

IT Law Update

Unix/Linux Dispute Broadens —Red Hat Files Suit Against SCO

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 also does business through the entity The SCO Group, Inc. ("SCO"). On July 23, 2003 we followed up summarizing the offer of so-called remedial measures made by SCO to Linux end users. Our advice on July 23, 2003, was to reject any such offer until at least a preliminary ruling had been issued validating one or more of SCO's still unsubstantiated claims. On the afternoon of August 4, 2003, Red Hat, Inc. ("Red Hat"), announced that it had filed a seven count complaint seeking declaratory and preliminary injunctive relief from the vague allegations made by SCO against Red Hat and licensees of its version of the open source computer operating system known as Linux.

Recall that the facts underlying the IBM/SCO dispute are roughly as follows: IBM licensed from AT&T rights to use Unix under a series of agreements dating as far back as 1985. Acting lawfully under those agreements IBM created its own version of Unix branded as "AIX." Through a chain of merger, acquisition and spin-off transactions, by about 1994 SCO came to hold the rights to enforce the original IBM Unix licenses. In about 1996, IBM and SCO (along with other parties) entered into a joint-development agreement for Unix dubbed "Project Monterey." In the course of Project Monterey (indeed by its stated purpose) IBM and SCO each had further access to the other's respective trade secret version of Unix. During and after Project Monterey IBM also continued an aggressive strategy to develop and promote the competing Linux technology. The crux of SCO's complaint is that IBM unlawfully disclosed to the Linux development community portions of SCO's Unix source code that had been obtained by IBM by virtue of the original Unix license agreements and as a result of Project Monterey.

Broadly speaking, Linux, like Unix, comes in both operating system and application embodiments. While the

Linux kernel that forms the programming heart of the Linux operating system continues to be licensed under the open source rubric of the General Public License, significant commercial offerings have arisen around both services related to Linux and the proprietary and quasi-proprietary business applications and interfaces created to run in the Linux environment. Of the many thousands of commercial Linux vendors worldwide, Red Hat is generally viewed as a market leader.

Red Hat thus comes into the IBM/SCO picture largely by virtue of its success as a vendor of commercialized Linux. Although it has not yet filed any formal legal action against Red Hat, SCO has made it very clear in interviews, press statements and in its legal pleadings against IBM that Red Hat and the Red Hat version or "flavor" of Linux benefited most from IBM's allegedly wrongful conduct. As we indicated in both of our prior alerts, largely in this connection SCO sent vaguely threatening letters to some 1,500 of the largest global companies, many of which are licensees of Red Hat.

Red Hat's lawsuit, filed in federal court in the District of Delaware now seeks put to rest SCO's allegations and its related implied threats against Linux vendors and their licensees. The legal theories underlying the Red Hat complaint are markedly similar to those brought successfully by German Linux vendor Univention GmbH in a German court in July. In that action, Univention succeeded in obtaining an injunction against SCO. The German ruling forces SCO to at least temporarily cease its campaign of implied threats against Linux vendors and licensees in Germany.

While the Red Hat suit opens a new and long-anticipated front in what promises to be a historical legal battle, we do not feel that it materially changes our impressions to date. In fact, Red Hat's direct challenge to SCO's position confirms our earlier impressions. As we have indicated previously, each end user of Unix, AIX and Linux has specific facts and circumstances surrounding its

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acquisition, possession and use of those technologies such that no single response can address every one of those variations. Subject to that qualification, we have said that parties should take prudent steps to preserve their potential indemnification and related rights regarding Unix, Linux and AIX but probably should do nothing more until one or more rulings are issued supporting or rejecting SCO's claims. This is even more appropriate now than it was just a week ago. The preliminary relief sought by Red Hat should bring such a ruling much sooner than the current 2005 date that has been set for proceedings to commence in the IBM/SCO suit.

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