Closing the Door on Open Source: Can the General Public License Save Linux and Other Open Source Software?

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Rather than defend the 'don't ask, don't tell' Linux intellectual property policy that caused the SCO v. IBM case, the Open Source community should focus on customers' needs. The Open Source community should assure that Open Source software has a solid intellectual property foundation that can give confidence to end users.[2]

In a community of over half a million developers, we can hardly expect that there will never be plagiarism. But it is no disaster; we discard that material and move on. If there is material in Linux that was contributed without legal authorization, the Linux developers will learn what it is and replace it. SCO cannot use its copyrights, or its contracts with specific parties, to suppress the lawful contributions of thousands of others.[3]

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1. Suffolk University Law School, J.D., 2005.
2. Darl McBride, *Open Letter to the Open Source Community* (2003), *at* http://sco.com/company/openletter/ (last visited Mar. 4, 2005). McBride is the CEO of The SCO Group, Inc., a software company based in Utah that is suing IBM. *See* http://www.sco.com/company/profile.html and http://www.sco.com/scoip/lawsuits/ibm/ (last visited Mar. 4, 2005).
3. Richard M. Stallman, *SCO, GNU and Linux*, *at* http://www.gnu.org/philosophy/sco/sco-gnu-linux.html (last visited Mar. 4, 2005). Stallman is President of the Free Software Foundation (FSF), a charity for free software development based in Boston, Massachusetts. *See* http://www.fsf.org/about (last visited Mar. 4, 2005). The FSF publishes and holds the copyright for the GNU General Public License ("GPL"), a copyright license agreement for software. *See* http://www.fsf.org/licensing/licenses/gpl.html (last visited Mar. 4, 2005).

I. INTRODUCTION

It is no longer a secret that the free computer operating system[4] Linux[5] has become a major player in the software industry,[6] if not yet a significant rival to Microsoft's dominance.[7] In addition to capturing the imaginations of software developers, programmers, and hackers worldwide, Linux has been embraced and championed by American corporate technology giants such as IBM,[8] Dell,[9] and HP.[10] Linux has also made substantial headway outside of the United States: for example, China, which has one of the world's fastest growing information technology markets, plans to create a domestic software industry centered around Linux, which would then become

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4. A computer operating system is the software program that governs all the other software programs, or applications, installed on a computer. *See* http://whatis.techtarget.com/definition/0,,sid9_gci212714,00.html (last visited Mar. 4, 2005). Microsoft Windows is an example of a computer operating system. *Id.*

5. *See generally* Linus Torvalds, *The Linux Edge*, *in* OPEN SOURCES: VOICES FROM THE OPEN SOURCE REVOLUTION (Chris DiBona et al. eds., 1999), *available at* http://www.oreilly.com/catalog/opensources/book/linus.html (describing the development, application, and success of the Unix-like operating system Linux). The name Linux is a contraction for "Linus' Unix," combining Linus Torvalds' first name with "Unix," the computer operating system that Linux resembles. *See* http://whatis.techtarget.com/sDefinition/0,,sid39_gci212482,00.html (last visited Mar. 4, 2005).

6. *See* Alorie Gilbert, *Linux Inches Up Corporate IT Priority List*, CNET News.com, *at* http://news.com.com/2100-1014-5089341.html (Oct. 10, 2003). Many American businesses are using Linux in order to cut technology expenditures. *Id.* According to one survey, 39% of large corporations use Linux. *See* Jim Kerstetter et al., *The Linux Uprising*, BUSINESSWEEK ONLINE, *at* http://www.businessweek.com/magazine/content/03_09/b3822601_tc102.htm (Mar. 3, 2003).

7. *See* Matt Hines, *Microsoft Still Rules Server OS Market*, CNET News.com, *at* http://news.com.com/2100-7344_3-5088233.html (Oct. 8, 2003). In 2002, Microsoft controlled 55.1 percent of the server operating systems in 2002, while Linux controlled 23.1 percent. *Id.*

8. *See IBM Linux Portal - Linux at IBM*, *at* http://www-1.ibm.com/linux/index.shtml (last visited Mar. 4, 2005). In 2002, IBM posted $1 billion in Linux-based revenues. *See* Alex Salkever, *The Big Guys Latch Onto Linux*, BUSINESSWEEK ONLINE, *at* http://www.businessweek.com/magazine/content/03_09/b3822616_tc102.htm (Mar. 3, 2003).

9. *See Dell Launches New Services to Simplify Enterprise Linux Deployments*, at http://www1.us.dell.com/content/topics/global.aspx/corp/ pressoffice/en/2002/2002_08_13_sf_002?c=us&l=en&s=corp (last visited Mar. 4, 2005).

10. *See HP.com - Linux solutions*, *at* http://www.hp.com/wwsolutions/linux/ (last visited Mar. 4, 2005); *see also* Stephen Shankland, *Linux brings in $2.5 billion for HP*, CNET News.com, *at* http://news.com.com/2100-7344-5141324.html (Jan. 14, 2004). In 2003, HP made $2.5 billion selling Linux-related products and services. *Id.*

the national standard.[11] Linux's surging popularity continues to rise, in part, because users can download it for free from the Internet.[12] Linux's inexpensiveness and ease of access thus makes it an attractive alternative to expensive proprietary software such as Unix, a product of AT&T Bell Labs, or Microsoft's Windows.[13] This is true especially during an economic downturn.[14] In addition, Linux is popular because it is Open Source software,[15] which, unlike proprietary software such as Microsoft Windows, is distributed freely along with its source code, allowing programmers to read, redistribute, and modify it.[16] Moreover, the Open Source movement has many dedicated adherents worldwide who can collaborate quickly by harnessing the speed and ease of the Internet to further enhance Linux.[17] In fact, Linux may be the largest collaborative project in history.[18]

Many Linux users are not surprised that Linux has been under attack from Microsoft[19] and other proprietary software companies,[20]

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11. *China to Invest in Linux-based Software*, CNN.com, *at* http://www.cnn.com/2003/TECH/biztech/11/05/china.linux.reut/index.html (Nov. 5, 2003). Currently, Microsoft, IBM, Oracle, Sybase, UFSoft, and Kingsoft control a significant share of China's domestic market. *Id.*

12. *See* Jim Kerstetter et al., *The Linux Uprising*, BUSINESSWEEK ONLINE, *at* http://www.businessweek.com/magazine/content/03_09/b3822601_tc102.htm (Mar. 3, 2003). Linux is, however, usually purchased as part of a software package that includes service and support. *Id.*

13. *See* Alex Salkever, *The Big Guys Latch Onto Linux*, BUSINESSWEEK ONLINE, *at* http://www.businessweek.com/magazine/content/03_09/b3822616_tc102.htm (Mar. 3, 2003).

14. *Id.*

15. *See* http://www.opensource.org (last visited Mar. 4, 2005). Open source adherents believe that open source software's rapid evolutionary process creates better software than the traditional proprietary model. *Id.*

16. Open source code is computer software that comes bundled with both its source code as well as its object code. The computer reads the object code and the programmer reads the source code. *See* Lawrence Lessig, *The Limits in Open Code: Regulatory Standards and the Future of the Net*, 14 BERKELEY TECH. L.J. 759, 764 (1999). As Lessig puts it, the source code "allows a programmer to open an open source software project and see what makes it tick." *Id.*

17. *See* Thomas M. Pitegoff, *Open Source, Open World: New Possibilities for Computer Software in Business*, BUSINESS LAW TODAY, Sept./Oct. 2001, at 52.

18. Gary Rivlin, *Leader of the Free World*, WIRED, Nov. 2003, at 154. At the very least, Linux may be the only software to have its own mascot, the friendly and serene cartoon penguin named Tux. *See* Salkever, *supra* note 13.

19. Michael Gartenberg, *Microsoft Can't Stifle Linux*, Computerworld, *at* http://www.computerworld.com/softwaretopics/os/linux/story/0,10801,82323,00.html (June 23, 2003). Microsoft's CEO, Steve Ballmer, leaked a memo that named Linux as Microsoft's main enemy. *Id.* Linux is the greatest threat that Microsoft has faced since Netscape's Web browser in 1995. *See* Kerstetter, *supra* note 12.

20. *See* Declan McCullagh, *The Politics of Open-Source Software*, CNET News.com, *at* http://news.com.com/2010-1071_3-1025268.html (July 14, 2003).

because it is freely available and thus represents a challenge to proprietary software companies. What surprised users, however, is that a former distributor of the Linux code, The SCO Group, Inc. ("SCO"), attacked it, claiming that Linux infringes on its Unix intellectual property[21] and that the license under which Linux and other Open Source software is distributed is trumped by federal Copyright Law and is thus invalid and unenforceable.[22] This legal attack could jeopardize the future of Open Source software, with users and potential users of GPL-licensed software fearful of previously unasserted intellectual property lawsuits.[23]

This Note focuses on the threat SCO's attack poses to the Open Source community and to many U.S. businesses, including some Fortune 500 companies, addressing, specifically, the status and legal implications of the Free Software Foundation's GNU General Public License, under which Linux and other Open Source software is distributed. Part II of this Note presents the history of Open Source software, Linux, and the various models of Open Source software licensing. Part III explores SCO's attack against Linux and the related litigation concerning SCO. Part IV analyzes the General Public License and argues that courts should recognize it as a valid license that creates binding legal obligations on those who accept its terms. Finally, this Note suggests that Congress should become involved and pass legislation to protect the Open Source movement, which in turn would help both consumers and many U.S. businesses.

II. HISTORY OF OPEN SOURCE AND LINUX

A. Open Source

Open Source software has been around for more than thirty years, but the Open Source movement is a recent development.[24] Before computers and software became mass-produced, software developers often shared software source code because it was cheaper and more

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21. *See* SCO Group, Inc. v. International Business Machines Corp., No. 03-CV-0294, Plaintiff's Amended Complaint (D. Utah Mar. 25, 2003). *See also* Richard Wilder, *Open Source's Moment of Truth*, CNET News.com, *at* http://news.com.com/2010-1071-1020184.html (June 24, 2003) (analyzing case and possible outcomes).

22. William M. Bulkeley, *Linux Lawsuit Could Undercut Other "Freeware,"* WALL ST. J., Aug 14, 2003, at B1.

23. *Id.*

24. Jason B. Wacha, *Open Source, Free Software, and the General Public License*, 20 COMPUTER & INTERNET LAWYER, Mar. 2003, at 21.

efficient to do so.[25]   Once computers and software became mass-produced and reached the business world, most software developers adopted a proprietary development model in which the source code was closed and inaccessible to other developers.[26]   There were, however, software developers who wanted a way to keep source code open, because they believed that freely available source code was important for the development of computer science and necessary for technology innovation to flourish.[27]

There are debates about what precisely constitutes Open Source software and whether it should even be called Open Source rather than Free Software, which developed earlier.[28]   According to the Free Software movement, which Richard Stallman founded in 1985,[29] both movements are two political camps within the same free software community,[30] but the Open Source movement's "values are less idealistic" than the values of the Free Software movement.[31]   The primary difference between the two main groups, the Open Source Movement[32] and Free Software Movement,[33] concerns their philosophical outlook on whether software should always be accompanied by its source code.[34]   Whereas the Open Source movement believes that the software provider should be required to offer or provide source code,[35] the Free Software movement believes

    25. *Id.*
    26. *Id.*
    27. *See generally* Chris DiBona et al., *Introduction*, *in* OPEN SOURCES: VOICES FROM THE OPEN SOURCE REVOLUTION (Chris DiBona et al. eds., 1999), *available at* http://www.oreilly.com/catalog/opensources/book/linus.html (describing development of the Open Source movement).
    28. Free Software Foundation, *Why "Free Software" is better than "Open Source,"   at*   http://www.fsf.org/licensing/essays/free-software-for-freedom.html (last visited Mar. 4, 2005). For the sake of convenience, this Note follows general usage and calls all non-proprietary software Open Source software. Using the term Open Source instead of Free Software prevents the misconception that non-proprietary software is always free of charge.
    29. *See* http://www.fsf.org (last visited Mar. 4, 2005).
    30. *See* http://www.fsf.org/licensing/essays/free-software-for-freedom.html (last visited Mar. 4, 2005).
    31. *See*   http://www.fsf.org/licensing/essays/words-to-avoid.html   (last   visited Mar. 4, 2005).
    32. *See* http://www.opensource.org (last visited Mar. 4, 2005). According to the Open Source Initiative (OSI), "Open source promotes software reliability and quality by supporting independent peer review and rapid evolution of source code. To be OSI certified, the software must be distributed under a license that guarantees the right to read, redistribute, modify, and use the software freely."   *See* http://www.opensource.org/advocacy/faq.php (last visited Mar. 4, 2005).
    33. *See*   http://www.fsf.org/licensing/essays/free-sw.html   (last   visited   Mar.   4, 2005).
    34. Wacha, *supra* note 24, at 21.
    35. Wacha, *supra* note 24, at 21.

that the software provider must be required to give purchasers of the software the source code itself or the right, exercisable for three years, to obtain the program source code.[36]

Regardless of the terminology, the essence of open source software is that the source code is accessible, not closed to view or proprietary, and that programmers can read, redistribute, and modify it.[37] Open source software runs everything from the most widely used Web server in the world, Apache, to handheld wireless devices,[38] to Sendmail, a program through which most of all electronic mail is routed.[39]

B. Linux

The most popular open source operating system is Linux, which is now as much of a movement as it is a software product.[40] Linus Torvalds, a Finnish computer science student, developed the Linux kernel, or core, in 1991.[41] Torvalds wanted to create an operating system that would run on the Intel 386 architecture.[42] He combined his kernel with existing open source programs and then integrated them into a functioning operating system.[43]

Linux has about 7.5 million users and is readily available as either a free or commercial software package, and is distributed under the Free Software Foundation's GNU General Public License.[44] Among its users are two of the most popular Web sites, the online store Amazon[45] and the search engine Google,[46] both of which rely on Linux exclusively.[47] Linux also runs everything from some of the world's most powerful supercomputers to consumer gadgets such as

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36. Wacha, *supra* note 24, at 22.

37. Wacha, *supra* note 24, at 20.

38. Wacha, *supra* note 24, at 20.

39. *See* Rivlin, *supra* note 18, at 154.

40. Peter Skarzynski and Pierre Loewe, *Can a Subpoena Stop a Movement?*, CNET News.com, *at* http://news.com.com/2010-1071-5062414.html (Aug. 12, 2003).

41. Marcus Maher, *Open Source Software: The Success of an Alternative Intellectual Property Incentive Paradigm*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 619, 622 (2000) (discussing creation of Linux).

42. *See* Torvalds, *supra* note 5.

43. *Id.*

44. *See* http://www.fsf.org/licensing/licenses/gpl.html (last visited Mar. 4, 2005).

45. *See* http://www.amazon.com.

46. *See* http://www.google.com.

47. Herman Verkade, *Linux Lunch: Debunking the Myths*, LINUXWORLD MAGAZINE, Nov./Dec. 2003, at 41.

TiVo, cellphones, and handheld devices.[48]

C. Open Source Models of Licensing Software

Unlike proprietary models of software licensing, which usually restrict the software to "execute-only format" and restrict the number of installations,[49] Open Source models of software licensing allow source code to be freely modified by anyone.[50] The GNU General Public License ("GPL"), an open source copyright license agreement that the Free Software Foundation published and copyrighted, is the most widely used of the open source licenses for software.[51] Licensing software under the GPL does not mean, however, that the licensor is required to distribute the program or charge next to nothing for it.[52] In fact, by its terms the GPL specifically covers only the copying, distribution, and modification of a program.[53]

The legal status of the GPL is an open question because it has never been tested in court.[54] One case that included a claim for a breach of the GPL, which was filed in the federal district court of Massachusetts, settled.[55] Now, however, with SCO's attack against Linux and the GPL, the entire future of Open Source software could be greatly harmed or, conversely, even strengthened.[56]

III. LINUX LITIGATION

A. SCO v. IBM Litigation

SCO, a Delaware corporation based in Lindon, Utah, develops software for personal computers and servers, primarily for small businesses.[57] SCO was formerly known as Caldera Inc., which was founded in 1994 as a distributor of Linux, and changed its name to

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48. *See* Rivlin, *supra* note 18.
49. Natasha T. Horne, *Open Source Software Licensing*, 17 GA. ST. U. L. REV. 863, 871 (2001).
50. Maher, *supra* note 41, at 633.
51. Maher, *supra* note 41, at 638.
52. Wacha, *supra* note 24, at 21.
53. *See* http://www.fsf.org/licensing/licenses/gpl.html. "Our General Public Licenses are designed to make sure that you have the freedom to distribute copies of free software (and charge for this service if you wish), that you receive source code or can get it if you want it, that you can change the software or use pieces of it in new free programs; and that you know you can do these things." *Id.*
54. Wacha, *supra* note 24, at 23.
55. Progress Software Corp. v. MySQL AB, No. 01-CV-11031 (D. Mass.).
56. Bulkeley, *supra* note 22, at B1.
57. *See* http://www.sco.com/company/profile.html (last visited Mar. 4, 2005).

The SCO Group in 2002.[58] In 1995, a predecessor company of SCO purchased the rights to the Unix operating system, proprietary software developed at AT&T Bell Labs[59] from the technology company Novell.[60]

In 1998, SCO and IBM began a collaboration called Project Monterey, which was designed to produce a powerful version of Unix for Intel's Itanium computer processors that IBM would distribute.[61] IBM, however, cancelled its involvement with the project in 2001, which greatly angered SCO management.[62] Two years later, in March of 2003, SCO shocked the software industry by suing IBM for $3 billion.[63] The suit alleged that IBM infringed on its Unix intellectual property, breached its contract with SCO, and misappropriated SCO's proprietary Unix software code by incorporating it into Linux in order to improve the operating system.[64]

Although SCO did not initially assert any specified claims of copyright infringement against IBM, it claimed that IBM misappropriated the Unix source code it had gleaned during Project Monterey.[65] As a result, according to SCO, IBM enhanced Linux in ways it would have been unable to without the misappropriated Unix source code.[66] Furthermore, SCO claimed that because of the illegal enhancements businesses chose the open source Linux over SCO Unix, which then cost SCO millions of dollars in lost sales.[67]

Many analysts and Open Source adherents saw little merit to the

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58. *See* http://www.sco.com/company/history.html (last visited Mar. 4, 2005).

59. *See* Michael Cantor & Pamela Chestek, *The Line on Linux Lawsuit*, CONNECTICUT LAW TRIBUNE, July 2003. Novell and SCO, however, dispute exactly what ownership rights SCO purchased. *See* Stephen Shankland, *Novell challenges SCO's Linux claims*, CNET News.com, *at* http://news.com.com/2100-1016_3-1010569.html (May 28, 2003).

60. http://www.novell.com/company/ (last visited Mar. 4, 2005).

61. Stephen Shankland, *SCO sues Big Blue over Unix, Linux*, CNET News.com, *at* http://news.com.com/2100-1016-991464.html (Mar. 6, 2003).

62. *Id.*

63. SCO Group, Inc. v. International Business Machines Corp., No. 03-CV-0294, Plaintiff's Amended Complaint (D. Utah Mar. 25, 2003). SCO filed the suit in the 3rd District Court of Salt Lake County, in Utah, on March 6, 2003. On March 25, 2003, IBM removed it to federal court, the United States District Court, District of Utah. *Id.*

64. *Id.* SCO alleged that "a very significant amount of UNIX protected code is currently found in Linux 2.4.x and Linux 2.5.x releases in violation of SCO's contractual rights and copyrights." *Id.*

65. *Id.* SCO officials said that IBM had "contaminated" Linux. *See* Shankland, *supra* note 61.

66. *See* Hiawatha Bray, *Suit Imperils Prospects for Linux*, BOSTON GLOBE, June 3, 2003, at D1.

67. *Id.*

lawsuit, believing that SCO filed the suit in order to generate media buzz and increase its stock price.[68] In May of 2003, however, SCO continued its attack on Linux by sending out 1,500 letters to commercial users of Linux, including some Fortune 500 companies, warning them that their use of Linux could infringe on SCO's intellectual property by infringing the copyright it owns in its Unix software.[69] Many in the Open Source community considered the letters to be "akin to an illegal shakedown."[70]

In February of 2004, SCO changed the nature of its suit against IBM: SCO filed a Second Amended Complaint, dropping its previous claim that IBM had misappropriated its trade secrets, but adding a copyright infringement claim against IBM.[71] In February of 2005, however, SCO seemed to be dealt a significant setback when the U.S. District Court judge overseeing the suit, Judge Dale A. Kimball, called SCO's lack of evidence to support its copyright infringement case against IBM "astonishing."[72] In his Memorandum Decision and Order dated February 8, 2005, denying IBM's summary judgment motion, Judge Kimball wrote:

> Viewed against the backdrop of SCO's plethora of public statements concerning IBM's and others' infringement of SCO's purported copyrights to the Unix software, it is astonishing that SCO has not offered any competent evidence to create a disputed fact regarding whether IBM has infringed SCO's alleged copyrights through IBM's Linux activities.... [D]espite the vast disparity between SCO's public accusations and its actual evidence—or complete lack thereof—and the resulting temptation to grant IBM's motion, the court has determined that it would be premature to grant summary judgment.[73]

B. Red Hat v. SCO Litigation

After much speculation about whether SCO would also sue Red Hat Inc.,[74] the leading Linux distributor, Red Hat preemptively struck

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68. *See* Shankland, *supra* note 61.

69. *See* Kelly D. Talcott, *Open-Source Software: With Benefits Come Potential for Innocent Infringement of IP Rights*, NEW YORK LAW JOURNAL, June 24, 2003, at 5.

70. Kevin Biddell, *A Time For Leadership*, LINUXWORLD MAGAZINE, Nov./Dec. 2003, at 7.

71. SCO Group, Inc. v. International Business Machines Corp., No. 03-CV-0294, Plaintiff's Second Amended Complaint (D. Utah Feb. 27, 2004).

72. *See* Stephen Shankland, *Judge Slams SCO's Lack of Evidence Against IBM*, CNET News.com, *at* http://news.com.com/Judge+slams+SCOs+lack+of+evidence+against+IBM/2100-7344_3-5570265.html?tag=nefd.pop (Feb. 9, 2005).

73. *Id.*

74. *See* http://www.redhat.com/about/ (last visited Mar. 4, 2005).

against SCO in August of 2003, filing suit in the United States District Court, District of Delaware.[75]   In response to what it called SCO's "unfair, untrue and deceptive campaign" and "goal of adversely affecting Red Hat's business," Red Hat filed the suit in part in order to obtain a declaratory judgment that Red Hat has not violated SCO's copyrights or trade secrets.[76]   Red Hat claimed that SCO's allegations that Red Hat violated copyrights amounted to trade libel and unfair business practices.[77]   In addition, in the complaint Red Hat sought to obtain a declaratory judgment that Linux is publicly available and thus cannot be a trade secret.[78]

Red Hat's lawsuit, however, was not its only strike against SCO. Red Hat established the Open Source Now Fund in order to help Open Source companies with legal expenses related to lawsuits concerning SCO or the development of software under the GPL.[79] Red Hat pledged $1 million to the fund to help the Linux community defend itself.[80]

C. IBM's Counterclaim Against SCO and SCO's Attack on the GPL

Less than a week after Red Hat filed suit, IBM filed a counterclaim against SCO, arguing that SCO misused its Unix rights in order to try to destroy Linux and "extract windfall profits" from its license on the Unix operating system.[81]   In addition, IBM denied that it violated any of SCO's rights and counterclaimed that SCO infringed a number of IBM's patents and violated the GPL.[82]   In part, IBM argued that SCO violated the GPL by claiming ownership rights over Linux and by trying to collect license fees from Linux code by the letters it sent to commercial users of Linux.[83]   Because SCO distributed a Linux version under the GPL, IBM argued that SCO is estopped from claiming that Linux is proprietary.[84]

In its Answer, SCO for the first time specifically targeted the GPL,

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75. Red Hat, Inc. v. The SCO Group, No. 03-772, Plaintiff's Complaint (D. Del. Aug. 4, 2003).

76. *Id.*

77. *Id.*

78. *Id.*

79. *See* http://www.redhat.com/opensourcenow/ (last visited Mar. 4, 2005).

80. Stephen Shankland & Michael Kanellos, *Red Hat Files Suit Against SCO*, CNET News.com, *at* http://news.com.com/2100-7252-5059547.html (Aug. 4, 2003).

81. SCO Group, Inc. v. International Business Machines Corp., No. 03-CV-0294, Defendant's Amended Counterclaim (D. Utah filed Sept. 26, 2003).

82. Stephen Shankland, *Big Blue Files Counterclaims Against SCO*, CNET News.com, *at* http://news.com.com/2100-1016-5060965.html (Aug. 7, 2003).

83. *Id.*

84. *Id.*

claiming that it is unenforceable and "violates the U.S. Constitution, together with copyright, antitrust and export control laws."[85] SCO argued that, because the GPL is unenforceable, IBM's claims based on the GPL are barred.[86] In addition, SCO claimed that only the Free Software Foundation, which created the GPL, could enforce it.[87]

IV. THE VALIDITY OF THE GENERAL PUBLIC LICENSE

A. Overview of the General Public License

The GNU General Public License ("GPL"), the most widely used open source copyright license, is published and copyrighted by the Free Software Foundation.[88] Richard Stallman created the GPL in the 1980s in order to cover his GNU's Not Unix (GNU) Project to develop a free Unix clone operating system.[89] Stallman released the first version, version 1.0, of the GPL in 1985.[90] Stallman replaced Version 1.0 with Version 2, in June of 1991, which is still the license currently in use.[91] Stallman and Eben Moglen, the Free Software Foundation's legal counsel, have been working on Version 3 of the GPL that will incorporate changes to address the new conditions of the digital modern era.[92]

Comprising only thirteen brief "Terms and Conditions," the GPL applies only to those software developers and companies who commit to using it.[93] Although the Free Software Foundation

85. SCO Group, Inc. v. International Business Machines Corp., No. 03-CV-0294, SCO's Answer to IBM's Amended Counterclaims (D. Utah filed Oct. 24, 2003).

86. *Id.*

87. *Id.*

88. The GPL and its terms are available at http://www.fsf.org/licensing/licenses/gpl.html (last visited Mar. 4, 2005). The Free Software Foundation calls it "copyleft" to contrast with copyright. *See* http://www.fsf.org/licensing/essays/copyleft.html (last visited Mar. 4, 2005). "Copyleft says that anyone who redistributes the software, with or without changes, must pass along the freedom to further copy and change it. Copyleft guarantees that every user has freedom." *Id.*

89. *See* Stephen Shankland, *SCO Attacks Open-Source Foundation*, CNET News.com, *at* http://news.com/2102-7344_3-5098610.html (last visited Mar. 4, 2005).

90. *See* Sean Michael Kerner, *GPL Awaits Test in SCO Group/IBM Dispute*, Internetnews.com, *at* http://www.internetnews.com/ent-news/article.php/3302801 (Jan.23, 2004).

91. *See* David Halperin, *The Future of the GPL, LinuxInsider*, *at* http://www.linuxinsider.com/perl/story/33121.html (Mar. 15, 2004).

92. *Id.*

93. *See* http://www.fsf.org/licensing/licenses/gpl.html.

champions free software[94] and is opposed to proprietary software, licensing software under the GPL does not mean, however, that the licensor is required to distribute the program or charge next to nothing for it.[95] By its very terms the GPL specifically covers only the copying, distribution, and modification of a program; other activities are outside its scope.[96]

Under the GPL, a user may distribute the program's open source code and any modifications made to it, but only under the same terms under which the user received it.[97] Thus, through this ingenious tactic, the code and modifications to it remain open source.[98] The GPL therefore prevents downstream recipients from using the open source software to develop new programs for distributing under a closed source, or proprietary, system.[99]

B. SCO v. The General Public License

As part of its intellectual property and contract suit against IBM, SCO claims that the GPL, under which Linux is distributed, is "unenforceable, void and/or voidable"[100] and "violates the United States Constitution and the U.S. copyright and patent laws."[101] As many observers have pointed out, however, SCO itself sold its own version of Linux until May of 2003 and continues to sell Unix software that includes programs licensed under the GPL.[102] Thus,

94. *See* http://www.fsf.org/licensing/essays/free-sw.html (last visited Mar. 4, 2005). "'Free software' is a matter of liberty, not price. To understand the concept, you should think of 'free' as in 'free speech,' not as in 'free beer.'" *Id.*

95. GPL § 1, *at* http://www.fsf.org/licensing/licenses/gpl.html;   s*ee also* http://www.fsf.org/licensing/essays/selling.html (last visited Mar. 4, 2005). "Many people believe that the spirit of the GNU project is that you should not charge money for distributing copies of software, or that you should charge as little as possible -- just enough to cover the cost. Actually we encourage people who redistribute free software to charge as much as they wish or can." *Id.*

96. GPL § 0, *at* http://www.fsf.org/licensing/licenses/gpl.html.   In the GPL Preamble: "We protect your rights with two steps: (1) copyright the software, and (2) offer you this license which gives you legal permission to copy, distribute and/or modify the software." *Id.*

97. GPL § 2, *at* http://www.fsf.org/licensing/licenses/gpl.html.

98. Christian H. Nadan, *Open Source Licensing: Virus or Virtue?*, 10 TEXAS INTELL. PROP. L.J. 349, 358 (2002).

99. Joseph Scott Miller, *Allchin's Folly: Exploding Some Myths About Open Source Software*, 20 CARDOZO ARTS & ENT. L.J., 491, 497 (2002).

100. SCO Group, Inc. v. International Business Machines Corp., No. 03-CV-0294, SCO's Answer to IBM's Amended Counterclaims (D. Utah filed Oct. 24, 2003).

101. Darl   McBride,   *Open   Letter   on   Copyrights*,   *at* http://www.sco.com/copyright/ (last visited Mar. 4, 2005).

102. *See* Shankland, *supra* note 89. UnixWare and OpenServer contain GPL-covered software. *Id.*

because IBM has the copyright rights to much of the Linux kernel, or software core, SCO itself may be in violation of copyright infringement and may have breached the Linux GPL because it redistributed Linux for years, even after filing its suit against IBM.[103]

SCO, however, is challenging the entire legal basis upon which the GPL rests, gravely proclaiming that "the future of the global economy hangs in the balance."[104]   According to SCO's CEO, essentially the GPL violates U.S. copyright laws because it runs counter to the profit motive inherent in and protected by them.[105] SCO alleges that the GPL poses a "long-term detriment to [the U.S.] economy" and that companies will eventually disavow their support for it.[106]   Profit-seeking technology giants such as HP and IBM, however, clearly have a significantly vested interest in seeing Linux succeed to challenge Microsoft's dominance.[107]   In addition, as has been noted, software developers can make profits selling Linux-based programs licensed under the GPL provided they share the source code for the features they create.[108]   Furthermore, as Linus Torvalds himself has pointed out,[109] U.S. Copyright law expressly includes "exchange of receipt of copyrighted works" in its definition of "financial gain": "The term 'financial gain' includes receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works."[110]

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103. Robert McMillan, *SCO: IBM Can't Enforce GPL Software License*, Computerworld, *at*
http://www.computerworld.com/governmenttopics/government/legalissues/story/0, 10801,86587,00.html (Oct. 28, 2003).

104. McBride, *supra* note 101.

105. *Id.* McBride argues that "[l]eaders of the FSF have spent great efforts, written numerous articles and sometimes enforced the provisions of the GPL as part of a deeply held belief in the need to undermine or eliminate software patent and copyright laws." *Id.*

106. *Id.*

107. According to Microsoft, "Microsoft's concern is the resulting degradation of the software ecosystem that would be triggered by widespread acceptance of the GPL, particularly within governmental and academic research sectors." *See* http://www.microsoft.com/resources/sharedsource/Articles/GNU.mspx.

108. Rivlin, *supra* note 18. As Rivlin points out, this is how RedHat, the leading Linux distributor, got its start. *Id.*

109. Linus Torvalds, *Linus Weighs In*: *GPL No Hippie Dream*, Computerworld, *at* http://www.computerworld.com/softwaretopics/
os/linux/story/0,10801,87964,00.html (Dec. 8, 2003). According to Torvalds, "the GPL is designed so that people receive the value of other people's copyrighted works in return for having made their own contributions. That is the fundamental idea of the whole license—everything else is just legal fluff." *Id.*

110. *See* 17 U.S.C. § 101 (2000).

C. Defending the GPL

Although some observers have cautioned against overstating the significance of SCO's lawsuit against IBM as it relates to Linux and the GPL,[111] there have been financial repercussions in the software industry after some analysts warned against large installation deployments of Linux.[112] In addition, if a court invalidates the GPL, companies and government agencies using software licensed under the GPL could be targets of surprise copyright claims.[113] Moreover, the development of new software could be hampered on account of software developers' resulting confusion.[114]

A court should therefore validate the GPL as an enforceable license that creates binding legal obligations on those who accept its terms, because federal copyright law does not preempt it. Although thus far SCO has not detailed in its court filings precisely how the GPL violates U.S. copyright laws, comments that SCO's legal representatives have made—including the CEO's about the GPL running counter to the profit motive in copyright—indicate the approach SCO is taking. Specifically, Mark Heise of Boies, Schiller & Flexner LLP, one of SCO's lawyers, has commented that because the GPL allows licensees to make unlimited copies of the GPL-covered software, it is "pre-empted by copyright law."[115] The GPL grants licensees permission to copy, modify, and distribute the software as they see fit, with the qualification that all derivative work is licensed under the same terms.[116] Section 117 of the Copyright Act, "Limitations on exclusive rights: Computer programs,"[117] limits the scope of software creators' exclusive right to control the reproduction of their programs by permitting owners of computer programs to copy their software if the copy is created as an "essential step in the utilization of the software" or for archival uses.[118]

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111. Lawrence Rosen, General Counsel of the Open Source Initiative, considers it a mere "contract dispute between two companies with deep pockets." *See* Rosen's *Q&A re: SCO vs. IBM, at* http://www.osdl.org/docs/qa_re_sco_vs_ibm_html.html (last visited Mar. 4, 2005). Eben Moglen, the Free Software Foundation's legal counsel, asserts that "the constitutionality attack on the GPL is not a tenable legal argument but is rather a public relations argument." *See* Halperin, *supra* note 91.

112. Red Hat, Inc. v. The SCO Group, No. 03-772, Plaintiff's Complaint (D. Del. Aug. 4, 2003).

113. Bulkeley, *supra* note 22, at B1.

114. *Id.*

115. *Id.*

116. GPL § 0, *at* http://www.fsf.org/licensing/licenses/gpl.html.

117. 17 U.S.C. § 117(a) (2000).

118. Mathias Strasser, *A New Paradigm in Intellectual Property Law?: The Case Against Open Sources*, 2001 STAN. TECH. L. REV. 4, 35 (2001).

Nowhere, however, does this provision mention that one must hold a license in order to make lawful copies, and the users who agree to the terms of the GPL do have a license. Moreover, the Copyright Act does not prohibit a copyright holder from giving others permission to copy, modify and redistribute his or her work, which is exactly what is permissible under the GPL.

A court should also validate the GPL on the grounds that it governs such a significant amount of important software.[119] A court will likely consider the GPL's widespread adoption and will approach the issue pragmatically, knowing that the consequences of invalidating the GPL would weigh heavily on the software industry.[120] To remedy unintentional code contamination, however, a court could merely order the removal of the infringing code instead of halting an entire software project. Currently, Torvalds and his associates who approve the donations of code they incorporate into Linux do not have the resources to guarantee that a programmer has not plagiarized code or is otherwise guilty of copyright infringement.[121] The code is accepted on the basis of its strength alone.[122]

Verifying the authenticity of all submitted code is a goal that Torvalds and other open source developers should pursue.[123] Some open source software projects require that contributors provide legal documentation of ownership over the code they submit.[124] In addition, some use digital signatures to authenticate those submissions.[125] These kinds of authentication procedures would forestall a copyright infringement suit and give assurances to both users and potential users of the legality open source software.

D. U.S. Government Intervention on Behalf of the GPL

Recently SCO mailed a letter to every member of Congress in which it argued that Linux and other open source software are direct threats to the security and the economy of the U.S.[126] SCO believes

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119. Bulkeley, *supra* note 22, at B1.
120. *Id.*
121. Rivlin, *supra* note 18, at 156.
122. *Id.*
123. *See* Richard Wilder, *Open Source's Moment of Truth*, CNET News.com, *at* http://news.com.com/2010-1071-1020184.html (June 24, 2003).
124. *Id.*
125. *Id.*
126. Robert McMillan, *SCO to Congress: Linux hurts the U.S.*, Computerworld, *at* http://www.computerworld.com/softwaretopics/os/linux/ story/0,10801,89335,00.html (Jan. 23, 2004).

that legislation concerning open source software is inevitable.[127] It is clearly too early to predict what legislation, if any, may result from SCO's new lobbying campaign. The Bush administration has declared that it will remain neutral in the battle between proprietary and Open Source software developers, believing the competition beneficial to the marketplace.[128]

Some observers believe that because Linux is not a revenue stream and generates no tax dollars, the U.S. government will be hesitant to intervene on Linux's behalf.[129] There is, of course, only one way to find out, and the Open Source community should urge Congress to create legislation to ensure that no company can step in and hamper the development of the open source software movement by a series of legal maneuvers.

V. CONCLUSION

A SCO legal victory that renders the GPL unenforceable would gravely damage the open-source community and harm many U.S. businesses, including some Fortune 500 companies who use Linux. It could turn Linux and other open source programs into intellectual property legal battlefields, with users and potential users in fear of being sued by previously unasserted infringement claims. The future of open source software would be jeopardized. Accordingly, courts should recognize the pragmatic remedy that in cases of unintentional software code contamination, removal of the infringing code is sufficient instead of halting an entire project.

Courts should also recognize the legality of the Free Software Foundation's GNU General Public License (GPL), that the GPL under which Linux is issued is a valid license and creates binding legal obligations on those who accept its terms. Additionally, Congress should pass laws to ensure that no company can intervene in order to hinder the development of the open source software movement by means of legal maneuvers. In so doing, Congress could protect innovation in the open source movement, which in turn would help software developers, U.S. businesses, and the consumers themselves.

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127. *Id.*
128. Open Source and Industry Alliance, *OSAIA Welcomes US Commerce Department*, *at*
http://www.osaia.org/modules.php?name=Content&pa=showpage&pid=11   (Jan. 23, 2004). Under Secretary of Commerce for Technology Phil Bond spoke at the LinuxWorld Exposition in New York. *Id.*
129. Tyler Jensen, *Let's Turn the Tables on the Meaning of FUD: Time for the Linux Community to Get Busy*, LINUXWORLD MAGAZINE, Nov./Dec. 2003, at 39.