

Mr Graeme Samuel
Chair
Australian Competition and Consumer Commission

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Dear Chairman

Open Source Victoria Complaint in relation to conduct of SCO Unix

1. Overview

1.1. By a press release dated 20 January 2004 (copy attached) the SCO Group Inc (SCO) (www.sco.com or www.thescogroup.com¹) announced the availability of a licence which “permits the use of SCO’s intellectual property, in binary form only, as contained in Linux distributions” (the SCOSource Initiative). SCO’s press release raises a number of issues of concern for Open Source Victoria (OSV), to the effect that consumers may be misled by the actions of SCO or may have been misled in the past. OSV asks the ACCC to investigate these concerns.

2. OSV’s concerns

- 2.1. OSV is concerned that SCO may be doing or may have done one of the following in trade or commerce:
- (a) making a false or misleading representation concerning the need for any goods or services in connexion with the supply or possible supply of goods or services by representing that people who have already acquired a licence for Linux from SCO are required to acquire an additional licence;
- or, as an alternative to (a)
- (b) made a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or

¹ References in this document are given to www.thescogroup.com. At the start of February SCO removed the domain name www.sco.com from the dns and operated their web site from www.thescogroup.com. We understand that this is temporary. A number of references are made to SCO’s filings with US regulatory authorities (such as forms 10-K etc). Copies of these forms are available from the SEC filings section of the investor relations area on SCO’s website - <http://ir.sco.com/edgar.cfm>.

remedy in that when SCO granted licences over Linux in the past it wrongly stated the scope of rights granted under the licence (in particular that binary execution was permitted).

- 2.2. OSV understands that SCO is currently involved in a dispute over whether or not it has any copyright entitlements in respect of parts of the code in Linux. OSV considers that, as this complaint does not involve any representation as to SCO's copyright holdings, then even assuming these claims are taken at their highest, they do not have any substantive effect on this complaint.

3. **About Linux**

- 3.1. Linux is an operating system licensed under specific licensing conditions (known as "the GPL") which are aimed at promoting competition for ancillary goods and services. Linux represents an emerging market, and one which unhindered, would grow very rapidly.

4. **This complaint relates to the Linux Kernel only**

- 4.1. The heart of Linux is the Linux kernel. This complaint relates only to the conduct of SCO in relation to the various versions of Linux kernel from version 2.2. The current version of the Linux kernel is version 2.6.

5. **About the Linux Market and the GPL**

- 5.1. According to SCO:²

"The Linux market is not characterized by some of the traditional barriers to entry that are found in most other markets, due to the open source nature of the Linux kernel"

- 5.2. OSV attributes Linux's rapid growth to the pro competitive licensing terms on which it is made available, namely the GNU General Public Licence, also known as the GPL. The GPL requires the disclosure of the source code of the Linux operating system. SCO describes this by saying that "anyone can freely download Linux and many Linux applications and modify and re-distribute them with few restrictions"³. The end result is a highly pro-competitive market in which competitive differentiation takes place primarily in services rather than in monopoly control over a key component.

- 5.3. OSV is concerned by the nature of the representations recently made by SCO, in that the message to the market is that there will be additional, and substantive, barriers to competition (ie that SCO may act as a gatekeeper by refusing to grant a licence) in the market both for Linux and for ancillary

² SCO (then Caldera International) Form 10-K (ie Annual Report) for year end 31 October 2002 (dated 29 January 2003) at page 9

³ SCO Unix (then Caldera International) Form 10-K (ie Annual Report) for year end 31 October 2002 (dated 29 January 2003) at page 12

goods and services related to Linux. This removes the key competitive advantage that Linux vendors have to offer – that their customers are acquiring from a free market rather than one which is subject to control by a specific vendor (as is the case for other operating systems).

- 5.4. The research group IDC in July 2002 predicted that on servers Linux would have a 35% share of the installed base share by 2006 (at a cumulative annual growth rate of 21%), with a 7% share of the installed base for desktop systems by the same time (CAGR 44%).
- 5.5. As the Linux product has received significant media attention only recently, and is a product which is licensed on a substantially different basis to similar products fulfilling the same function, potential acquirers of the product are especially vulnerable to misleading or deceptive conduct. OSV considers that the emergent nature of the market also means that any adverse impact SCO's actions have will be substantially compounded over time.

6. About SCO Linux/ Caldera

6.1. OSV understands that:

- (a) SCO Unix (SCO) previously traded under the name of Caldera International (Caldera) (after 7 May 2001)⁴;
- (b) for several years prior to April 2003 in trade or commerce SCO distributed various versions of the Linux operating system under names including "SCO Linux" and "Caldera OpenLinux" (the "SCO Versions")⁵;
- (c) each of version 2.2 and version 2.4 of the Linux kernel have been included in at least one of the SCO Versions⁶
- (d) SCO purported to grant licences to the Linux kernel forming part of the

4 "On May 7 [2001], Caldera Systems completes the acquisition of SCO's Server Software and Professional Services Divisions, becoming Caldera International (Caldera) and providing the world's largest Linux/UNIX channel."
<http://www.thescogroup.com/company/history.html>

"The Company [Caldera International] was originally incorporated as Caldera Systems, Inc. ("Caldera Systems"), a Utah corporation, on August 21, 1998, and reincorporated as a Delaware corporation on March 6, 2000. In March 2000, Caldera Systems completed an initial public offering of its common stock." SCO (then Caldera International) Form 10-K (ie Annual Report) for year end 31 October 2002 (dated 29 January 2003) at page 40

5 "Caldera Systems developed and marketed software and provided services related to the development, deployment and management of Linux-based specialized servers and internet devices. Caldera Systems sold and distributed its software and related products indirectly through distributors and solutions providers, which included value-added resellers ("VARs"), original equipment manufacturers ("OEMs"), vertical solution providers ("VSPs") and systems integrators, as well as directly to end-user customers. These sales occurred throughout the United States and in certain international locations."

SCO (then Caldera International) Form 10-K (ie Annual Report) for year end 31 October 2002 (dated 29 January 2003) at page 40. Similar statements can be found in SCO's 10-K filing for the year ended 31 October 2000 at page 53.

6 "OpenLinux 2.3 is based on the 2.2.10 kernel and includes an improved LIZARD (Linux wiZARD) install with faster auto-probing.", <http://www.thescogroup.com/company/press/19990913ol23.html>

"[SCO Linux 4 is] Based on 2.4.19 kernel version" Slide 14, Powell R, (System Engineer, SCO Unix) SCO Group Technical Overview 24 April 2003 available from:

<http://www.dtrbus.com/RC2003/present/SCO%20Technical%20Overview.ppt>

SCO Versions under the terms of the GPL⁷ over an extended period of time (see paragraph (b) above);

- (e) The terms of SCO's end user licence agreements over the SCO Versions permit any licensee, subject to some minor qualifications, to⁸:
 - (i) "copy and distribute verbatim copies of the Program' s source code as you receive it, in any medium,..."
 - (ii) "modify your copy or copies of the Program or any portion of it"
 - (iii) "copy and distribute the Program (or a work based on it, ...) in object code or executable form" and
 - (iv) run the program
- (f) SCO now represents that licensees require an additional licence from SCO to use the licensed software in circumstances already permitted by SCO's previous licences (a "right to use" "in binary form" ⁹ – in other words, to run the program)¹⁰.

6.2. OSV also understands that:

- (a) SCO claims that when it licensed software under the GPL it didn't really mean to;¹¹
- (b) SCO was aware of the nature of the GPL and the risk of code (including SCO code) being included in the SCO Versions illicitly;¹²

⁷ "Linux packages as selected, arranged and coordinated by Caldera Systems for inclusion in this OpenLinux distribution. GPL Software is not owned by Caldera Systems. GPL Software is distributed by Caldera Systems to Licensee for use by Licensee. GPL Software is distributed under the terms of the GNU General Public License, Version 2, June 1991, a copy of which accompanies this OpenLinux Agreement. The GNU General Public License governs the GPL Software and the copying, distribution and modification of the GPL Software. GPL Software source code is included in the GPL Software distributed to Licensee consistent with the requirements of the GNU Public License." OpenLinux Version 2.2 End User License Agreement available from <http://www.thescogroup.com/support/docs/openlinux/2.2/gsg/eula.html>

"Hasn't SCO already indicated that it's okay for its code to be distributed by distributing this code itself that is now in question? Haven't they essentially GPL'd their code?" question 5 of

<http://www.thescogroup.com/scosource/linuxqanda.html>

See also: SCO's response to this question and Eblen Moglen's response to their response at section 3 of http://www.osdl.org/docs/osdl_eben_moglen_position_paper.pdf.

⁸ Attachment: "Copy of GNU General Public License" to SCO's document entitled "OpenLinux Version 2.2 End User License Agreement" available from <http://www.thescogroup.com/support/docs/openlinux/2.2/gsg/eula.html>

⁹ "End user customers who purchase a SCO IP license are granted the right to use SCO intellectual property in binary form as contained in Linux binary installations on end user systems" <http://www.thescogroup.com/scosource/linuxqanda.html>

¹⁰ "24. If I am running SCO Linux or Caldera OpenLinux do I need to obtain a SCO IP License for Linux? Yes." Item 24 at <http://www.thescogroup.com/scosource/linuxqanda.html>

¹¹ SCO's explanation is far from clear: "During the period that SCO distributed Linux, SCO was unaware of the copyright violations. Copyrights cannot be given up by unintentional or illegal inclusion in a GPL product. The owner of the copyrights must transfer the copyrights in writing, which SCO has never done." – Response to question 5 of

<http://www.thescogroup.com/scosource/linuxqanda.html>

¹² "In addition, due to the open source nature of Linux, anyone can freely download Linux and many Linux applications and modify and re-distribute them with few restrictions. For example, solution providers upon whom we depend for the

- (c) SCO was distributing versions of the Linux kernel under the terms of the GPL as recently as early December 2003¹³

7. Reasoning

- 7.1. OSV is concerned that SCO is representing that recipients of a SCO Version are required to acquire an additional licence from SCO. If this is the case, then either the result of the initial licence grant by SCO was that recipients of the SCO Versions received the rights SCO said that they would receive (ie the rights to use and distribute the relevant kernel in accordance with the terms of the GPL) or they didn't.
- 7.2. If the former is true, then when SCO initially licensed the SCO versions it made a false or misleading representation as to the effect of rights.
- 7.3. If the latter is true, then a further licence from SCO is unnecessary and SCO's statement that recipients need a further licence is a false or misleading representation as to the effect of rights.
- 7.4. OSV notes that the terms of the licence are specifically directed to consumers who, in addition to using the SCO Versions themselves, are also contemplating on supplying them to others. It is not an uncommon practice for acquirers of a Linux kernel to then on supply that kernel to others as part of a service offering. If SCO repudiates the licences it has granted over the SCO Versions, both the initial takers, and anyone to whom they have on supplied the kernel will be affected. Such conduct has the potential to be very damaging both to consumers and to businesses who may wish to on supply the kernel of the SCO Versions.
- 7.5. Whether or not SCO realised what it was doing when it granted licences over the kernel on the terms of the GPL should not be relevant. SCO purported to grant a licence over the SCO Versions and should not be able to rely on its own conduct to diminish those licence grants.

8. Remedies

- 8.1. In the view of OSV, if SCO has previously offered to licence specific versions (2.2 and 2.4) of the Linux kernel on the terms of the GPL then:
- (a) SCO should be required to be held to those licence terms in respect of existing licensees. Those licences should be declared to be valid and

distribution of our products could instead create their own Linux solutions to provide to their customers." SCO (then Caldera International) Form 10-K (ie Annual Report) for year end 31 October 2002 (dated 29 January 2003) at page 12
"We believe that Linux has not yet been widely adopted by businesses due to a number of factors, including: the fragmentation of Linux offerings; concerns about intellectual property protection for software designed to work with the Linux kernel" *ibid* at page 4

13 "However, as of Monday, December 8, 2003, SCO Group was still distributing the Linux kernel under the terms of the GNU GPL via their FTP server. (<ftp.sco.com> [OpenLinux 3.1.1 linux-2.4.13-21S src.rpm \[5\] \(FTP\)](#))" [OSV assumes this link refers to version 2.4.13 of the Linux kernel] http://en.wikipedia.org/wiki/SCO_v._IBM_Linux_lawsuit

effective;

- (b) where a consumer acquired a copy of the relevant Linux kernels from SCO prior to the commencement of SCO's SCOSource initiative, then that consumer should be entitled to the grant of a licence by SCO on terms which are of the same effect as the GPL;
- (c) any marketing conducted by SCO in relation to its SCOSource initiative should explicitly state that existing licensees of OpenLinux and SCOLinux products are not required to acquire any additional licences and that such existing licences are valid and enforceable according to their terms;
- (d) SCO should correct its existing advertisements and advertise those corrections;
- (e) consideration should be given to the appropriateness of the imposition of pecuniary penalties.

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SCO Announces A/NZ Availability of SCO Intellectual Property License
FOR IMMEDIATE RELEASE

Sydney, January 20 2004

The SCO Group, Inc. (Nasdaq: SCOX), the owner of the UNIXR operating system and a leading provider of UNIX-based solutions, today announced the availability of the SCO Intellectual Property License to companies and organisations in Australia and New Zealand.

The company began the worldwide roll out of the license in the UK, France and other European countries last week, and plans to make the license available to many more countries and regions by February 1.

The SCO Intellectual Property (IP) License permits the use of SCO's intellectual property, in binary form only, as contained in Linux distributions. By purchasing the license, customers are properly compensating SCO for the UNIX source code, derivative UNIX code and other UNIX-related intellectual property and copyrights owned by SCO as it is currently found in Linux.

Pricing:

The SCO IP License is currently available at introductory pricing of AUD\$999.00 per server processor and AUD\$285.00 per desktop processor. The company is also offering the license to embedded device manufacturers that use Linux to run their devices.

In addition to extending the license to customers worldwide, the company also announced that the license will shortly be made available through select SCO resellers. SCO resellers who are interested in obtaining more information about providing the SCO IP License to their customers can contact SCO at anz_info@sco.com after February 1, 2004.

"While we have identified several problem areas at issue within Linux, we also want to be fair to customers and allow them to continue using Linux and our intellectual property unencumbered," said Chris Sontag, senior vice president and general manager of SCOSource, the intellectual property licensing and protection division of The SCO Group, Inc. "We believe the SCO IP License helps customers satisfy the legal requirements to continue using SCO's UNIX intellectual property in Linux in a forthright way while properly compensating the company for use of its property."

Kieran O'Shaughnessy, SCO's Regional General Manager, Australia and New Zealand, said he will begin briefing the company's local distributors this week regarding the SCO IP License's introduction.

"The SCO IP License helps organisations in Australia and New Zealand to protect and leverage the investments they have made in Linux while providing the means for them to continue day-to-day business without interruption," he said.

Availability:

Commercial business end users of Linux, based on the 2.2 kernel and

later, that are interested in more information or in purchasing the SCO IP License in Australia or New Zealand can call +61 2 9440 7577 or e-mail SCO at anz_info@sco.com.

Notes for Editors:

Forward looking statement safe harbor:

This press release contains a forward looking statement regarding The Company's plans to make the SCO Intellectual Property License available in Australia, New Zealand, the U.K., France, and other European countries and many more countries and regions by February 1, 2004. This statement is subject to risks and uncertainties including without limitation those risks and uncertainties identified in our filings with the SEC and the risk that we will not be in a position to roll out this license in such countries and regions as planned. We undertake no obligation to update the information in this release, except as required by law.

About The SCO Group

The SCO Group (Nasdaq: SCOX) helps millions of customers in more than 82 countries to grow their businesses with UNIX business solutions.

Headquartered in Lindon, Utah, SCO has a worldwide network of more than 11,000 resellers and 4,000 developers. SCO Global Services provides reliable localized support and services to all partners and customers.

For more information on SCO products and services visit:
<http://www.sco.com/> <http://www.sco.com> .

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