

This copy is for your personal, non-commercial use only. To order presentation-ready copies for distribution to your colleagues, clients or customers visit <https://www.djreprints.com>.

<https://www.wsj.com/articles/SB106081595219055800>

Linux Lawsuit Could Undercut Other 'Freeware' Programs

By William M. Bulkeley Staff Reporter of THE WALL STREET JOURNAL

Aug. 14, 2003 11:59 pm ET

(See Corrections & Amplifications [item below](#).)

To many observers, tiny SCO Group Inc.'s \$3 billion copyright-infringement lawsuit against International Business Machines Corp., and SCO's related demands for stiff license fees from hundreds of users of the free Linux software, seem like little more than a financial shakedown.

But the early legal maneuverings in the suit suggest the impact could be far broader. For the first time, the suit promises to test the legal underpinnings that have allowed free software such as Linux to become a potent challenge to programs made by Microsoft Corp. and others. Depending on the outcome, the suit could strengthen or drastically weaken the free-software juggernaut.

The reason: In filing its legal response to the suit last week, IBM relied on an obscure software license that undergirds most of the free-software industry. Called the General Public License, or GPL, it requires that the software it covers, and derivative works as well, may be copied by anyone, free of charge. IBM's argument is that SCO, in effect, "signed" this license by distributing Linux for years, and therefore can't now turn around and demand fees. It's somewhat like Coca-Cola Co. selling its secret recipe on the Internet, then suing people who brewed their own cola based on it.

Now, SCO is preparing to wheel out the software-industry equivalent of a nuclear bomb: It will argue that the GPL itself is invalid, says SCO's lead attorney, Mark Heise of Boies Schiller & Flexner LLP. Mr. Heise says the GPL, by allowing unlimited copying and

The Latest on Vaccines, Re-openings, New Strains and

Sign up to the Coronavirus Daily Briefing for the latest.

SIGN UP

most believe the industry could adapt, companies that use GPL-licensed software might be confronted by surprise copyright claims from software developers. In addition, creation of new programs might be slowed by the confusion.

Eric Raymond, a free-software developer in Malvern, Pa., says he is concerned about the possibility that a judge could invalidate the GPL. Although he thinks that's unlikely, Mr. Raymond says free-software advocates have created an alternative license that they believe would survive court challenge. Mr. Raymond says the potential new license has won a powerful backer: Linus Torvalds, the Finnish developer of Linux, who has agreed to use the alternative license for Linux if necessary.

SCO's attack on the GPL is a "very interesting argument from a legal angle," says Brian Ferguson of McDermott, Will & Emery in Washington, an intellectual-property attorney who has no connection to the free-software movement. "If a court says that's not an enforceable clause, it's going to cause some concern," among free-software developers.

Although SCO, of Lindon, Utah, is a little-known player, industry observers give its suit credibility in part because of its law firm, which is headed by David Boies, a heavyweight who became famous representing Al Gore in the Florida ballot battle and the government in the Microsoft antitrust case. Boies, Schiller is taking the case, in part, on a contingency basis. The suit is being heard in U.S. District Court in Salt Lake City.

The GPL was first promulgated by Richard Stallman, a researcher at Massachusetts Institute of Technology who started the free-software movement in the 1980s. Mr. Stallman regards free software as a form of free speech, "free as in freedom -- not free as in beer," he writes. In fact, companies can charge money for free software, but they can't stop it from being copied. To make sure that free software stays free and spreads, in 1991 he wrote the GPL, which he sometimes refers to as "copyleft," because it encourages copying, as opposed to "copyright," which discourages it.

The GPL has been vital to the rapid spread of free software because it ensures programmers that if they contribute software that others augment, the original authors will benefit by having access to the improved software. Indeed, the GPL "is the

The Latest on Vaccines, Re-openings, New Strains and

Sign up to the Coronavirus Daily Briefing for the latest.

[SIGN UP](#)

The best known is Linux, an operating system that competes with Microsoft's flagship Windows. Most computer companies, including IBM, [Hewlett-Packard Co.](#) and [Dell Inc.](#), encourage customers to use GPL-licensed programs such as Linux, in part to counter Microsoft's move into software for the corporate server-computer market.

Indeed, Linux is beginning to take hold in the computer rooms of many large companies. In addition, many companies such as [Texas Instruments Inc.](#), [Yahoo Inc.](#) and [Sony Corp.](#) are using a GPL-licensed database program, MySQL, instead of a commercial database to store their customer accounts and other records.

For its part, Microsoft regards the GPL as a threat to the entire commercial software industry. Microsoft Group Vice President Jim Allchin, who runs the vast Windows group, has said: "The GPL, in my view, is bad in all its dimensions." Brad Smith, Microsoft's general counsel, says he won't allow programmers to even study competing software that is covered by the GPL for fear they might copy some of it into Microsoft's lucrative programs, inadvertently transforming them into free software. Wednesday, a spokesman said Microsoft thinks "the industry would benefit" from a court ruling on the GPL.

Some free-software backers are delighted to see IBM taking on the case, because they believe it will validate the GPL. "It's very helpful," says Eben Moglen, a Columbia University law professor who serves as the pro bono counsel of the Free Software Foundation, a cash-strapped, Boston-based nonprofit.

Since 1991, Mr. Moglen has enforced the GPL by bluster and wit, calling and writing companies that use free software without sharing it. But he's never defended it in court. Now, IBM and its white-shoe law firm, Cravath, Swaine & Moore LLP of New York, have shown they are willing to try a case based in part on the GPL.

Still, the case may not turn on the GPL-validity argument. Both IBM and SCO have other legal claims. James Boyle, an intellectual-property professor at Duke University's law school, says, "I have a hard time seeing any court saying this license isn't enforceable," in part because it covers so much important software. "Courts pay attention to that pragmatically, and it's legally relevant because the consequences [of overturning it]

The Latest on Vaccines, Re-openings, New Strains and More

Sign up to the Coronavirus Daily Briefing for the latest.

[SIGN UP](#)

Corrections & Amplifications:

Brian Ferguson is an intellectual-property attorney with McDermott, Will & Emery in Washington, D.C. The article above incorrectly gave Mr. Ferguson's first name as Andrew.

Copyright © 2021 Dow Jones & Company, Inc. All Rights Reserved

This copy is for your personal, non-commercial use only. To order presentation-ready copies for distribution to your colleagues, clients or customers visit <https://www.djreprints.com>.

The Latest on Vaccines, Re-openings, New Strains and

Sign up to the Coronavirus Daily Briefing for the latest.

SIGN UP