

Is it legal?

Comparing litigation around open source and proprietary software, Bill Weinberg of MontaVista Software sees the open advantage

MontaVista Software recently took a strong public stand against the attempts of the SCO Group to intimidate and extract monies from users and deployers of Linux. While most of the public furore has centred around ubiquitous enterprise deployment of Linux, companies that promote and use Linux in intelligent embedded devices – semiconductor manufacturers, device OEMs, and embedded software suppliers – were also eager to understand SCO rhetoric versus reality to gauge potential risk to them and their customers.

In the course of briefing these companies and the press, we met with a recurrent concern – what if SCO's claims, meritless or not, are just the first of many that might plague Linux use and deployment?

On the surface, this question seems simple and valid. However, it reveals the unfamiliarity that many business people have with open source licensing and open source development practices. It simultaneously shows the extent of misplaced trust that commercial interests have in traditional proprietary software development.

It is impossible to predict whether the future holds further legal threats to Linux and open source. However, it is easy and instructive to observe that until SCO v. IBM, the track record of Open Source IP (Intellectual Property) has been squeaky-clean. By comparison, the history of proprietary software development and licensing is one long litany of litigation.

Prior to SCO versus IBM: The Case, and to SCO versus The Linux Community: The

Threat, the worst-case legal scenario for Linux and open source software went as follows: what if someone contributed code to Linux and later that contributor's employer or an interested third-party claimed the code belonged not to open source but to a single company – and they wanted it back?

Well, the SCO affair closely echoes that scenario, casting Big Blue and others as contributors and SCO as putative owners of IP that made its way into Linux. In the past, such threats hardly seemed plausible. Today, however, legal and PR volleys cross almost hourly among SCO, IBM, Red Hat, and open source and commercial interests.

While such a scenario and today's reality give pause to enterprise CIOs, imagine the impact on CTOs and management of embedded Linux OEMs. For enterprise IT departments, OS redeployment involves time, effort, and potentially unforeseen licensing expense.

For device manufacturers, replacing a deployed OS version could involve recall and rework of tens of millions of devices or unforeseen margin-destroying licence costs on device "Bills of Materials".

Track record

It has been eleven years since Linus Torvalds first created the Linux kernel, began promoting its development via the Internet, and fostered its growth into today's full-blown GNU/Linux OS and global technology ecosystem.

In that time, there have been only a handful of legal proceedings around this 30 million-line software behemoth. In every instance (until

SCO) those few cases have been adjudicated quickly on the basis of traditional copyright and patent law. Linux licensing (the GPL, etc) has never been challenged, nor has errant IP been discovered.

Programmers who are deeply involved in the Open Source process – Eric Raymond, Bruce Perens, and of course Linus Torvalds himself, along with Open Source lawyers like Larry Rosen and Laurence Lessig – have been quick to describe how strict project control and broad community oversight combine to ensure a pure, unburdened pedigree for Linux and other Open Source code. They aver that the risk is small and add that rapid revision weeds out even suspect contributions, let alone wholesale misappropriation.

By comparison, purveyors of proprietary software seem to spend more time in court than in the marketplace. In the last decade, proprietary interests have launched thousands of lawsuits involving tens of thousands of claims over copyright, patents, trade secrets, and contractual business arrangements (see boxout).

A more comprehensive list would fill volumes and would further underscore an undeniable fact – while the SCO situation opens the *question* of IP-related risk with use of Linux and other open source software, a casual analysis of the history of proprietary software reveals the *certainty* and vast scope of litigation around traditional software, its engineering, marketing and use.

CO actions

In order to prove their claims against Linux in court, and to answer suits from Red Hat and from the German plaintiffs LinuxTag and Tarent GmbH, SCO will have to show *where* SCO UNIX IP supposedly resides in Linux source code, and to prove *how it got there*.

Its discovery in this area and the response of the community will serve to make open source even more open – to let laypersons see for themselves how Open Source works to document its origins and to police itself.

So let the sun shine in. Instead of prejudging open source for the legal manoeuvrings of a failing proprietary software company, look at the lengthy rap sheet of proprietary software in general.

Then ask yourself – open or proprietary? Which is more likely to keep you and your customers out of court?

PROPRIETARY SOFTWARE - A LITANY OF LITIGATION

In Bill Weinberg's own particular field of expertise, embedded systems, his casual recollection yields a doleful docket of court cases in the last decade or so:

GreenHills Software v Microtec Research [1991] Greenhills sued its former reseller, claiming that the Microtec C Compiler was illegally derived from Greenhills C
GreenHills Software v ISI [1997] Greenhills claimed that ISI (now part of Wind River Systems) was in breach of contract over failing to meet commitments for resale of Greenhills technology in ISI's IDE, pRISM
Wind River Systems v Greenhills Software [2002] The embedded OS maker sued for patent

infringement in GreenHills# "EventAnalyzer" and MULTIÆ IDE
IKOS Systems v. Cadence Design Systems [2002] IKOS, a subsidiary of Mentor Graphics, sued Cadence, alleging Cadence Quickturn Palladium design verification system infringed on an IKOS patent

And a sampling of cases further a field:

Unidata v Avon [1997] Hong Kong-based Pacific Unidata filed against Avon for violating its software copyrights, asking \$30 million in compensation
RealNetworks v Streambox [1999] Streaming technology provider RealNetworks charged Streambox

with violation of the Digital Millennium Copyright Act (DMCA), copyright infringement and unfair competition for the Ripper product

And closer to matters at hand:

USL v Berkeley Systems Design, the Regents of the University of California et al [1992] ATT spin-offs USL sued BSDI, the University of California (and even then-governor Pete Wilson) for trademark infringement, false advertising and unfair competition for the creation and propagation of Berkeley UNIX
Caldera v. Microsoft [1996] Caldera (now the SCO Group) filed an antitrust lawsuit against Microsoft, alleging monopolistic practices and asking over \$1 billion in damages

MontaVista is one of a handful of companies working on embedded Linux and Bill Weinberg is its Marketing Director. He has over 16 years experience in the field of embedded software.