

Clearing Up Confusion Surrounding Linux Copyrights and Trademarks



There is much confusion among companies regarding how to take advantage of the powerful Linux operating system, without violating copyright or trademark laws or losing their trademark or copyright protection. This article briefly addresses some copyright and trademark questions that the use of Linux raises. It first provides a brief background on the Linux operating system and its license, the GNU Public License, more commonly known as the GPL. It then discusses the level of risk companies face using Linux internally and in a software development context. It discusses strategies for staying in compliance with the copyright aspects of the license. Finally, the article discusses how a company can comply with the registered trademarks for LINUX and its various distributions.

Background

Linus Torvald developed Linux in 1992, while he was a graduate student in Finland. He created it to be an open-source version of the then-popular UNIX operating system. Since 1992, Linux has flourished in the business community. Several full-fledged operating systems incorporating Linux soon emerged, such as SuSE, Debian, and Mandrake. Some companies, like Red Hat and Hewlett-Packard found that they could earn money off of open-source software, by providing services such as technical support and warranties for a fee. Other companies, such as IBM and Novell (which now owns SuSE) financially support Linux, viewing it as a reliable alternative to Windows for their high-priced computer servers.

Linux is subject to the GPL. Under the terms of the GPL, a company can obtain Linux either for free or at cost of the provider. Any company can modify the source-code of Linux for its own internal use. If a company does modify the source-code of Linux and chooses to distribute its changes, then it is obligated to release the source code of its changes back to the open-source community. Though this license has not been tested in the U.S. courts, it has been upheld in Germany, and is believed by many legal scholars and practitioners to be enforceable. Other similar licenses are also used for open-source software programs.

Copyright Issues

Many companies still hesitate to migrate to open-source software. A common misconception is that if a company uses open-source software for internal use, such as using Open Office to create a client presentation, the resulting work will have to be released to the public. This is not true. As long as a company is not changing the source code of the program or incorporating source code into proprietary software, there is no violation. Even if a company modifies open-source software for their own internal use, but does not distribute the modified software (such as through sale), the company will be adhering to the license. Companies should conduct general audits

to ensure all in-house software complies with its respective license, particularly if the company is looking to be acquired.

Software development companies should exercise even greater care with open-source license compliance. It is often difficult to get software developers to understand why they are not allowed to incorporate lines of code readily available on the Internet into a company's proprietary software. Policies for educating their programmers about open-source software and for monitoring the proprietary code base for copyright violations are key. This may protect the company down the road against a finding of willful copyright infringement, in the event that the company is sued.

Trademark Issues

The use of trademarks associated with Linux is completely distinct from Linux-related copyrights. Though a company can freely obtain Linux, if it makes modifications to the code and releases a new version of Linux, it is not entitled to its predecessor's trademark. For example, suppose a company obtains a free copy of the most recent release of SuSE Linux, makes a number of modifications to the software, and then wants to redistribute the software at no cost. That company would *not* be automatically entitled to use the SuSE mark, but would need to obtain permission from the trademark holder of SuSE before using the mark. Without permission, that company could be liable for trademark infringement.

What if a company wants to call their new version of Linux "Company X Linux?" Recent cases in Australia have caused confusion regarding this question. In the United States, LINUX is the registered trademark of Linus Torvald, and the Linux Mark Institute handles the licensing of the mark on his behalf. Thus, the company must pay a fee to the Institute and obtain a proper trademark license. It would then be free to use the LINUX mark for marketing products or services to the public.

Conclusion

Understanding the unusual legal status of open source software and the LINUX mark will help users avoid adverse effects on their own trademarks and copyrights. A company can lower its risk in using Linux by exercising due diligence, such as periodically auditing whether Linux users are complying with the terms of the GPL. Software development companies should take particular care to ensure that Linux or other open-source code does not inadvertently enter the company code base, as such a mistake could lead to costly code revisions, or worse, law suits. Finally, companies that do modify Linux should carefully follow the terms of the GPL for distribution, and obtain proper trademark licenses. These preventative steps can help prevent future legal problems.

— Sapna Kumar

Firm Update/Announcements

New Associate

Natalie Kernisant ... has joined the firm as an associate. Natalie received her J.D. degree from the University of Virginia law school.

Appointments

Sanjiv Sarwate ... was appointed Chair of the Copyright Licensing subcommittee of the Committee on IP Licensing for the ABA IPL Section.

Presentations

Annie L. Albertson ... spoke on a panel at Northwestern University School of Law on October 5, 2005, entitled "Law 101: Intellectual Property Practice," which was designed to give law students an insider's perspective on the diversity of intellectual property law practice from current practitioners in the field.

Bradley L. Cohn ... served on a Chicago Bar Association panel sharing thoughts on "Careers in Intellectual Property" with law students and young lawyers, on September 15, 2005.

Jonathan S. Jennings ... spoke on "Domain Names, Trademarks and Data Privacy and Security on the Internet" at the ABA Forum on Franchising's Annual Meeting in Orlando, Florida, on October 19, 2005. **Jonathan** also guest lectured on "Trademark Registration Practice" to a law school class at The John Marshall Law School on September 9, 2005.

Mark V.B. Partridge ... spoke on "Plagiarism and Fair Use" at the Construction Writers Association Midyear Meeting in Chicago on October 20, 2005.

Robert W. Sacoff ... as President of AIPPI United States led the US Group's delegation to the AIPPI (Association Internationale pour la Protection de la Propriété Intellectuelle) Executive Committee Meeting in Berlin during the last week of September. He also presided over the US Group's annual meeting on October 7, 2005, at Northwestern University School of Law. **Bob** also spoke on "Ethical Issues Involving Pretext Investigations in Trademark Infringement Cases" at the INTA paralegal seminar in Chicago on September 19, 2005.

Uli Widmaier ... spoke on "Optimizing Product Design Protection under Patent, Copyright and Trademark Law" at the Corporate Patent Seminar, on September 20, 2005, in Chicago, Illinois. **Uli** also guest lectured on "Intent and Counterfeiting in Trademark Law" to a law school class at Northwestern University School of Law on October 10, 2005.

Publications

Jonathan S. Jennings ... authored a chapter on "Domain Names and Trademarks On the Internet" for the American Bar Association's book entitled *The Intellectual Property Handbook: A Practical Guide for Franchise, Business and IP Counsel* scheduled for publication on October 19, 2005.

In September 2005 LexisNexis Publishing published a 245 page book entitled *Trademarks and Unfair Competition* by **Beverly W. Pattishall**,

David C. Hilliard and **Joseph N. Welch II**. It contains key domestic and international statutes, treaties and procedural rules for use by practitioners and students.

Belinda J. Scrimenti ... authored a chapter on "State Law Remedies on Trademark Infringement and Unfair Competition," with a compendium summarizing the statutes of the 50 States, for the American Bar Association/BNA treatise entitled *Trademark Infringement Remedies*, scheduled for publication in late December 2005.

Teaching

Pattishall McAuliffe attorneys continue to offer their time and expertise as adjunct faculty and lecturers in law at area law schools. **David C. Hilliard**, **Angela K. Steele** and **Joseph N. Welch II** currently are teaching at Northwestern University School of Law on Trademarks and Unfair Competition; **Mark V.B. Partridge** is currently teaching a course on Trademark Law and Practice at The John Marshall Law School; and **Uli Widmaier** is currently teaching a course on The First Amendment and the Media at the University of Chicago.

In addition, **Bradley L. Cohn** and **Matthew A. Griffin** will be teaching an Advanced Legal Writing Seminar at DePaul University School of Law in the Spring of 2006; **David C. Hilliard** and **Uli Widmaier** will be teaching courses on Advanced Trademarks and Unfair Competition and on Intellectual Property Law and the Regulation of Information at the University of Chicago in the Winter and Spring of 2006; **Jonathan S. Jennings** will be teaching a course on Right of Publicity law at The John Marshall Law School starting in January 2006; and **Sapna Kumar** will be co-teaching "Law and Technology: Current Issues" at the University of Chicago in the Spring of 2006.

Noteworthy

Raymond I. Geraldson, Jr., **David C. Hilliard**, and **Robert M. Newbury** have been listed in *The Best Lawyers in America 2006 Edition* for ten years or longer in the specialty of Intellectual Property Law. They were selected by attorneys throughout the country who cast more than a million votes on the legal abilities of their colleagues.

Illinois attorneys recently selected **Brett A. August**, **Raymond I. Geraldson, Jr.**, **David C. Hilliard**, **Jonathan S. Jennings**, **Robert M. Newbury**, **Mark V. B. Partridge**, **Robert W. Sacoff**, and **Joseph N. Welch II**, "Leading Lawyers" in intellectual property law based on a statewide survey conducted by The Law Bulletin Publishing Company. Fewer than 5% of licensed attorneys in the state earned the distinction in their respective areas of law.

Sapna Kumar's law review article written while she was at The University of Chicago Law School recently was cited in Footnote 3 of *Churchill v. State of New Jersey*, 876 A.2d 311, n.3 (N.J. Super. 2005). **Sapna's** comment is cited as being part of the debate over whether the single publication rule should apply to cases of libel on a website. See www.marainlaw.com/churchill.html.