

# IT Law Alert

## SCO To Demand License Fees from Linux Users

On June 17, 2003, we issued an alert outlining developments in the litigation between International Business Machines Corporation (“IBM”) and Caldera International, Inc., a company that does business under the name The SCO Group (“SCO”).

Despite being widely reported in the popular and trade press, the facts of the IBM/SCO dispute remain complex and often misunderstood. Distilled to their most basic elements, SCO is making two inter-related claims. First, that IBM wrongfully used and disclosed portions of the source code to SCO's proprietary “UnixWare” and “Unix System V” computer operating systems. Second, that as a consequence of IBM's alleged wrongful use and disclosure, SCO's proprietary source code was unlawfully incorporated into the popular “Linux” open-source operating system used at thousands of companies around the world.

In our earlier alert we broadly outlined the manner in which these claims impact end users of both the open-source Linux operating system and IBM's AIX version of Unix. We also pointed out indications from SCO that it would be making an “offer” of “remedial measures” to Linux licensees. On July 21, 2003, SCO announced the general terms of this so-called offer. The purpose of this alert is, therefore, to summarize SCO's latest announcement and our preliminary reaction to it. Our reaction is, of course, not only preliminary but generalized. Each end user of Unix, AIX and Linux has specific facts and circumstances surrounding its acquisition, possession and use of those technologies. No single response can address every one of those variations.

As we predicted, SCO's offer is little more than an attempt to capitalize on the confusion created by its claims against IBM. In summary, SCO has offered to sell to existing Linux users, license rights to those portions of the SCO source code that are alleged (but not yet proven) to be in Linux. Specifically, in its July 21, 2003, press release SCO states:

“[. . .] SCO will hold harmless commercial Linux customers that purchase a UnixWare license against any past copyright violations, and for any future use of Linux in a run-only, binary format. [. . .] Beginning this week, [SCO] will begin contacting companies regarding their use of Linux and to offer a UnixWare license.”

SCO's offer, as described in the above quoted materials and reiterated in numerous media interviews, is gravely, and probably fatally flawed as a “remedial measure” that would be acceptable to Linux end users.

As an initial matter, it is not clear whether SCO meant to limit its offer only to “past copyright violations.” Indeed, SCO's choice of words in this regard is strange because, to-date, SCO has relied exclusively on trade secrets theories and not made a single claim based on the copyright violations from which it says it will “hold harmless” Linux end users. In fact, until this week, SCO did not even hold an uncontested registered copyright to its own Unix source code. Equally as troubling is SCO's reference to a “run-only, binary format” restriction on the license rights that would be granted under its offer. While it might appear on the surface that SCO is offering, in SCO's words to “give [Linux customers] an option that will not disrupt their IT infrastructures” the license restrictions stated in the SCO press release (to say nothing of the additional restrictions likely to appear in the language of the license itself) are very likely to cause just such a disruption by significantly reducing the scope of rights already held by most Linux end users. Indeed, under the open source rubric through which most Linux end users hold their present Linux license rights, there are no such restrictions.

Even if these (and the many other) substantive defects contained in the SCO offer were to be overcome, it would not alter the single most compelling reason why we believe most Linux end users should reject it. In short, SCO makes its offer of remedial measures before there is anything for Linux end users to remediate. SCO's offer is based on

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assumptions about the existence of rights and the occurrence of events that are nothing more than its own unproven assertions. As of this writing, SCO has not obtained so much as a preliminary legal ruling stating that its source code was in fact unlawfully incorporated into Linux or that any specific Linux end user is in possession of such source code.

Based on our understanding of the facts underlying the IBM/SCO dispute (and contrary to the unsupported assertions being made by SCO's lawyers in the media), in order for any third party end user of Linux to be held liable to SCO for such party's otherwise lawful Linux use, a lengthy and intensive factual inquiry involving documentary and testimonial evidence in a court or similarly competent forum would have to determine, in roughly the sequence described:

- that Unix code was disclosed by IBM; and
- that such code was code from a proprietary SCO version of the Unix operating system rather than that of the proprietary components of IBM's AIX version; and
- that IBM's disclosure was restricted either by IBM's license agreement with SCO or the law (or both); and
- that the disclosed SCO source code, had not already lost protection by having been made publicly available by SCO itself (as many commentators have argued has occurred); and
- that such disclosed source code found its way into the specific version of Linux licensed by each company to whom SCO attempts to make its offer.

As we currently understand the procedural disposition of SCO's suit against IBM, it is not likely that the type of formal ruling described above will be issued for months or years—even if SCO again amends its complaint to seek immediate temporary relief. Whether the contents of such a ruling would be favorable to SCO is even less predictable. Thus, stated plainly, for most Linux end users, accepting SCO's offer will mean paying more fees for a reduction in current rights all to a party who has not yet proven its legal entitlement to charge those fees or reduce those rights in the first instance.

We do not believe, therefore, that at the present time and as a general matter, there is any compelling basis on which Linux end users should accept SCO's offer without at least analyzing the specific details of their own individual risk exposure and weighing that exposure against the loss of rights that might occur if the offer is accepted. As such, if you receive any type of letter from SCO we recommend that you contact counsel immediately. This is particularly true if you receive a “remediation” offer from SCO but have not already received the earlier letter sent by SCO as described in our June 17 alert. To be sure, even those parties who may decide to accept SCO's offer should take great care to ensure that they receive in exchange for their license fee payments a favorably worded release and indemnity from SCO protecting against all future claims by both SCO and third parties.

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