

To: Mr Graeme Samuel
Chairman
Australian Competition and Consumer Commission
Level 35, The Tower
360 Elizabeth Street
Melbourne Central 3000



From: CyberKnights Pty Ltd
[address suppressed]
[suburb of Perth, Western Australia] [postcode]

CyberKnights Pty Ltd
Modern Tools
Traditional Dedication

Date: 03 March 2004

Dear Sir

Re: Complaint

CyberKnights Pty Ltd wishes to complain about the business conduct of The Sco Group Australia and New Zealand.

Summary of Complaint

The SCO Group Australia and New Zealand (TSGANZ)¹ and their parent corporation The SCO Group Incorporated (TSGINC)² are making unreasonable and unfounded ownership claims on the software around which CyberKnights Pty Ltd (CK) bases its business, including claims for an additional licence fee of typically AUD\$999 per computer. Since the claims originate from TSGINC but are made in Australia by TSGANZ I will use "TSG" to refer to either or both below when their aims and actions coincide.

TSG's claims and their licence terms are sufficiently vague that it has proven impossible for CK or anyone else CK is aware of to determine the basis for the claims beyond that some "intellectual property" of poorly defined and ever-changing nature purportedly inherited from The Santa Cruz Operation (now Tarantella) and in turn Novell and Unix Systems Laboratories has been inserted into the source code for Linux somewhere.

The very few references published by TSG to the thirty-million-plus lines of source code in Linux do not identify code belonging to, written by or inherited from TSG. Since TSG's suit of IBM over the matter claims no trade secrets and has been in the discovery phase for approximately a calendar year, it is reasonable to believe that there is no identifiable TSG ownership of any material part of Linux.

TSG has also knowingly published and distributed the Linux 2.4 kernel source code set under the GNU General Public License (GPL)³ including for several months after filing suit against IBM. The GPL permits unrestricted distribution of code licensed under it and "the recipient automatically receives a license from the original licensor to copy, distribute or modify the Program subject to these terms and conditions." CK has received a copy of this distribution, so has already received a licence to "copy, distribute or modify" Linux 2.4 and derivatives freely regardless of any ownership claims TSG may make, however TSG has so far refused to acknowledge this.

The TSG claims are causing CK loss of business as some customers refuse to commit to projects which the licence fee would render uneconomic or the threat of suit from TSG would render unattractive. Additionally, CK is having to expend considerable unrecoverable staff time in having to field queries from customers and provide enough background information to reassure some of them that they are not at risk from TSG's spurious claims.

These TSG claims are also causing CK loss of reputation through the implication that CK is operating and/or distributing unlicensed software.

TSG has repeatedly skirted the edges of defamation law and Section 202 of the Copyright Act 1968, both in Australia and in relation to similar laws overseas, and has not once voluntarily⁴ acknowledged any fault, impropriety or wrongdoing in their actions.

CK has questioned other Linux-based consultancies operating in Western Australia, the Australian Capital Territory, South

1 TSGANZ may be found at <http://au.sco.com/>; anz_info@sco.com; 56 Berry Street, North Sydney 2060 or (02) 9440 7577

2 TSG may be found at <http://sco.com/>; scoinfo@sco.com; 355 South 520 West, Suite 100, Lindon, Utah 84042 USA or 0011 1 801 765 4999.

3 Published on the Internet at <http://www.gnu.org/copyleft/gpl.html> and in many other places.

4 The sole out-of-court settlement with Univenton in Germany is hardly voluntary in nature.

Australia, New South Wales and Victoria, and their replies indicate that they too are being negatively impacted by TSG's ongoing actions.

The Relief sought by CyberKnights

CK does not have the resources to follow through a lawsuit of the scope which would be required to obtain substantial relief through any Australian, United States or International Court.

We hereby seek prompt relief through the ACCC. The ACCC as a guardian of business and consumer rights has expressed a willingness to deal with overseas actions impacting Australian businesses, and in particular harmful actions undertaken through the Internet, and is thus the most appropriate government agency to approach.

While we herein ask for this relief for CyberKnights alone, please bear in mind that the same relief if granted will also apply to hundreds, possibly thousands of other Open Source based businesses across Australia.

1. CK hereby asks ACCC to as far as possible restrain TSG from stating, claiming or implying that they in any way own or control the Linux operating system or any significant or essential component of it. This includes permanently withdrawing their purported "SCO IP in Linux Licence" from sale.
2. CK asks ACCC to as far as possible require TSG to publicly and prominently retract their publicly and prominently made claims to ownership or control of Linux.
3. CK asks ACCC to as far as possible require TSG to publicly and explicitly state that companies using or distributing the Linux operating system under the GPL are doing so fairly and legally to the best of TSG's knowledge under the terms of the GPL.
4. CK asks ACCC to require TSG to make good the harm which it has already caused CK. Such harm is by its nature difficult to quantify⁵, but if ACCC indicates an intention to pursue this point CK will invest resources in providing documentation of and a supported reasonable estimate for the actual harm caused.
5. CK asks that if TSG continue to make claims in defiance of ACCC requests, ACCC prevent TSG from advertising or trading in Australia or as an "Australian" company.

It is important that relief be obtained in a timely manner. CK is most earnest in seeking immediate partial relief, even if this delays or defers relief on other points.

The Complaint in more detail

In support of the complaint, we have laid out some more detailed background information in an enumerated question-and-answer form.

Is TSG really demanding a licence from CK?

CK's business is built on and centred around Linux, and in particular Mandrake Linux which is currently based on 2.4 and 2.6 versions of the Linux kernel. As such, CK is both an end user of and supports end users of Linux 2.4. The following statements by TSG and TSGANZ each unequivocally make a claim for a licence.

From the web page published at <http://sco.com/scosource/linuxqanda.html> –

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20. Does everyone who uses Linux need a SCO UNIX IP License for Linux?
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End users running Linux 2.4 or later versions for commercial purposes need a SCO IP license (commercial=using Linux to operate the business).
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From the web page published at <http://sco.com/scosource/> –

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End users who purchase this license will be held harmless against past and future copyright violations based on their use of SCO's intellectual property in binary format in Linux distributions on the licensed system. The license applies to all commercial users of Linux.
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An email on 23 July 2003, Kieran O'Shaughnessy of TSGANZ stated to CK (message ID

⁵ For example, if a business quietly put off a decision to contact CK because of TSG's actions, CK would not be aware of this loss, and so would be unable to account for it.

“005501c350db\$db6b5450\$6400a8c0@Waratah”):

In May, SCO [...] indicated that Linux end users could face liability for running it in their organization. [...] SCO will offer UnixWare® licenses tailored to support run-time, binary use of Linux for all commercial users of Linux based on kernel version 2.4.x and later. SCO will hold harmless commercial Linux customers that purchase a UnixWare license against any past copyright violations, and for any future use of Linux in a run-only, binary format.

From the web page published at <http://sco.com/scosource/linuxlicensefaq.html> –

SCO has announced it will bring legal action against some Linux end users in the near future for unauthorized use of our IP in Linux. SCO created the SCO IP license to cure the infringement for the Linux end user. SCO prefers that end users purchase this license rather than resorting to litigation. If we are forced to litigate to protect our rights, we will.

...and...

24. Does everyone who uses Linux need a SCO IP License?

All commercial users of any version of Linux need an SCO IP License.

What are the terms of TSG’s “IP in Linux” licence?

Quotes are from the PDF file published at [http://sco.com/scosource/SCOIPLicEULA\(Feb17-04\).pdf](http://sco.com/scosource/SCOIPLicEULA(Feb17-04).pdf) but the short answer is “we can’t tell”.

The document is entitled “INTELLECTUAL PROPERTY LICENSE”, which is already confusing because at law there is no such thing as “intellectual property”, a term which is loosely used to refer to copyrights, patents, trademarks and trade secrets. The document does not define which, if any, the purported licence applies to. It cannot be patents, because TSG holds none over Unix or Linux. It cannot be trademarks, because The Open Group holds the Unix and UnixWare trademarks. It cannot be trade secrets since none are in dispute, and if they had been they would no longer be secret. We are left to surmise that the claim is against copyright, despite no significant copyrights having been conveyed to TSG.

The document does not identify any copyrights, but it does make this claim in the “GRANT OF RIGHTS AND OBLIGATIONS” section:

The SCO IP is protected by copyright, under local law and under international copyright conventions.

The document overtly mentions Linux only once, and even this reference was absent from the original version:

“Operating System” shall mean software operating system Code (or Code that substantially performs the functions of an operating system) that is a distribution, rebranding, modification or derivative work of the Linux® operating system.

The document warrants that TSG has the ability to grant you rights to “intellectual property” in Linux:

SCO WARRANTS THAT IT IS EMPOWERED TO GRANT THE RIGHTS GRANTED HEREIN.

If the “rights” in question are consequent on any residual copyright holdings, which are currently under dispute in two courts of law in the United States, then TSG doesn’t yet (if they ever will) have clear title to them and so can’t offer rights based on them for sale. If the “rights” are not based on copyright holdings, TSG has still not nominated any source of authority for these “rights”.

The document appear to claim to offer only one “right” which is to escape prosecution by TSG and at that point it also emphasises the payment of fees in return for legal protection. This is phrased as:

Provided You comply fully with this Grant of Rights and Obligations, SCO will not consider such use of the SCO IP licensed by You under this Agreement to be in violation of SCO's intellectual property ownership or rights. [...]

Provided You pay the applicable license fee and complete the

required registration of the COLA, SCO grants You the right to use all, or portions of, the SCO IP only as necessary to use the Operating System on each System for which the appropriate CPUs have been licensed from SCO [...]

A plain reading of Section 202 of the Australian Copyright Act 1968 indicates that TSG are “[...]threaten[ing] a person with an action or proceeding in respect of an infringement of copyright, then, whether the person making the threats is or is not the owner of the copyright or an exclusive licensee, a person aggrieved may bring an action against the first-mentioned person[...]” and possibly even Australian Standard Offence Classification #0621.

What are TSGANZ demanding for a licence?

The published⁶ amounts are “AU\$999 per server processor and AU\$285 per desktop processor”. It is not clear whether a “hyperthreading” processor counts as one or two.

CK invites the ACCC to carefully consider this following dictionary⁷ definition while remembering the statement “SCO has announced it will bring legal action against some Linux end users in the near future for unauthorized use of our IP in Linux” and examining the purported licence for any identification of or explicit reference to the “intellectual property” purportedly licensed:

the act or practice of wresting anything from a person by force, by threats, or by any undue exercise of power; undue exaction; overcharge.

To put the AUD\$999 per processor figure in context, CK typically sells a basic but complete office gateway server, both software setup and provision of hardware, for AUD\$962. Adding the cost of a purported licence to this would more than double it.

How has TSGANZ responded to requests for clarification?

The first email query by CK in July 2003 drew a response in four hours, but the response did not clarify anything.

TSGANZ’s responses became slower (of the order of several days to a week) in the weeks following, and they have not responded to any of CK’s renewed attempts to communicate with them this year, including contact by Australia Post Registered Mail.

What relevant “Intellectual Property” might TSG own or control?

If TSGINC had any valid copyright, patent, trademark or trade secret rights over Linux, they would surely have employed them in their suit against IBM. TSG owns no patents on Unix, and The Open Group (as TSG acknowledge on their websites) owns the trademark rights to Unix and UnixWare.

There is no record with the US Copyright Office of any conveyance of Unix copyrights from AT&T’s Unix System Laboratories, their successors-in-interest Novell, or The Santa Cruz Operation (now Tarantella) to TSGINC or their predecessors-in-interest Caldera.

IBM have allowed TSGINC to amend their Court case to include copyright allegations, however, this is very unlikely to indicate TSG ownership of significant copyrights for at least three reasons:

1. Since IBM intends to win their case and has every right to refuse TSGINC’s amendments, it would be absurd for IBM to admit those same amendments if the entrained copyrights were at all damaging to IBM’s case;
2. The “father” of Linux, Linus Torvalds, and many of the more important contributors to the Linux kernel source code have repeatedly stated that they’re not interested in using any of TSG’s code. Taking the copyrights to court will identify the related code – if any – which will in turn enable the Linux kernel maintainers to promptly remove it and so destroy any copyright encumbrance on the kernel;
3. It would have been negligent of TSGINC to not include the copyrights in their original suit, if they’d had them at the time, implying that the copyrights must be recent (that is, not covering the areas of code which TSG claims or claimed to have covered by copyrights) or trivial (and so not enforceable).

In summary, the answer is “nothing” or at worst “nothing significant”.

TSG have not established title to any material in the Linux kernel, there is no reasonable expectation by CK of them ever doing so, and the Linux kernel maintainers have several strong motivations to immediately remove any code which might be

⁶ For example, at <http://www.zdnet.com.au/news/software/0,2000061733,39115747,00.htm>

⁷ <http://dictionary.reference.com/search?q=extortion>

tainted by TSG.

TSG knowingly published the Linux 2.4 source code under the GPL themselves for many months after launching their suit against IBM, and prior to that TSG-as-Caldera published the “Ancient Unix” sources including code from which System V and their own UnixWare and OpenServer code-bases were derived. This renders their task of proving title to any derivatives considerably more difficult. Australian law is even harder to satisfy on this point.

TSG have also claimed that some Linux header files are older Unix header files with the copyrights removed. However, they have not shown that the two sets of header files weren't from a common public-domain origin, nor have they shown that the copyright notices on “their” set of header files were legitimately added.

If TSG's purported licence were valid alone, what about with the GPL?

The GPL does not permit the distribution of any associated copyrighted or patented material unless the material in question is also freely licensed to the recipient. TSG's own publication of GPLed kernel sources appears to have implicitly granted such licence if it was ever required, but if not, then nobody (even TSG) has the right to distribute the tainted sources, since the GPL is the only licence which both applies to the Linux source code and permits its distribution, so TSG itself is already in violation of US and international copyright laws.

TSG's purported “IP-in-Linux” licence has no clear bearing since it does not claim to apply to either distribution or source code.

Since CK has obtained a copy of the Linux kernel sources as used by TSG, versions 2.4.19 and 2.4.13 from TSG's own FTP server on 14 August 2003 under the GPL, CK in principle possesses the right to freely use, “enjoy” and distribute at least the Linux 2.4 kernel, however TSG have refused to acknowledge this, claiming that (more than six months after they prepared to go to Court over the matter) that they didn't know their IP was in it.

The potential for TSG to harm industry sectors reliant upon Linux seems obvious.

What actual harm has CK suffered at the hands of TSG?

CK has had several proposals for supply turned down because they were based on Open Source. When the enquirer has been successfully pressed for an explanation, TSG's action “against Linux” has frequently been either the only supporting reason cited, or one of the few reasons cited. Each such lost sale typically represents a loss of between \$500 and \$5000 worth of work in addition to the unbillable time spent dealing with the enquiry.

CK has spent many unbillable man-hours defending Open Source and Linux in particular in the eyes of existing CK customers concerned by TSGs very public accusations and court actions.

Consequently, CK has also spent many unbillable man-hours analysing TSG's statements and actions, querying TSG and others on their policies and actions in regard to TSG's claims in order to prepare truthful and accurate defenses; also in preparing and documenting answers and policies for existing and potential customers, and preparing documents of complaint such as this in attempt to mitigate the damage to CK's business, reputation and market from TSG's statements and actions.

There is also less tangible harm in the form of distress to CK's staff and customers, and damage to CK's reputation through the implied accusation of unlawful behaviour (specifically dealing in software without a valid licence to do so).

Have other entities taken TSG to court and won?

Univention GmbH took The SCO Group GmbH to court and obtained a temporary injunction against them. That injunction has now been made permanent in an out-of-court settlement, the terms of which are (as translated from German by Arne Ahrend, a resident of Germany):

1. SCO commits itself to Univention to refrain in future from maintaining or disseminating the assertion that:
 - a. Linux operating systems contain unlawfully acquired intellectual property from SCO UNIX® and/or
 - b. end users, if they use Linux, could be held liable for the violations of SCO intellectual properties related thereunto and/or
 - c. Linux is an unauthorized derivative of Unix and/or
 - d. buyers of Linux operating systems had to fear criminal

prosecution, unless the purchased operating systems are SCO Linux or Caldera Linux, if this is not demonstrably true.

2. SCO makes clear that it will not publicly claim that proofs for copyright violation would be provided soon, unless they are provided to Univention within one month from such announcement.

3. SCO further commits itself to pay to Univention for each instance of future violation of the above obligations a penalty for breach of contract to the amount of 10,000 Euros.

4. [Univention] relinquishes the rights from the preliminary injunction of the Bremen district court of 28 May 2003. SCO accepts this abandonment and refrains from pursuing the lifting of the abovementioned court order.

CK believes that as well as exemplifying prompt and legal contradiction of the claims, TSG GmbH entering into such an agreement is a clear statement that TSG's claims are worthless.

Is prompt action important?

As well as the ongoing damage to CK and similar Australian firms, TSG appears to have found at least one "real" taker for their licensing scam: EVI Servers⁹. In the absence of prompt action to restrain TSG, the risk of Australian companies becoming confused enough to follow suit is real and pressing.

Since TSG have widely propagated their claims, and since their continued viability on the stock market depends on a significant number of people believing those claims, it is likely that a Court pronouncement or other newsworthy event will send SCOX shares crashing through the floor at short notice and effectively kill TSGANZ's parent corporation.

If that happens before TSG are required to recant their position, the damage they are doing to Australian Linux enterprises now will inevitably be frozen and perpetuated by claims from fellow-travellers along the lines of "they were right, but didn't get a chance to prove it". Action from the ACCC now will count as an official statement against the veracity of those claims and so will reduce the eventual damage toll on CK and similar Australian firms.

It is also possible that there will be a successor-in-interest to TSG (such as The Canopy Group) who will again begin damaging Linux firms – or other, unrelated stand-over men may arise, each hoping to get rich quick by copying TSG's actions. If the ACCC has already acted against TSG, this will establish a precedent and a warning which may act as an effective deterrent against a recurrence of the entire class of problem.

Thank you for your attention to this complaint.

Yours faithfully

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Leon Brooks, Director
CyberKnights Pty Ltd

9 <http://www.informationweek.com/story/showArticle.jhtml?articleID=18201361>