

ADVISORY

SULLIVAN & WORCESTER INTELLECTUAL PROPERTY ADVISORY

SCO Update

In a major blow to SCO, the U.S. District Court for the District of Utah last week held that Novell is the owner of the copyrights in UnixWare, Unix and, by extension, Linux and dismissed SCO's slander of title and breach of contract claims.

This decision is excellent news for open source software advocates from Boston to Tel Aviv and scuttles SCO's three year old lawsuit against IBM, as the judge also ruled in favor of Novell's request for permission to demand that SCO withdraw its lawsuit against IBM. Novell has made such a demand. SCO has not yet responded.

In the SCO v. IBM case, SCO claimed that IBM allowed key pieces of SCO's Unix technology, specifically Unix System V, to slip into Linux - an open source application made available to the public for free under the General Public License, Version 2 ("GPL"). SCO then amended its complaint to include counts of copyright infringement after it was granted U.S. copyright registrations on several Unix components.

In response, IBM argued that because SCO distributed the Linux source code under the GPL it cannot claim that the Linux software improperly includes source code to which SCO owns the copyright. IBM also asserted that SCO breached the GPL by, among other things, claiming ownership rights in Linux source code and seeking to impose additional restrictions upon Linux end users. SCO responded by asserting that the GPL contravenes the Copyright Act and is unenforceable.

In last week's ruling, the judge held that the main piece of evidence in the SCO v. Novell case, an asset purchase agreement, did *not* transfer ownership of Unix to SCO as SCO had alleged in its complaint. In a press release issued by Novell, Novell stated, in part, that the judge's decision eradicated SCO's threat to the Linux community and that Novell has no plans to assert legal claims against Unix users, stating: "We don't believe there is Unix in Linux."

Although the court's decision last week appears to be consistent with its rulings in the SCO v. IBM case, most of SCO's nearly 300 claims were dismissed last year, and although the decision appears to be great news for companies using open source software, it leaves at least one important question unanswered: Is the GPL license valid and enforceable?

Because the Novell case is so complex, the judge has requested that the parties educate him as to what they each believe are the open issues in the case before trial is slated to begin in mid-September. Perhaps we will get lucky and get an answer to our question. Stay tuned.

IF YOU WOULD LIKE ADDITIONAL INFORMATION, PLEASE CONTACT:

Kimberly B. Herman
617 338 2943
kherman@sandw.com

BOSTON

Sullivan & Worcester
One Post Office Square
Boston, MA 02109

NEW YORK

Sullivan & Worcester
1290 Avenue of the Americas
New York, NY 10104

WASHINGTON, DC

Sullivan & Worcester
1666 K Street, NW
Washington, DC 20006

SULLIVAN &
WORCESTER