SCO's big legal gun takes aim

Attorney Mark Heise is leading the company's battle against IBM--a legal case he says may redefine the direction of the software industry.

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Instead of talking up new products, SCO Group executives devoted the bulk of their presentations at this week's SCO Forum to the fight against Linux.

And for good reason. The company sued IBM in March, saying it illegally contributed some of SCO's licensed Unix code to Linux. Since then, SCO has been making a major business out of intellectual property enforcement, which happens to be the company's fastest-growing revenue generator.

SCO's lawsuit has excited no small degree of controversy. Critics say the company is trying to shake down Linux users and that it does not have any legal basis for its claims. So in a bid to clarify its case both to customers and detractors, the company showed the disputed code to some attendees at the SCO Forum, its annual user conference that took place this week in Las Vegas.

But that step did anything but lower the temperature. Shortly after making the offer to let outsiders examine the code, members of the Linux community blasted SCO, saying the code was originally covered under a public license that allows it to be shared.

CNET News.com sat down at SCO Forum earlier this week with attorney Mark Heise, a partner with Boies Schiller & Flexner, which is representing SCO, to talk about how the case is affecting the company, the open-source community, and public licenses that require sharing such as the General Public License, or GPL.

Q: Why is this case important?

A: It's a case that has the possibility of defining what direction the software industry is going. Are we going to have an open-source free-for-all? Are we going to have proprietary only? Or are we going to have some sort of combination?

This case has been characterized as an attack on the GPL.
We never raised the GPL in this litigation. We are somewhat surprised that IBM, which has this tremendous copyright and patent portfolio, is advocating the use of the GPL since it could have an impact on them.

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If, for example, their copyrighted materials are finding their way into the GPL, does that suddenly strip them of their rights? We don't think the GPL applies. We believe it is pre-empted by the federal copyright law.
The Free Software Foundation apparently disagrees. If you look at the terms of the GPL and the terms of copyright law, copyright law governs. It is the exclusive authority regarding the use, distribution, etc., of copyrighted material. In the GPL, (there is a section that) specifically says it applies only to the use and distribution. In other words, the exact same topics that are covered exclusively by the Copyright Act are covered by the GPL. Section 301 of the Copyright Act says the Copyright Act pre-empts any claims that are governed regarding use, distribution and copying. We believe that although the GPL is being tossed into the fray, it is pre-empted by federal copyright law.

If SCO were to prevail, do you think it would poke holes in the GPL?
The difference between SCO and other companies that have put their copyrighted material into the GPL is SCO didn't do it. SCO is not the one that put in these derivative works, which, as SCO has maintained, these companies were not allowed to do pursuant to their license. SCO is not the one that put its copyrighted System 5 source code into the GPL. It was another Unix licensee that violated the terms of their licensing agreement. So the difference is that SCO didn't say, "Here is my copyrighted material, and I'm knowingly and willingly giving it to you under the GPL. Here's my copyrighted work."

You're not going to see that when you go into Linux. You're not going to see "copyright, The SCO Group." You'll see copyright IBM; you'll see copyright any other UNIX licensee, but it's not coming from us. The difference is that other companies have donated their copyrighted material, and they did so knowingly, and they're free to do that. But you're not free to take somebody else's copyrighted or otherwise protected material and put it into the GPL and suddenly it's for everybody.

What if, during the course of discovery or another time, you find that the code was originally under the GPL?

Using that hypothetical, if Caldera (International) put something into the GPL, with copyright attribution, the whole nine yards, they can't make the claim about what that thing is that they put in there. But that doesn't mean that--well, let's use an example. Let's say you have a hundred files, and you put one of your hundred files under the GPL. That doesn't mean you've lost the rights to your other 99 files. So I don't think it's going to have an impact.

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The question a lot of people have is how do you put the cat back in the bag? The code is out there.
SCO has carefully thought out that a business resolution is the licensing agreement because SCO is no different than any other company in the United States. Business solutions are always better than litigation solutions. They want to resolve this on terms that are fair to the company, as well as the industry in general. If they can't do that, then they are going to court and they are entitled to receive substantial damages that are owed to them for material that was improperly used in the 2.4 version of the (Linux) kernel. Whether they are paid by IBM or by hundreds of other people, they are committed to making sure they are compensated for their valuable knowledge and copyrights.

Why show off the code?
Why show the code? Why show the contracts? Why show anything? Because SCO is committed to educating people about their rights to ownership and allowing people, with their own eyes, to see what code is out there because I think you've seen throughout a lot of the open-source media: "There's nothing to this litigation. There are no lines of code out there. They keep claiming there (are), but we don't believe that." We are addressing that. We're educating the public in general that, well, there is in fact infringing code, both direct line for line and obfuscated code, derivative works, nonliteral--it's there.(We) just don't want the rest of the world to believe that it's not (there), that this is some sort of smoke and mirrors. It's not.

How did the decision to show the code play out? At the beginning, it seems, not a lot was being shown by the company. Weren't you afraid of tipping your legal hand or that people would criticize the code you were showing?
As a lawyer, I'm always hesitant to show anything, so I'm probably not a good person to ask. I think it really was the company feeling the need to educate the world. They had heard one too many times: "There's nothing there; this is ridiculous."

Now people are saying, "Just show it to us, and we'll fix it." But the cat is out of the bag now. If this case were just about 80 lines of code--first of all, there wouldn't be a lawsuit--people could sit down and try to fix it. That's not what this case is about. They're just going forward with respect to everything.

Who is this silent majority of supporters that SCO CEO Darl McBride referred to? Are we going to see people come out and support the company in statements or legal filings?
We'll have to see. The case is really in its infancy. There haven't been any amicus briefs yet. It certainly wouldn't surprise me because a lot of issues in this case have applications outside of this narrow area.

How so?
We're talking about copyright and how, in the Internet age, people are able to take protected material and have free access to it and make it accessible to millions of people at the flick of a switch. That's something that was unheard of in the past. And the recording industry has

struggled with this with Napster. I'm impressed that these people were able to come up with free file-sharing. How somebody was able to figure out how to do that, I'll never understand. It was clear that you can't do that. It was litigated, including by David Boies who represented Napster, and the recording industry won that case. DVDs are finding their way onto the Web before they're released to the public.

(The SCO case) is really getting to the meaning of copyrights in this Internet age. That's the one hand. On the other, a lot of these issues were dealt with at the turn of the last century. For example, we had motion pictures. There were copyright issues then where if I said I'll give you a license, you can perform this play. And you turn around and you decided they just invented motion pictures. (And you think): If I get a movie out of this instead of a play, I could make a lot more money.

But courts have said you had the rights to make a play, not a motion picture. You didn't have the rights to do that. That's what's happening here. These companies had the right to make their own flavor of Unix, (and) they did that for a while. But a new thing came out, open source, and they went into that but they weren't licensed to do that. While the case has the fresh angle of the Internet, it also goes back to historical roots similar to copyright infringement at the turn of a different century.

What about with radio or the VCR, which caused the music and movie industries to freak out and say their businesses were ruined and their stuff was going to be stolen? Eventually, the industries adopted a different business model that was better for everyone and they didn't have to sue their customers.

I don't think SCO is champing at the bit to sue every customer. I don't think the recording industry is champing at the bit to sue every customer. And we're now starting to see with (Apple Computer's iTunes music store) and other ways to download music that it may not be free...It's now playing out that the industry is finding a business model that works for everybody and not just people who want free music. To the extent that a business model can be worked out--so it's fair to the intellectual property holders as well as people that want access to the software--great. But in the absence of that, SCO has no choice but to go forward and make sure its intellectual property rights are protected.