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# Consortium Standards Bulletin

A *ConsortiumInfo.org* publication

AUGUST 2004

Vol III, No. 8

## TRENDS

### LINUX HAS A BAD FUD WEEK

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Ever since SCO CEO Darl McBride launched his ongoing assault against Linux, the risk of infringement claims against the popular open source operating system has seemed reminiscent of United States Homeland Security concerns. In the last several weeks, the Linux patent claim danger alert (if there was one) would doubtless have been raised from yellow to orange, due to a number of revelations and reports in the press.

Most of the fear, uncertainty and doubt related to concerns that Microsoft intended, or at least someday might be able, to assert patents against its open source rival.

As with the recent major terror alert involving U.S. financial institutions (which stemmed from the discovery of years' old information on a laptop), the infringement scare began with another piece of ancient intelligence – a two-year-old HP memo. The memo circulated around the Internet for a while before being posted at NewsForge.com on July 19, following confirmation of authenticity by HP.

In that memo (reproduced in full at [www.newsforge.com/article.pl?sid=04/07/19/2315200](http://www.newsforge.com/article.pl?sid=04/07/19/2315200)), then-vice president of strategic architecture Gary Campbell stated: "Basically, Microsoft is going to use the legal system to shut down open-source software. Microsoft could attack open-source software for patent infringements against (computer makers), Linux distributors, and, least likely, open-source developers." The memo informed HP executives that Microsoft was also "specifically upset about" Samba, Apache and Sendmail, each of which is a widely distributed open software program (and used to share files, host Web sites and route email, respectively).

It didn't ease concerns when Bill Gates announced ten days later that Microsoft intended to file at least 3,000 patent registrations in 2004 – up from only about 2,000 filings in 2003, and closing rapidly on perennial patent champ IBM, which was awarded 3,415 patents in 2003.

The icing on the paranoia cake was the release on August 1<sup>st</sup> of a report that found that Linux potentially infringed an impressive 238 patents. The analysis had been commissioned by Open Source Risk Management, which plans to sell infringement insurance to the Linux community. While over a third of the patents identified are owned by companies commonly thought to be Linux allies, that would still leave many patents in potentially hostile hands, or in the hands of those who might be acquired by those who do not have kind feelings for Linux.

True, the study also stated that the validity of none of the patents in question had as yet been tested, leaving open the possibility that many claims could be satisfactorily challenged as having been anticipated by "prior art." Still, 238 is a very large number, and even if half of that number could be invalidated, a great deal of work could be required to either gain non-assertion promises from the various remaining patent owners, or to try to design around the patent claims in question.

The open source community and its allies quickly circled the wagons in response. IBM promptly announced through a representative at the LinuxWorld Conference and Expo that "IBM has no intention of asserting its patent portfolio against the Linux kernel, unless of course we are forced to defend ourselves."

Similarly, a spokeswoman for HP stated that the two year old HP memo is “not relevant today,” and that HP has no knowledge of any specific patents that could be asserted by Microsoft against any of the open source software referred to in the memo.

Those that thought about the Microsoft announcement could also take comfort in the fact that only a few years ago, Microsoft was filing far fewer patent registrations: on the order of 1,000 a year. And, of course, patents take a number of years to issue, and may not be asserted against another implementer until such time (if ever) as the Patent and Trademark Office agrees to grant the claims applied for.

As a result, an ultimately granted patent applied for today could not be wielded against an implementer until some indefinite point in the future. Given that reality, it will be years before Microsoft would begin to rack up the same issued patent score as IBM, which has actually been granted over 3,000 patents per year for each of the last three years.

Eventually things settled down. If Tom Ridge were to be tracking the situation, he would probably have lowered the infringement danger gauge back to yellow. But the episode underscores the vulnerability of open source to the kind of FUD attacks that can undermine market penetration, with or without the filing of actual infringement suits.

Happily, it is within the power of the open source community to tighten intellectual property security far more easily than the Department of Homeland Security. The Linux development community, while large, does not have thousands of miles of unprotected physical frontiers to protect.

The lesson to be learned is that end-user trust can be earned through tightening the development process in such a way that infringement should be difficult, rather than easy, to imagine. Revelations that a Linux user might run afoul of 238 patents is hardly conducive to achieving that kind of trust.

It would be wise for not just the Linux community, but the open software community as a whole, to take whatever measures may be necessary to ensure that infringement claims in the future will be met with doubt about the veracity of the accuser, rather than fear, uncertainty and doubt over the possible reality of a threat.

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