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SCO v IBM: The Linux Spat

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Part of the open source debate revolves around the *SCO v IBM* litigation over Linux. We provide a summary of the position in that case as at May 2003.

This whole open source story is a moving feast and very important in the computer world. It affects public and private sector. Watch this space!

Hot news in the I.T. world is the debate between traditional licensed software (the Microsofts of this world) and open source. A spat between SCO and IBM has hit the headlines and is a good example of risk and solutions in relation to software. Open source is becoming mainstream (for example our government has just said it is an acceptable option in the public sector). But the path isn't easy. See Stuart van Rij's article: *Open Source Software*.

SCO owns the copyright in an operating system used by large customers, called Unix. Open sourcers hotly debate many issues in this area, but let's assume for present purposes that SCO have got it right.

From the open source corner comes the Linux operating system which fulfills a similar function to that of Unix. It's becoming mainstream. For example, IBM are using it in many of their computers and with many of their customers.

One of the potential problems with open source, including Linux, is the risk that software code has been hijacked in breach of copyright from somewhere else. If that's happened, the true owner of the code could stop its use by injunction (with potentially devastating impact on customers and their suppliers). There is also risk of claims for damages and so on.

SCO say that Linux includes Unix software code. They're doing 2 main things about this so far:

1. they are suing IBM for breach of copyright and other breaches;
2. they have written to over 1,000 major Linux users alleging breach of copyright and other problems (ultimately, in theory at least, this could lead to an injunction restraining those and other customers from using the software until the Unix code is replaced).

Open source cynics see this as just another phase of traditional suppliers such as Microsoft (who are closely involved with SCO) protecting their patch.

Whatever the answer to that, if indeed Unix code has been used in breach of copyright, there are serious implications for the industry.

It will be interesting to see how this plays out. For example, one outcome may be some sort of money settlement.

There are lessons in this even for users of traditional licensed software. That software almost always contains components obtained from third parties. The customer is very

reliant on the software developer/supplier getting a proper license for its use. That's one reason why a good I.T. contract contains an unlimited indemnity as to intellectual property. But that in itself won't hold back a third party owner of copyright from successfully stopping the customer from using the software. In theory at least, in many countries they may be able to get an injunction stopping use of the software. Further, the indemnity is only worth what the customer's supplier can pay. The third party of course owns the software and can stop its use if there's no adequate licence to the customer's supplier (they're be issues about degree of copying, whether there is actual copyright infringement, etc, but the basic legal point remains).

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While mostly we work for large organisations, we also act for SMEs.

With a strong combination of commercial, legal, technical and strategic smarts, Wigley & Company provides genuinely innovative and pragmatic solutions.

The firm is actively involved in professional organisations (for example, Michael is President of the Technology Law Society and Stuart van Rij its secretary).

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