courtroom dueling. The purpose of Red Hat's actions appeared two-fold; first to provide SCO a small taste of the legalistic FUD it has been spreading willy-nilly over the past months and second to collect a bit of happy face PR in the form of \$1 million in funding to the self-ascribed Open Source Fund.

To many in the Open Source community, Red Hat's actions were likely a welcome relief. SCO's original \$1 billion suit against IBM for inclusion of AIX code in the Linux kernel has evolved publicly and metastatically into an all-out attack on Linux, which SCO seems to regard as a near-wholesale rip-off of the intellectual property the company purchased from Novell many years ago. Unfortunately, SCO has been better at making claims than it has at providing proof. The company has limited access to the evidence it says backs up its claims only to those willing to sign NDAs, and abandoned claims in Germany after the government asked to see the material.

SCO's threats to pursue legal action against Linux-using business customers, and its offer of indemnification

via the company's questionable IP licensing scheme may have brought things to a head. Red Hat may have been first out of the gate with a legal complaint, and the company's Open Source Now Fund is likely to receive plaudits from Linux folk of various stripes. Overall, though, we believe IBM's countersuit is the sort of big gun action that will catch the attention of Open Source adherents, the media, and — one would assume — SCO.

Some have wondered why it has taken IBM so long to fight back. The company's apparent indifference in the face of SCO's myriad accusations seemed nearly bovine in its complacency. But a look at the issues contained in the company's countersuit suggests that IBM was simply waiting for SCO to fashion enough rope for a public hanging before moving carefully and methodically ahead. The suit proceeds along lines both predictable and unique. First, it echoes an issue that many in the Linux community have pointed to. Since until recently SCO was an active and eager Open Source participant, accepting and distributing Linux contributions, its claims against other Open Source distributions is contradictory and violates the GNU General Public License. Second, SCO's claims that it has the power to revoke IBM's license to AIX, which lay at the heart of the company's original suit, are essentially fallacious and contradicted by agreements between IBM and the original UNIX license holder, Novell.

Most importantly and intriguingly, IBM claims that SCO has itself infringed on IBM patents in four of the company's commercial software products; UnixWare, Open Server, SCO Manager and Reliant HA. This may appear little more than an overt bit of tit-for-tat legalizing, but the fact is that if IBM has the evidence to prove these allegations, it opens SCO to legal and financial actions similar to those they have been pursuing against IBM, and provides an interesting avenue to a possible settlement between the two companies.

Considering the volume of effluent SCO has flushed under myriad bridges over the past few months, it is reasonable to ask if such a settlement could ever realistically come to pass. The honest answer to this question is: it depends. SCO has been effective, if somewhat melodramatic, in playing a bellicose aggressor in a play of its own design. However, in the process the company has reduced its chances of realistically portraying an aggrieved victim. How well SCO will perform under a far different and less flattering spotlight, and what they may do to exit this particular stage, remains to be seen.