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January 8, 2004

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The Honorable

Washington, DC 20515

Dear Honorable

I am writing to you to draw your attention to an important controversy that has become one of the dominant issues in the software industry. The way in which this issue is resolved will have very important ramifications for

- our nation's economy
- our continued ability to lead the world in technological innovation
- our international competitive position in the global software industry, and even for
- our national security.

The source of this controversy is the rapid spread of a form of software called "Open Source software." The most widely used Open Source product is a software environment called Linux. Open Source Linux software is developed and enhanced by a loose, worldwide group of volunteers usually called "the Open Source community." Through the work of this community of volunteers, lately abetted by the efforts of several major computing companies, Linux software has become a popular way to run computer server systems, Web sites, networks and many applications.

Innovation in software in itself is not a problem -- new computing technologies have long been an engine of growth for our nation. But there are two serious problems associated with the spread of Linux and the Open Source approach to software development and distribution.

First, Linux and Open Source software are developed and distributed (often at no cost) under a scheme called the GNU General Public License (GPL) which, some believe, is in direct contradiction to U.S. Copyright law, to the Digital Millennium Copyright Act (DMCA), and to the recent Supreme Court decision in *Eldred v. Ashcroft*. I have attached a document that describes in detail the problems of the GPL and the ways in which it violates current U.S. statutes.

Those who designed the GPL readily admit that they created this license to have the effect of "freeing" software -- taking it out of the realm of copyright protection by placing it in the public domain. The author of the GPL is well-known for his view that proprietary software (meaning software as an intellectual asset from which the designer can derive profit) is unacceptable.

The GPL seeks to commoditize software by reducing its monetary value to zero and making it freely available to anyone. The GPL is carefully designed to have a viral effect – it “frees” the software that is proprietary, licensable, and a source of income from the companies that developed it. Until now it has been generally agreed that the GPL has never faced a legal test. SCO is involved in a major software intellectual property case through which the GPL will face such a test.

The second problem with Open Source software is that it is not all original. Linux software contains significant UNIX software code that has been inappropriately, and without authorization, placed in Linux. I know this because my company, The SCO Group, owns the rights to that UNIX code originally developed by AT&T. SCO holds licenses to this valuable asset with more than 6,000 companies, universities, government agencies and other organizations. But as the use of Linux has grown, license revenue from UNIX has shrunk. Why wouldn't it? Why would someone license UNIX code from SCO and other legitimate providers when they can get much of that same code, for free, in Linux? The damage this has inflicted on SCO's UNIX business is an example of what could happen to the entire software industry if the current Open Source model continues. For this reason, SCO has taken legal action against those who, we believe, have misappropriated our most important corporate asset. By taking action, our company has become a target for sometimes vicious attacks – including online attacks that have repeatedly shut down our company Web site. Despite this, we are determined to see these legal cases through to the end because we are firm in our belief that the unchecked spread of Open Source software, under the GPL, is a much more serious threat to our capitalist system than U.S. corporations realize.

I believe that this threat is manifest in these important areas:

1. The threat to the U.S. information technology industry. Our economic recovery appears to be well underway, but it is still fragile and could be thrown off track. Just as technology and innovation have led the U.S. economy during previous boom periods, many assume that this will happen again. But imagine a major new technology buying cycle in which revenue from software sales shrinks. Free or low-cost Open Source software, full of proprietary code, is grabbing an increasing portion of the software market. Each Open Source installation displaces or pre-empts a sale of proprietary, licensable and copyright-protected software. This means fewer jobs, less software revenue and reduced incentives for software companies to innovate. Why should a software company invest to develop exciting new capabilities when their software could end up “freed” as part of Linux under the GPL?

Economic damage to the U.S. software industry could have serious repercussions if this continues unchecked. International Data Corporation forecasts that the global software industry will grow to \$289 billion by 2007. Beyond the economic stimulus provided by the software industry, U.S. sales taxes on that amount of software will be somewhere between \$17 billion to \$21 billion.

Our economy has already been hurt by offshore outsourcing of technology jobs. I'm sure you've seen this among your constituents. What if our technology jobs continue to move offshore at the same time the economic value of innovative software declines? For more than 20 years, software has been one of the leading examples of innovation and value-creation in our economy. When software becomes a commodity with nearly zero economic value, how will our economy make up for this loss?

2. The threat to our international competitive position. In a growing number of countries, including Britain, Germany, France, Israel, Brazil, Japan, South Korea, China and Russian, national and municipal governments are requiring that government entities use Open Source software. Instead of UNIX from any number of U.S. companies or Windows from Microsoft, governments throughout Europe and Asia are using Linux, often downloaded for free from the Internet. I find this particularly galling because that Linux software contains thousands of lines of my company's proprietary UNIX code – for which we receive no revenue. SCO has a strong, involuntary presence in certain non-U.S. government markets – but this is only through unauthorized use of our code in Linux software.

U.S. software companies are already finding it difficult to compete with highly capable Open Source software that has gained many of its capabilities through the illegal incorporation of code “borrowed” from the rightful owners. We need to look no further than the declining revenues of the music publishing industry — undermined by free, online downloading — to see a warning of what could be next for our software industry.

Through the years, Congress has repeatedly dealt with the tough issues of predatory pricing and “dumping.” I contend that the ultimate predatory price is “free.” There is no more damaging example of dumping than the widespread availability of highly capable software that devalues intellectual property by making it available at no cost — in direct competition with the products from which it is derived.

3. The threat to our national security. I assert that Open Source software — available widely through the Internet — has the potential to provide our nation's enemies or potential enemies with computing capabilities that are restricted by U.S. law. SCO's UNIX software is subject to export licensing restrictions, and for good reason. With the powerful multi-processing features of UNIX software, someone could build a supercomputer for military applications. My company must adhere to these restrictions: we cannot sell to North Korea, Libya, Iran, Sudan and several other nations. But a computer expert in North Korea who has a number of personal computers and an Internet connection can download the latest version of Linux, complete with multi-processing capabilities misappropriated from UNIX, and, in short order, build a virtual supercomputer.

When I talk about this, some people think I'm an alarmist. I have a different view - I think that this may have already happened. Open Source software and the GPL, unchecked, are an easy way for our adversaries to circumvent our software export restrictions.

I'm bringing these troubling issues to your attention to ask you to consider them whenever you are discussing or voting on issues of the economy, intellectual property and national security. The Open Source community now includes several major corporations. These companies have been lobbying for increased government support of Open Source software. Some want government RFPs to specify Open Source software. I urge you to consider the other side because I believe that Open Source, as it is currently constituted, is a slippery slope. It undermines our basic system of intellectual property rights, and it destroys the economic reasons for innovation.

As part of the effort to protect our intellectual property rights, The SCO Group has met with several U.S. government agencies. We have been encouraged to see that, unique among the organizations with which we've met, most government agencies understand the implications of SCO's case. Government agency leaders readily understand the value of copyrights, and they do not want to be in violation. This is in contrast to many corporations, who seem to have a "don't ask, don't tell" policy when it comes to understanding the source of the software they are using.

Our nation's economic system is reflected in the concept and practice of Copyright. In 1980 and again in 1998, Congress took action to solidify the rule of copyright in the software industry. The GPL (which its authors call "copyleft" to emphasize that it is the opposite of copyright) should not be allowed to continue to undermine the foundation of one of our most important industries. I ask that you consider this very carefully in your role as one of our nation's leaders.

Sincerely,



Darl McBride
President and CEO,
The SCO Group, Inc.



December 4, 2003

An Open Letter:

Since last March The SCO Group ("SCO") has been involved in an increasingly rancorous legal controversy over violations of our UNIX intellectual property contract, and what we assert is the widespread presence of our copyrighted UNIX code in Linux. These controversies will rage for at least another 18 months, until our original case comes to trial. Meanwhile, the facts SCO has raised have become one of the most important and hotly debated technology issues this year, and often our positions on these issues have been misunderstood or misrepresented. Starting with this letter, I'd like to explain our positions on the key issues. In the months ahead we'll post a series of letters on the SCO Web site (www.sco.com). Each of these letters will examine one of the many issues SCO has raised. In this letter, we'll provide our view on the key issue of U.S. copyright law versus the GNU GPL (General Public License).

SCO asserts that the GPL, under which Linux is distributed, violates the United States Constitution and the U.S. copyright and patent laws. Constitutional authority to enact patent and copyright laws was granted to Congress by the Founding Fathers under Article I, § 8 of the United States Constitution:

Congress shall have Power ... [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries,

This Constitutional declaration gave rise to our system of copyrights and patents. Congress has enacted several iterations of the Copyright Act. The foundation for current copy protection in technology products is grounded in the 1976 Copyright Act. The 1976 Act grew out of Congressional recognition that the United States was rapidly lagging behind Japan and other countries in technology innovation. In order to protect our ability to innovate and regain global leadership in technology, Congress extended copyright protection to technology innovations, including software. The 1976 Act had the desired effect. The U.S. economy responded rapidly, and within 10 years had regained global technology leadership.

Most recently, Congress has adopted the Digital Millennium Copyright Act ("DMCA") to protect the intellectual property rights embodied in digital products and software. Congress adopted the DMCA in recognition of the risk to the American economy that digital technology could easily be pirated and that without protection, American companies would unfairly lose technology advantages to companies in other

countries through piracy, as had happened in the 1970's. It is paramount that the DMCA be given full force and effect, as envisioned by Congress. The judgment of our elected officials in Congress is the law of the land in the U.S. copyright arena, and should be respected as such. If allowed to work properly, we have no doubt that the DMCA will create a beneficial effect for the entire economy in digital technology development, similar to the benefits created by the 1976 Copyright Act.

However, there is a group of software developers in the United States, and other parts of the world, that do not believe in the approach to copyright protection mandated by Congress. In the past 20 years, the Free Software Foundation (FSF) and others in the Open Source software movement have set out to actively and intentionally undermine the U.S. and European systems of copyrights and patents. Leaders of the FSF have spent great efforts, written numerous articles and sometimes enforced the provisions of the GPL as part of a deeply held belief in the need to undermine or eliminate software patent and copyright laws.

The software license adopted by the GPL is called "copyleft" by its authors. This is because the GPL has the effect of requiring free and open access to Linux (and other) software code and prohibits any proprietary use thereof. As a result, the GPL is exactly opposite in its effect from the "copyright" laws adopted by Congress and the European Union.

This stance against intellectual property laws has been adopted by several companies in the software industry, most notably Red Hat. Red Hat's position is that current U.S. intellectual property law "impedes innovation in software development" and that "software patents are inconsistent with open source/free software." Red Hat has aggressively lobbied Congress to eliminate software patents and copyrights. (see http://www.redhat.com/legal/patent_policy.html).

At SCO we take the opposite position. SCO believes that copyright and patent laws adopted by the United States Congress and the European Union are critical to the further growth and development of the \$186 billion global software industry, and to the technology business in general.

In taking this position SCO has been attacked by the FSF, Red Hat and many software developers who support their efforts to eliminate software patents and copyrights. Internet chat boards are filled with attacks against SCO, its management and its lawyers. Personal threats abound. This is to be expected when the controversy concerns such deeply held beliefs. The issue, however, is clear: do you support copyrights and ownership of intellectual property as envisioned by our elected officials in Congress and the European Union, or do you support "free" - as in free from ownership - intellectual property envisioned by the FSF, Red Hat and others? There really is no middle ground. The trampling of copyrights and intellectual property will have an extremely negative effect on our global economy.

As SCO prepares new initiatives to protect our intellectual property rights, we do so with the knowledge that the most powerful voices in our democratic process give clear support to the intellectual property laws we seek to enforce. As stated above, the United States Congress has adopted the Digital Millennium Copyright Act to give clear and unequivocal protection to copyright management information distributed with software. We are also in accord with important decisions of the United States Supreme Court in the copyright area. In the case of *Eldred v. Ashcroft*, decided earlier this year, the United States Supreme Court gave clear and unequivocal support to Congress's authority to legislate in the copyright arena. The European Union remains firmly in support of intellectual property laws, as embodied generally in the Berne Convention.

Thus, SCO is confident that the legal underpinning of our arguments is sound. We understand that the litigation process is never easy for any party involved. Our stance on this issue has made SCO very unpopular with some. But we believe that we will prevail through the legal system, because our position is consistent with the clear legal authority set down by Congress, the Supreme Court and the European Union.

To understand the strength of this authority, it is interesting to read the recent Supreme Court case, *Eldred v. Ashcroft*, 123 S.Ct. 769 (2003). In *Eldred*, key arguments similar to those advanced by the open source movement with respect to copyright laws were fully considered, and rejected, by the Supreme Court. This suggests that however forcefully Open Source advocates argue against copyright and patent laws, and whatever measures they take to circumvent those laws, our intellectual property laws will carry the day.

The majority opinion in *Eldred* was delivered by Justice Ginsberg, in which Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, Souter and Thomas joined. Dissenting opinions were filed by Justice Stevens and Justice Breyer. In *Eldred*, the petitioner argued that the Copyright Term Extension Act enacted by Congress in 1998 was unconstitutional. The Supreme Court disagreed, ruling that Congress had full constitutional authority to pass the Extension Act. The Court's analysis of the constitutional foundation of the Copyright Act applies directly to the debate between SCO and the FSF / Red Hat regarding intellectual property protection for software.

SCO argues that the authority of Congress under the U.S. Constitution to "promote the Progress of Science and the useful arts..." inherently includes a profit motive, and that protection for this profit motive includes a Constitutional dimension. We believe that the "progress of science" is best advanced by vigorously protecting the right of authors and inventors to earn a profit from their work.

The FSF, Red Hat and other GPL advocates take the contrary position. They believe that the progress of science is best advanced by eliminating the profit motive from software development and insuring free, unrestricted public access to software innovations. The FSF was established for this purpose. The GPL implements this purpose. Red Hat speaks for a large community of software developers dedicated to this purpose. However, the Supreme Court has dramatically undercut this position with its

guidance in *Eldred* in how to define the term "promote the Progress of Science and the useful arts..." under the Constitution.

In *Eldred*, the Supreme Court addressed for the first time in recent history the Constitutional meaning of the term "promote the Progress of Science and the useful arts..." Seven Supreme Court justices defined the term one way – and SCO agrees with this definition. Two dissenting justices defined the term differently.

Let's consider the dissenting view. Justice Breyer articulated a dissenting view that the Constitutional objective of "promot [ing] the Progress of Science" is oriented to benefit the general public good, rather than create a private reward for authors. Justice Breyer posited:

The Clause does not exist "to provide a special private benefit," ... but to "stimulate artistic creativity for the general public good.... The "reward" is a means, not an end.

123 S.Ct. at 802-03. Under this view of the Constitution, Justice Breyer would find a Congressional act unconstitutional if, among other things, "the significant benefits that it bestows are private, not public." Of course, this argument is at the very core of the positions advanced by the FSF, Red Hat, and the GPL. According to the FSF, Red Hat and under the GPL, private benefits are impediments to the general advancement of science and technology, and need to be eliminated entirely from the software industry and the process of software development.

But, unfortunately for the FSF, Red Hat and others, this dissenting view was squarely rejected in the majority opinion delivered for the Court by Justice Ginsberg. The majority position specifically acknowledges the importance of the profit motive as it underpins the constitutionality of the Copyright Act. In expressing this position, the majority opinion stated as follows:

Justice Stevens' characterization of reward to the author as "a secondary consideration" of copyright law ... understates the relationship between such rewards and the relationship between such rewards and the "Progress of Science." As we have explained, "[t]he economic philosophy behind the [Copyright [C]lause ... is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors." ... Accordingly, "copyright law *celebrates* the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge.... The profit motive is the engine that ensures the progress of

science."... Rewarding authors for their creative labor and "promot [ing] ... Progress" are thus complementary; as James Madison observed, in copyright "[t]he public good fully coincides ... with the claims of individuals." The Federalist No. 43, p. 272 (D. Rossiter ed.1961.) Justice Breyer's assertion that "copyright statutes must serve public, not private, ends" ... similarly misses the mark. The two ends are not mutually exclusive; copyright law serves public ends by providing individuals with an incentive to pursue private ones.

123 S.Ct. at 785, fn. 18; emphasis in original.

Based on the views of Congress and the Supreme Court, we believe that adoption and use of the GPL by significant parts of the software industry was a mistake. The positions of the FSF and Red Hat against proprietary software are ill-founded and are contrary to our system of copyright and patent laws. We believe that responsible corporations throughout the IT industry have advocated use of the GPL without full analysis of its long-term detriment to our economy. We are confident that these corporations will ultimately reverse support for the GPL, and will pursue a more responsible direction.

In the meantime, Congress has authorized legal action against copyright violators under the Copyright Act and its most recent amendment, the Digital Millennium Copyright Act. SCO intends to fully protect its rights granted under these Acts against all who would use and distribute our intellectual property for free, and would strip out copyright management information from our proprietary code, use it in Linux, and distribute it under the GPL.

We take these actions secure in the knowledge that our system of copyright laws is built on the foundation of the Constitution and that our rights will be protected under law. We do so knowing that those who believe "software should be free" cannot prevail against Congress and the ruling of seven Supreme Court justices who believe that "the motive of profit is the engine that ensures the progress of science."

Sincerely,

Darl McBride
President & CEO
The SCO Group, Inc.