

SCO NEWS



Keeping up with the Joneses

Regular readers of *Linux Format*, *Linux Pro* and anyone who has been following SCO's attempts to sue IBM, Red Hat and various other players in the Linux community will be familiar with paralegal researcher Pamela Jones's *Groklaw* weblog at www.groklaw.net/, so we thought it was time she got to present her take on the debacle, and express a few opinions where normally she just presents the facts...

LINUX PRO: What drew you to the SCO case?

PAMELA JONES: First, indignation. I love the software, and I love the freedoms the GPL offers and I didn't want to see GNU/Linux software trashed or co-opted. I also found the case interesting and entertaining, because I saw from the beginning that the GPL was SCO's Achilles' heel. It was like watching a serious car wreck – you just have to look...

Later, I realised I could find information that I thought could make a real difference. My experience with lawyers has been that they are not always up to-the-minute on tech. Tech people, in turn, aren't always so *dernier cri* on the law. I hoped to put the two groups together. Each group knows more than I do about their area, but I knew enough about each, I

With no end yet in sight for the SCO case against Linux, one person has been providing key research that has helped the Linux community keep up with the courtroom battles. PAUL HUDSON interviewed PAMELA JONES of Groklaw fame...

hoped, to translate as necessary, so that some serious co-operation could result. I was pretty sure we could increase our chances of a win with the right cross-pollination.

I figured that if I could draw together kernel coders, the guys who write Linux, plus the Unix greybeards, most of whom are still alive, who know the history, who know where the bodies are buried, and explained to them what kind of evidence I thought might matter, drawing on my think-tank of attorneys, that such a community of pooled knowledge could make a dent in the SCO case. I saw it as a way to apply the Open Source method to legal research.

LXP: Tell us a little about SCO's history with Linux.

PJ: SCO took the name SCO fairly recently. As I understand it, the current SCO used to be called Caldera, which was a Linux company. After the Santa Cruz Organisation sold some of its Unix assets to Caldera, Caldera adopted the name SCO. The old SCO became Tarantella, which still exists. Hence, the contractual issues 'newSCO' is raising with respect to Project Monterey are about a contract between 'oldSCO' and IBM, *not* Caldera and IBM. If you read IBM's legal documents carefully, such as its Amended

SCO vs LINUX TIMELINE: THE STORY SO FAR

History of the dispute

1968

Donald Knuth writes (probably reworking earlier papers) some packet filter software. Thompson and Richie at AT&T write portions of code used in UNIX.

1985

IBM take a UNIX licence from AT&T.

1993

Novell buys UNIX source & patents from AT&T.

1994

Novell sells full UNIX Licence to Sun. Novell sells UNIX trademark and UNIX specification to the Open Group.


1995

SCO buys UNIX from Novell – some confusion over whether all patents and copyrights transferred – Novell can't find its copy but confirms the signature is valid so that some copyrights may be owned by SCO.


Feb 2001

SCO & Caldera merge. Pro-Linux statements are released.

2002

Caldera releases code as Open Source. **JUNE** McBride takes over as SCO CEO. **AUGUST** Caldera announces it's changing its name to the SCO Group and state that the company is going to concentrate on Unix development.

Jan 2003

LinuxWorld Expo: IBM makes a keynote speech about "Linux coming of age" that reportedly upsets McBride by stating its intent to "obliterate UNIX." McBride then hires Boies' law firm, claiming that SCO wants to find out if there is SCO intellectual property in Windows, Mac OS X, Linux and versions of BSD. There's no specific claims made about Linux yet, but McBride singles out Mac OS X: "If you pull down OS X you'll see a lot of copyright postings that point back to Unix Systems Laboratories, which is what we hold."


March 2003

After announcement of SCO's intention to sue IBM on **MARCH 6** SCO's stock price leaps 40 per cent and trades at just over US\$3.00; IBM's stock also rises. Linus Torvalds' first public statements on the case dismiss the lawsuit as a contract dispute between IBM and SCO, saying it only really affects Linux "peripherally." Linux and FOSS communities react: Eric Raymond calls SCO's actions

Answer, you will see that its legal team consistently highlights this distinction [1].

Caldera under Ransom Love, its Co-Founder and CEO, was "very involved" [2] in writing code for Linux and specifically "for the Linux kernel" [3], including some of the very code SCO is now complaining about. Groklaw has found employees [4] of Caldera (and of oldSCO too [5]) who donated code to the kernel, with the apparent approval of their superiors. Caldera was working with the goal of getting Unix and Linux to work seamlessly together. There are questions in the Linux community as to whether Caldera took Linux code and inappropriately put it in Unix – for example in things like the *Linux Kernel Personality, LKP*. The trial will likely reveal whether that happened or not, if it goes to trial.

Caldera had its own Linux distribution, which obviously included the kernel, which it released under the General Public License (GPL). Once code is released under the GPL, it's like losing your virginity. There is no turning back to the way things were, because of the terms of the license. The last I heard, SCO was still distributing Linux from its servers, so although the company's chiefs are apparently going to argue that the GPL is void or voidable" [6], it's a difficult argument to make when you've used it for years, IPO'd from GPL products, and let the whole world know you were a Linux company distributing under the GPL. Will SCO argue that it was so incompetent that its coders never noticed 'infringing' code in *its own* Linux distribution?

SCO's executives have a hard row to hoe there, which is likely why they are arguing that the GPL is unconstitutional. GPL code cannot be distributed under any other license. If you reject the GPL, you have no right to distribute at all. At that point, if you distribute, you are violating the copyrights of the authors of the code. The GPL is a license that sits on top of copyright protection, so if the GPL were to be

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The timeline is a broad and simple distillation of some much more comprehensive information available online at www.groklaw.net/, at www.linux.org/news/sco/timeline.html and www.linux.org/news/sco/timeline.html and should be regarded as a very rough guide, with *Linux Pro* making no claims regarding its authority or accuracy.

declared void or unconstitutional, then copyright law remains. So SCO is in a tight spot, no matter which way it goes on the GPL issue. Either the company properly distributed under a valid license – the GPL – and it is valid, or it has been massively infringing on the copyrights of the authors of the Linux kernel, not to mention the GNU and other applications. One of IBM's counterclaims centres on this very issue.

LXP: What were SCO's initial allegations against IBM?

PJ: They were contractual and tort-related, basically framed in the context of the Project Monterey joint venture and IBM's contributions of code to Linux, allegedly in violation of their Unix license: specifically, misappropriation of trade secrets, unfair competition, breach of contract and tortious interference with SCO's business. (Cf. "their complaint" [7] and a particular news article [8]). Of course, there are two tracks on this case, the one being argued in the media and the one being argued in the courtroom. They are not identical. Assuming you are asking about the court, it was tort and contract allegations. It appears it still is, because just this month, a spokesman for SCO said that SCO was not alleging copyright infringement against IBM after all.

The IBM case is only one part of the story though. For example, the Red Hat case [9] is about copyright and Lanham Act violations, not contractual issues, and in that case, SCO is the one being accused. And then there is the SCO campaign [10] against Linux end-users [11] regarding alleged copyright infringement and SCO's DMCA claim [12].

LXP: What claims has SCO made concerning Linux and the GPL?

PJ: SCO has made so many, it's a daunting question. If you'd like to follow all the twists and turns, just go to *Groklaw's* SCO Archives [13], and you can follow the case by date from mid-May to the present.

SCO started by saying that Unix code had been put in Linux [14] and that therefore users who wished could buy a license to use Linux in binary-only form [15] for a fee. That went down like a lead balloon. >>

"Will SCO try to argue that it was so incompetent that its coders never noticed 'infringing' code in *its own* Linux distro?"

May 2003

"deeply stupid"; Bruce Perens states lawsuit is "a prelude to acquisition [of SCO by IBM]". IBM says that SCO's case is "full of allegations with no supporting facts". SuSE announces it is "re-evaluating" its relationship with SCO.



Linus Torvalds

SCO's website suffers the first of three highly publicised distributed denial of service attacks (DDoS). SCO implies in later statements that it believes this and subsequent attacks were the work "some of the Linux community who are hostile toward SCO". Linus Torvalds hilariously compares the whole SCO vs IBM, Red Hat, TurboLinux, SUSE, Novell etc controversy to "white trash battling it out on the Jerry Springer show". Microsoft – which has remained quiet up to this point on SCO vs IBM – injects capital into SCO's anti-Linux strategy by purchasing a Unix license from SCO for a reported US\$10 million, ensuring that SCO can claim a profit for that quarter's operations.

June 2003

SCO finds a 1996 amendment to Novell's contract with 'oldSCO' transferring ownership rights to SCO – backing up SCO's claims of copyright ownership, and begins showing – under non-disclosure agreements – selective code fragments that could bear a close similarity to code in the kernel. Jon 'Maddog' Hall, the guardian of the Linux trademark doubts SCO's claims. Richard Stallman writes in *ZDNet* that even if a few lines of code *do* eventually turn out to have been plagiarised, it won't taint the rest of the GNU/Linux system as they can easily be removed, contrary to SCO's claim that the whole GPL and Linux as a concept is invalid.

July 2003

SCO offers a 'get out jail free' licence to Linux users. SCO continues to offer the Linux kernel from its own servers and refuses to disclose alleged infringing code. Netcraft and Internet Week data showS that Linux deployments are increasing, especially at large companies. SCO stock hits a new high of US\$15.02 per share. Gates comments that the whole case is due to "the fundamental weakness of Linux", namely the GPL. Evidence of SCO's forbears directly contributing code to the Linux kernel is found – cooperating with IBM on the same code that's the basis of the dispute: journaling files systems (JFS).



Bill Gates

SCO NEWS

Currently [16], SCO appears to be focusing on Unix licensees [17], based on contractual terms [18], as well as on copyright infringement claims against Linux end-users, but again apparently only Linux users who are also Unix licensees. The letters SCO recently sent could be used [19], if any recipient later distributed Linux, as the basis for a DMCA claim, based on the header files it claims it has a copyright on. Of course, SCO would have to prove to a court they really have a copyright.

The problem SCO faces though, is that its copyright claim was debunked by Linus Torvalds [20] saying he wrote most of



Any time there is such a large group, there will be an assortment of reactions. What is the common thread? Moral outrage and some very effective and pragmatic planning and implementation of ways to protect their investment in Linux. The OSDL Legal Defense Fund [24] springs to mind, which pays for the legal fees of qualifying Linux users who may be sued by SCO. This is quite clever, legally, I think: because it pays for their legal fees but not their judgments, so SCO can't get money from the fund, even if it wins; but SCO will have to face top-notch legal talent even if it sues some small company that otherwise might have felt economically compelled to settle rather than be sued.

IBM – to its credit – did not attempt to buy SCO off, but stepped up to the plate and was willing to defend Linux and the GPL [25]; and Big Blue has been doing a fantastic job in the legal arena, as you can see for yourself by reading IBM's legal documents [26] or the transcript of the 5 December 2003 hearing [27]. I've always heard that if IBM has any doubts about winning a case, it settles early rather than fight; so if they decide to go to trial with a case, it's because it is confident to get a win.

“When you say ‘Linux Community’ today, it’s a mighty group of mainstream players like Google, IBM, US Dept of Defense...”

the headers himself without access to Unix code, and for the rest, Novell says [21] it owns the copyrights and indeed it has registered them with the US Copyright Office, and then there is the belief [22] among most I've talked to that the headers are not copyrightable anyway, let alone by SCO.

SCO now offers the SCO Intellectual Property License for Linux [23]. As of now, it's globally available, and there are rumours that SCO will find someone to sue in the UK first. Note there are three different kinds of such ‘licenses’: Client, Server, and Embedded.

LXP: What has the Linux community's response been?

PJ: I think we need to define our terms. A couple of years ago, the definition of ‘Linux community’ would be different to what it is today. IBM is now a member of the Linux community; so are Novell and SuSE, Red Hat, Merrill Lynch, Google, the US Department of Defense, the government of the city of Munich, NASA, the US Weather Service, OSDL, Dreamworks, and so forth. A lot of corporations and governmental entities use or distribute Linux. The Internet depends on Open Source applications like *Apache*. You can hardly go to a movie any more that doesn't have Linux-created special effects. Linux is also very important in the embedded space, so when you say “Linux community” today, it's a mighty large group of mainstream players.

Your one-stop shop for every piece of information you could conceivably need about SCO vs the world and his dog.

LXP: What do you think SCO actually wants the conclusion of this case to be?

PJ: SCO's boardmembers would have to speak for themselves, but I believe I can safely guess that they would



SCO vs LINUX TIMELINE: THE STORY SO FAR continued

August 2003

Red Hat and IBM counter-sue. SCO declares it will defend the invalidity of the GPL (dubbed by some as the ‘Chewbacca defence’). SCO reveals two example fragments from a claimed one million lines of ‘copied’ code that are traced to public domain code or no-copied code based on public domain specs. Linus Torvalds replies: “They are smoking crack”. SCO's website apparently falls victim to another DDoS attack. SCO reports a profit of \$3.1million on revenue of just over US\$20million. *Wall Street Journal* points out that SCO execs have sold over US\$1.2 million of stock since March, and that SCO has only had one profitable quarter since issuing shares to the public in 2000.

September 2003

German court imposes a 10,000Euro fine on SCO's German subsidiary. SCO failed to comply with an earlier court order prohibiting it from claiming that Linux is an unauthorised copy of Unix. SCO has urged people to buy licenses, but interested parties apparently find out that SCO won't sell them one. Hewlett-Packard announces a plan to indemnify its Linux customers and maintains that HP has no official position on the dispute, despite SCO's claims to the contrary. IBM files new counterclaims, alleging that SCO violated the GPL and IBM's copyright by claiming its own copyright on Linux code. SCO stock drops more than 17 per cent on the news.

October 2003

A provision in the SCO Unix contract with Novell is found, allowing “amend, supplement, modify or waive any right” with respect to licensing Unix: undermining the main part of SCO's case – IBM's supposed breach of contract. FSF attorney Eben Moglen calls SCO's legal claims “rubbish”: SCO itself distributed Linux under the GPL! Red Hat pushes its lawsuit against SCO hard. SCO responds by requesting a delay in the discovery process. SCO announces that it is not going to invoice Linux users despite it receiving US\$50 million from BayStar Capital. Some analysts are able to link Microsoft to BayStar, who deny MS connection. On Deutsche Bank's recommendation to buy, SCO stock hits a three-year high.



like some money. Darl McBride has indicated that what SCO wants is not to kill Linux off, but to collect a royalty every time Linux is sold. Some have speculated that this is why SCO has been so slow to show what it thinks is infringing code, for fear the Linux coders will immediately remove any infringing code, if any exists; thus thwarting SCO's hope to be like the troll under the Linux bridge, collecting a toll every time anyone crosses over.

LXP: How could this case affect other free software?

PJ: My personal view is that it has been great publicity for GNU/Linux and particularly the GPL. Is there anyone left who doesn't see how much easier it is to use Free/Open Source software than to take a chance on becoming like SCO's current customers: facing legal threats when all they did was buy a license from SCO to use Unix code?

This could never happen with Free Software. Any so-called 'viral' properties of the GPL pale when compared to the SCO alternative. Nobody tells you what to do with your own code in 'the free world'. It's true that if you use GPL code and blend your code in with it into one program, if you then distribute the program you must use the GPL license. On the other hand, if you release two different programs that can be used together, but each stands alone, then you can release your code as proprietary if you want to, and put it with the GPL program(s) in the same box.

If you don't distribute software – and most of us don't – and merely use it in your business, you can use GPL code [28] and modify it all you wish for your own use and you don't have to release your proprietary code modifications ever. Take them with you to your grave, if you like, rather than share it! The GPL allows you to do that too. Whether that works is another issue, but my point is: you wouldn't be violating the GPL. Compare that with companies who licensed Unix from SCO, built their own proprietary modifications and then distribute software, like IBM. SCO is demanding rights not only to SCO's System V code, but also to all derivative code written as well. And they try to call the GPL 'viral'! SCO doesn't own the copyrights to NUMA, JFS, SMP or any of the code it has mentioned. It's all apparently based on SCO's own elusive definition of what constitutes 'derivative code'. Most of the world defines it quite differently from SCO...

SOURCES

- [1] www.groklaw.net/article.php?story=20031101041552437
- [2] www.eweek.com/article2/0,4149,1300359,00.asp
- [3] www.eweek.com/article2/0,4149,1300411,00.asp
- [4] www.groklaw.net/article.php?story=128
- [5] www.groklaw.net/article.php?story=20031210111235600
- [6] www.groklaw.net/article.php?story=20031027193958740
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- [9] www.redhat.com/about/presscenter/2003/press_sco.html
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- [26] www.groklaw.net/staticpages/index.php?page=legal-docs
- [27] www.groklaw.net/article.php?story=2003121122033016
- [28] www.groklaw.net/article.php?story=20031214210634851

LXP: Do you see this case coming to a conclusion soon, or dragging on for the foreseeable future?

PJ: I think that depends on whether an entity with big pockets is funding it or not. If not, I think we could have a fairly quick resolution.

So far, SCO isn't doing well in court, in my view. Otherwise, it could go on a couple of years. It doesn't really matter in the long run, I don't think – I expect the outcome to be the same. ■

November 2003

Tech research company Gartner warns SCO's customers to get a "contingency plan". SCO reportedly hired bodyguards to protect execs, but no threats reported to Utah Police. SCO claims that Novell's acquisition of SuSE will violate a non-compete agreement it supposedly has with Novell. Novell claims there is no such non-compete provision in the 1995 SCO-Novell contracts that transferred some Unix rights to 'oldSCO'. IBM issues subpoenas to investors in SCO to try to get facts on case, SCO responds tit-for-tat. SCO claims that Novell's acquisition of SUSE will violate a non-compete agreement it supposedly has with Novell.

December 2003

CNET reports SCO lost money in Q4 "based largely on hefty legal fees." SCO sends out more warning letters – in response, Linus Torvalds claims authorship of several files listed: "I think we can totally demolish the SCO claim that these 65 files were somehow 'copied'. They clearly are not." A third DDoS attack is reportedly directed against SCO's servers, but defense against this type of attack is easy and SCO's main interest seems to be in generating press coverage. McBride claims that the GPL is incompatible with the US Constitution. SCO suffers its first legal setback – having shown header files, it now has just 30 days to show the exact code.

January 2004

Novell announces indemnification for its Linux customers in the event of legal action by SCO, reportedly similar to Hewlett-Packard's September 2003 offer. To pay for SCO's defense, Law firm Boies, Schiller & Flexner will receive US\$1million in cash for their services. In addition, SCO will issue 400,000 shares of common stock to the law firm. Intel is the latest company to contribute cash to the legal defense fund aimed at protecting individuals from SCO's legal activities. SCO claims "low level" talks with Google about licensing fees (Google's search services reportedly uses 10,000 servers running Linux).

Aug 2004

AUGUST 25
Deadline for reports from SCO's experts (source: Scheduling Order dated 6/20/03).

April 2005

APRIL 11
Scheduled beginning of a 5-week jury trial (source: Scheduling Order dated 6/20/03).