

March 2004

Contacts

Washington, DC
1900 K Street, NW
Washington, DC 20006

Jennifer A. Albert
(202) 955-1978
jalbert@hunton.com

Lewis E. Lamb III
(202) 955-1889
llamb@hunton.com

Richmond, VA
Riverfront Plaza
East Tower
951 East Byrd Street
Richmond, VA 23219

Randall S. Parks
(804) 788-7375
rparks@hunton.com

Lee N. Kump
(804) 788-8396
lkump@hunton.com

SCO Continues To Target Corporate Users of Unix and Linux; Files Suit Against DaimlerChrysler and AutoZone, Inc.

SCO's Controversial Enforcement Campaign Expands in Scope With Recent Filings; More Suits Possible

After sending letters threatening legal action to thousands of corporate users of Unix and Linux operating system software, The SCO Group, Inc. filed lawsuits this month against AutoZone, Inc. and DaimlerChrysler Corporation seeking injunctive relief and unspecified damages.

In a complaint filed in Nevada federal district court on March 3, 2004, SCO alleges that AutoZone's use of Linux software infringes upon SCO's copyright in Unix. In a second action, filed in Michigan state court the same day, SCO alleges that DaimlerChrysler breached the compliance certification provisions required under a Unix license.

These latest lawsuits bring two more companies into a rapidly expanding series of legal battles that arise from SCO's claim to hold a proprietary interest in Unix, as well as SCO's related

allegation that source code from Unix has improperly been incorporated into the open source software Linux. SCO's claims, if established, could impact thousands of companies that rely on one or both operating systems for enterprise-critical or companywide applications. Pending resolution of the suits, many recipients of SCO's demand letters are evaluating the underlying claims and weighing options for response. Among the factors being considered are significant legal and factual questions that exist with respect to SCO's claims.

Complaints Follow Demand Letters

The complaints filed against AutoZone and DaimlerChrysler followed a letter writing campaign in which SCO targeted large-scale Linux and Unix users. In May 2003, SCO wrote to 1,500 companies alleging that use of Linux software



without license from SCO constitutes copyright infringement. In December 2003, SCO sent letters to 3,000 companies demanding a range of certifications related to the nature and scope of the recipient's use of Unix software. SCO has threatened to terminate the licenses of Unix users unless they make the required certifications, and has also threatened to proceed against Linux users in copyright infringement actions unless they take licenses from SCO.

Latest Suits Join Actions Against IBM and Novell

With the filing of the complaints against AutoZone and DaimlerChrysler, SCO is now party to five pending suits related to its claims. On March 6, 2003, SCO filed suit against IBM alleging, in part, that IBM had breached a contract and violated trade secret protection by allowing Unix code to be incorporated into Linux. In connection with that action, SCO purported to cancel the Unix distribution license, pursuant to which IBM licenses

Unix to end users. The suit is now pending in Utah federal district court.

On January 20, 2004, SCO filed suit against Novell, Inc. alleging slander of title arising from Novell's statements that SCO is not the rightful owner of Unix. SCO purports to have purchased all relevant rights from Novell in 1995. Novell has disputed such assertion and contends that it never assigned to SCO the copyright in Unix on which SCO bases its claims. That suit is also pending in Utah federal district court before the same judge presiding in the SCO action against IBM.

SCO has also been named as defendant in a suit brought by Linux distributor Red Hat, Inc. filed on August 4, 2003, in federal district court in Delaware. Red Hat seeks a declaratory judgment that Linux does not infringe any SCO copyright interest. Central to these suits are issues which go to the heart of some of SCO's demands.

SCO's Demands

SCO's letter to Unix users purports to cover Unix V software and any modifications or derivative works based on Unix made by the user. SCO demands identification of every CPU running Unix, as well as a statement that the user has reviewed the Unix license and is in compliance with its terms. SCO makes additional demands, including requiring certification that the user has kept Unix confidential and that neither the user nor its employees has contributed code based on Unix to Linux. SCO threatens to terminate the user's Unix license or pursue legal action if compliance is not made within 30 days from receipt of the letter. Although many Unix users receiving the letter never directly entered into a contractual relationship with SCO as a party, SCO purports to assert rights acquired as a successor licensor.

SCO's letter to Linux users alleges that proprietary SCO code has been incorporated into Linux and advises that use or distribution of Linux without a license from SCO



violates SCO's copyright. SCO advises users to take steps to "discontinue" any violations and to contact SCO to discuss a licensing arrangement. SCO states that it will take action to protect its rights if users do not comply.

Users Should Weigh Options

SCO's claims, if established, would impact Unix and Linux users across a range of industries. Both operating systems play a role critical to many corporate computer systems. SCO has clearly stated its intentions to enforce claimed rights and has filed suits accordingly. Additional suits may be forthcoming.

Although the specific facts and particular circumstances unique to each Unix or Linux user will ultimately control how a company receiving a demand from SCO proceeds, such companies may wish to consider a number of factors before determining a particular course of conduct. The cost of responding to a demand by SCO to conduct an internal audit or to take a license can be substantial. While some companies,

including Microsoft and Sun Microsystems, have taken various licenses from SCO, considerations beyond the possible validity of SCO's claims alone may have factored into such decisions. Moreover, there are a number of fundamental issues related to the viability of the claims underlying SCO's demands. Both legal and factual questions exist with respect to SCO's claim of proprietary interest in Unix, as well as with respect to SCO's rights to enforce certain Unix licenses. For example, while SCO purports in some instances to be the successor licensor to Unix licenses granted over the past twenty years by companies such as AT&T, there are issues related to the possible enforceability of such claims. Similarly, legal and factual ques-

tions exist with respect to SCO's claims regarding Linux. Evaluation of these and other matters may influence a company's decision as to how to respond to a demand by SCO.

Hunton & Williams is tracking the SCO cases and the underlying issues. We are prepared to assist clients in evaluating and assessing factors relevant to SCO's claims and its related demands, as well as to provide counsel on the broader issue of open source software. Hunton & Williams has prepared a background memorandum which provides further detail on the SCO cases. We are pleased to make this memorandum freely available upon request as a service to our clients.

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Representative Transactions

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