SCO v. IBM

SCO's Summary Judgment Hearing Binder

IBM's Motion for Summary Judgment on its Claim for Declaratory Judgment of Non-Infringement (IBM's Tenth Counterclaim)

**United States District Court
District of Utah
Civil No.: 2:03CV – 0294DAK**

What Does IBM's Tenth Counterclaim Really Seek?

IBM THEN	IBM NOW
"IBM does not believe that its activities relating to Linux, including any use, reproduction, and improvement of Linux, infringe, induce the infringement of, or contribute to the infringement of valid, enforceable copyrights owned by SCO."	"IBM sought a declaration from this Court from this Court that the Linux kernel, the core of the operating system, does not infringe copyrights owned by SCO."

(IBM Brief at 1)

(10th Counterclaim, ¶ 171)

Just Where Does Linux Come From?

What Makes Linux Different...

Open Source

Developed on the Web

No Single Vendor

Small & Modular

Standards Based

Derived from UNIX

Linux Attributes

Low Cost

Community Developed & Owned

Multi-platform

Enabling Business Innovation

IBM

181011201

10

In Other Words . . .

Why Does Linux "Work"?

- UNIX was a pre-write of Linux
- Development tools used are becoming industry standards
- Supported on 70 different system architectures
- Straight forward code design
- Source code is freely available
- Thousands of interested and talented developers around the globe
- A free exchange of design innovations
- Quick response to design problems
- Brutal design and code reviews

IBM

10

181011200

Novell Acknowledged SCO's Ownership of the UNIX Copyrights

Novell Press Release dated June 6, 2003:

> "Amendment #2 to the1995 SCO-Novell Asset Purchase Agreement…appears to support SCO's claim that ownership of certain **copyrights for UNIX did transfer to SCO in 1996**."

(SCO Ex. 322 (emphasis added).)

Literally Copied Material

As shown in the Final Disclosures, Linux contains literal source code copied from UNIX, including:

1. System Calls & Related Header File Material

2. ELF-Related Material

3. Streams-Related Material

4. Memory Allocation Material

IBM Improperly Limits Its Analysis To 326 Lines of Literal UNIX Source Code

IBM limits its analysis to 326 lines of source code contained in the Final Disclosures that reside in the Linux kernel.

--IBM Mem. at 2, 37.

However, IBM's Second Amended Complaint seeks a declaration regarding **all** of IBM's Linux activities, with no limitation to material residing within the Linux kernel.

--IBM Second Am. Compl. at ¶¶ 168-73.

The Final Disclosures in the case show indisputably substantial source code copied from UNIX into Linux.

--*See* Final Disclosure Items 150-64, 183-85, 205-31, 272.

Literally Copied System Calls & Related Header File Material

System Calls allow user applications programs to interact with and request services from an operating system.

A **System Call "Signature"** consists of:
.

1. The name of the system call;
2. An ordered list of the kinds and possible names of any "arguments" that are transmitted *into* the system call; and
3. The type of the result, if any, that is returned *back* to the application program from the system call.

Header Files contain **System Calls** and other information prescribing how applications and the operating system are to interact.

Literally Copied ELF-Related Material

The copied ELF Material consists of:

1. Coordination and arrangement of information into binary executable files in the Executable & Linking Format (ELF)

2. Literal source code specifying how to write and read binary files in the ELF Format.

Copied Non-Literal Material

Linux copies the overall structure of UNIX, including the selection, coordination, and arrangement of literal and non-literal elements of UNIX

Linux Copies the Overall Structure of UNIX

See Ex. 276 at 33.
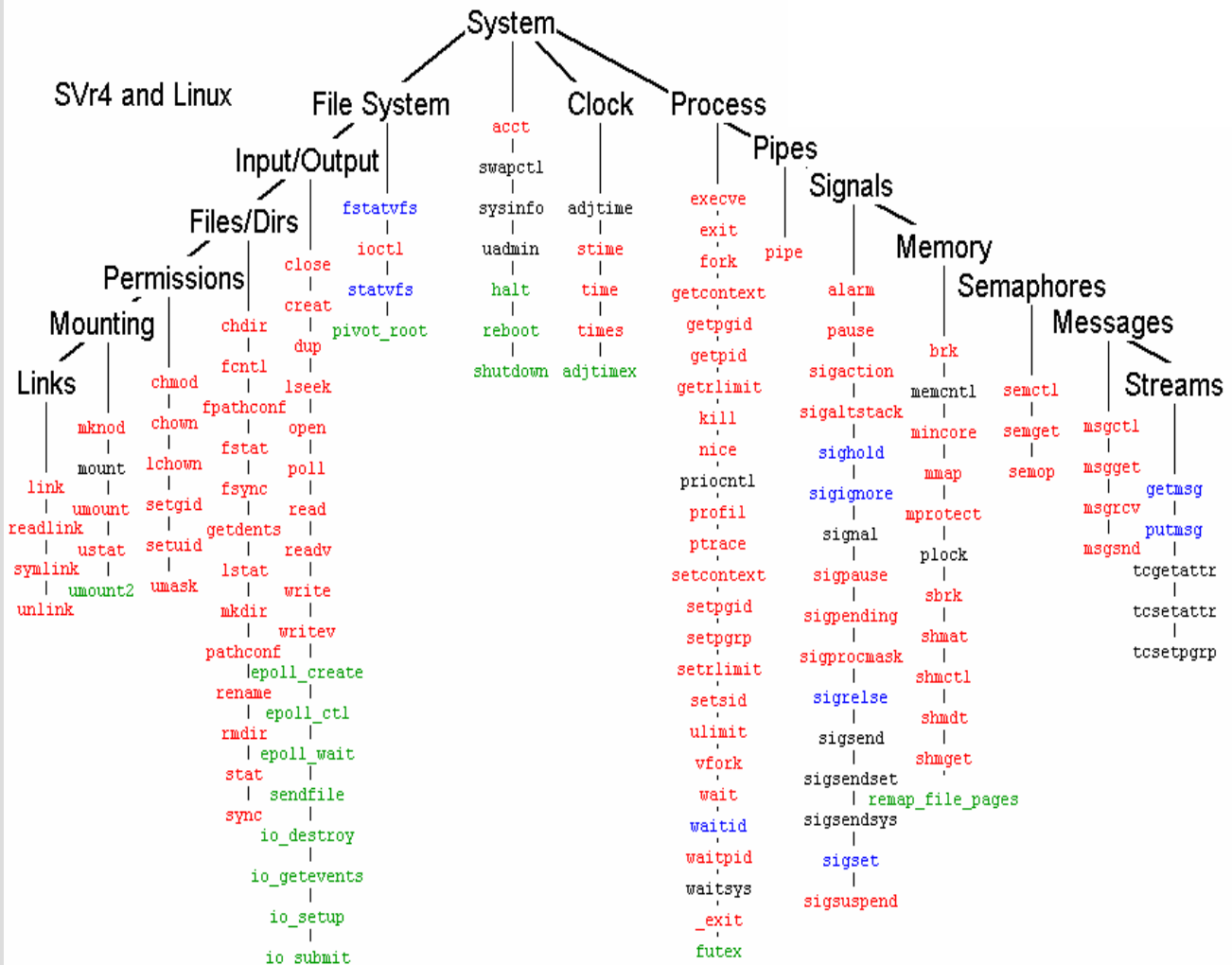
Red System Calls = SVr4, Linux 2.4, & Linux 2.6
Blue System Calls = SVr4 & Linux 2.6
Green System Calls = Linux Only
*This Legend Has Been Modified From Ex. 276 to Accurately Describe the Chart Above

IBM Does Not Have a License Under the GPL

The GPL only applies to a work if it bears a "notice <u>placed by the copyright holder</u> saying that it may be distributed under the terms of [the GPL]."

--IBM Ex. 128, § 0

"SCO never placed any language on the UnitedLinux 1.0 material or the SCO Linux Server 4.0 material indicating that SCO granted any license or rights to such material under the GPL or any other 'open source' license."

--Nagle Decl., SCO Ex. 233, ¶ 23.

IBM Does Not Have a License Under the GPL

IBM provides **no evidence** that SCO placed the copyright authorization notice required by GPL § 0 on any version of Linux or UNIX.

IBM Does Not Have a License Under the GPL

None of IBM's cited declarations show that any Linux version contained a "notice **placed by the [UNIX] copyright holder** saying that it may be distributed under the terms of" the GPL.

All of IBM's cited declarations:

1. Refer to Caldera, Inc. and/or Caldera Systems, Inc., which were <u>never</u> UNIX copyright holders; and/or

2. Do not show that Caldera International or SCO ever <u>placed</u> a GPL License notice on any Linux distribution, as opposed to merely redistributing notices placed by others

   -- IBM Reply at 25; IBM Ex. 176, ¶ 13; IBM Ex. 221, ¶¶ 16-26, 66-86; IBM Ex. 226, ¶ 10;

IBM Does Not Have a License Under the GPL

The GPL itself states that an effective copyright authorization notice requires **"at least"** identification of the copyright holder placing the notice:

How to Apply These Terms to Your New Programs

If you develop a new program, and you want it to be of the greatest possible use to the public, the best way to achieve this is to make it free software which everyone can redistribute and change under these terms.

To do so, attach the following notices to the program. It is safest to attach them to the start of each source file to most effectively convey the exclusion of warranty; and each file should have at least the "copyright" line and a pointer to where the full notice is found.

```
one line to give the program's name and an idea of what it does.
Copyright (C) yyyy  name of author

This program is free software; you can redistribute it and/or
modify it under the terms of the GNU General Public License
as published by the Free Software Foundation; either version 2
of the License, or (at your option) any later version.

This program is distributed in the hope that it will be useful,
but WITHOUT ANY WARRANTY; without even the implied warranty of
MERCHANTABILITY or FITNESS FOR A PARTICULAR PURPOSE.  See the
GNU General Public License for more details.

You should have received a copy of the GNU General Public License
along with this program; if not, write to the Free Software
Foundation, Inc., 51 Franklin Street, Fifth Floor, Boston, MA  02110-1301, USA.
```

Also add information on how to contact you by electronic and paper mail.

--IBM Ex. 128 at 8.

IBM Does Not Have a License Under the GPL

IBM knows that identification of the copyright holder is a necessary component of an effective copyright authorization notice under § 0, as shown by the notices IBM placed on its own contributions to Linux:

```
/*
 * arch/ppc64/kernel/iommu.c
 * Copyright (C) 2001 Mike Corrigan & Dave Engebretsen, IBM Corporation
 *
 * Rewrite, cleanup, new allocation schemes, virtual merging:
 * Copyright (C) 2004 Olof Johansson, IBM Corporation
 *            and  Ben. Herrenschmidt, IBM Corporation
 *
 * Dynamic DMA mapping support, bus-independent parts.
 *
 * This program is free software; you can redistribute it and/or modify
 * it under the terms of the GNU General Public License as published by
 * the Free Software Foundation; either version 2 of the License, or
 * (at your option) any later version.
 *
 * This program is distributed in the hope that it will be useful,
 * but WITHOUT ANY WARRANTY; without even the implied warranty of
 * MERCHANTABILITY or FITNESS FOR A PARTICULAR PURPOSE.  See the
 * GNU General Public License for more details.
 *
 * You should have received a copy of the GNU General Public License
 * along with this program; if not, write to the Free Software
 * Foundation, Inc., 59 Temple Place, Suite 330, Boston, MA  02111-1307 USA
 */
```

--IBM Ex. 617 at linux-2.4.19/arch/ppc64/kernel/ iommu.c

IBM Cannot Reasonably Rely on Pre-2001 Caldera Actions

IBM embraced Linux in March of 1999.

--IBM Ex. 21 at 4.

IBM could not have reasonably relied on any Caldera actions at this time, because Caldera did not own the UNIX copyrights.

--SCO Ex. 269 at ¶ 9; SCO Ex. 386 at ¶ 5.

Santa Cruz owned the UNIX copyrights at the time IBM embraced Linux.

--SCO Ex. 351 at ¶ 4, 9-12.

Emergence of Linux as Competitive Threat to SCO Would Justify Suit

A plaintiff's decision not to sue until infringement actions become a competitive threat cannot give rise to an estoppel defense.

-- Boothroyd Dewhurst, Inc. v. Poli, 783 F.Supp. 670, 680-81   (D. Mass. 1991)