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Rebirth

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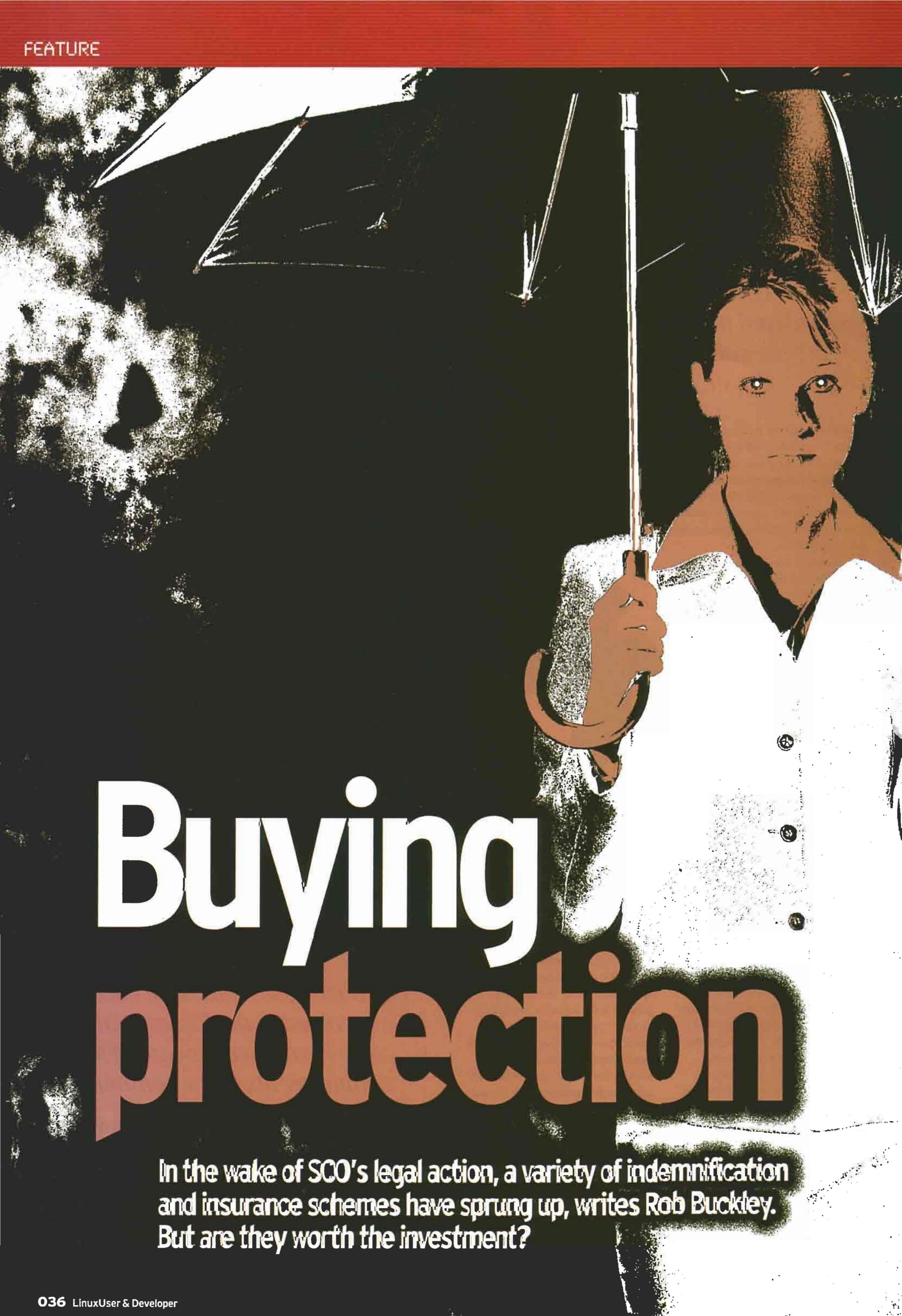
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Buying protection

In the wake of SCO's legal action, a variety of indemnification and insurance schemes have sprung up, writes Rob Buckley. But are they worth the investment?

Imagine being bankrupted and put out of business. It's a terrifying thought for all companies. As well as the fear of failure and the humiliation, there's the little matter of all those hard-working employees forced into unemployment through no fault of their own.

But how much worse would it be to be bankrupted not for anything you've done or because of some act of God, but because of something you simply bought in total innocence from a perfectly reputable company?

SCO has raised such a fear in the minds of companies around the world, although even mentioning the company name is enough to trigger both nausea and venom in equal amount from even the most civilised GNU/Linux user. The self-proclaimed "owner of the Unix operating system" has an ever-changing lawsuit against systems giant IBM.

This originally rested on one main allegation – that parts of the Linux kernel contain Unix code that IBM illegally gave to the Open Source community. If IBM had been the only target of SCO's suit, few people would have been worried. But SCO argues that since the binary version of its code is inside practically every Linux kernel

installed on computers worldwide, Linux advocates are using stolen property and should pay SCO a licence fee. This is calculated on every machine on which they've installed the kernel. Not only that but SCO has said it will sue anyone who refuses.

To hammer the point home, the corporation sent letters to over 1,500 corporate Linux users and filed lawsuits in the US against car manufacturer DaimlerChrysler and car parts specialist AutoZone. Even though SCO no longer alleges

that IBM transferred code into the Linux kernel, it is continuing with its suits against DaimlerChrysler and AutoZone, maintaining that someone did.

WAIT AND SEE

"Lots of companies are taking a kind of 'wait and see' approach," says Gregory Blepp, vice president of SCOSource. "The perception in the market is that if the IBM case is settled, then there's still time to discuss. We are taking the firm position of saying the IBM case and the customer-usage of Linux are two completely different cases. The problem with IBM is a breach of contract; but we have contacted customers, saying they are using software that uses our intellectual property. We have contacted 1,500 customers globally, formally stating we have a problem with the software which is being used out there in the market and requesting compliance with our intellectual property rights."

SCO is offering the lucky recipients of their letters the chance to settle by buying a license for each server or desktop equipped with a Linux kernel or they "may need to see us in court", continues Blepp.

This might be understandably frightening some bigger organisations and companies away from deployments based around GNU/Linux. Forrester, an independent technology research company, polled 36 North American companies in May this year to see how the SCO suit was affecting their views of GNU/Linux. Thirteen of



"I surmise that a lot of the companies that claim to offer indemnities would go bankrupt if forced to pay those claims"

Bruce Perens

WHAT'S ON OFFER



redhat.

Linux distributor Red Hat's Open Source Assurance Program is a warranty rather than an indemnity. What's the difference? Firstly, if you get sued, you have to prove there's a problem with the software, which might involve a trip to court on your part. Secondly, Red Hat will only replace problematic code and if the case continues, the company won't pay any of your costs.

"Our programme is much better positioned for the customer than competitors", says Bryan Sims, Vice President of Business Development at Red Hat. "What they're offering is an after-the-fact solution. What we've decided to do is pro-actively go out and look at the source code. If we find anything the matter with the code, we will replace it as an update or an upgrade. The real value to the end-user is the comfort that they can continue to use the software and that's what we offer, rather than an after-the-fact solution that doesn't necessarily solve the problem of being able to use the software."

In addition to the Open Source Assurance Program, Red Hat has set up the Open Source Now Fund, a non-profit corporation that will cover legal expenses associated with infringement claims brought against companies developing software under the GPL. It has donated \$1 million to the fund so far.

those companies said they were concerned about the legal questions surrounding GNU/Linux (including the SCO/IBM suit), with those not using GNU/Linux apparently slightly more concerned than those that do.

Of course, this in turn worries those groups which would like to see GNU/Linux and Open Source software adopted in the enterprise. They've been looking at ways to end the fear, uncertainty and doubt caused by SCO and the most common solution chosen so far is indemnification. If that just happens to give them a chance to get ahead of the others in the market, all the better for them.

INDEMNIFICATION

On paper, indemnification is similar to insurance. However, it differs mainly in terms of who can provide it. This means it can be offered by companies other than insurance outfits, which need to abide by certain financial reporting restrictions and so on.

A software indemnity will typically say that if the user is sued by a company for some kind of intellectual property problem, the indemnifier will cover some or all of the costs. But like many insurance policies, the devil is in the details.

For instance, indemnities can stipulate that the GNU/Linux distribution has to be running on a specific vendor's hardware; that it has to have been bought from a specific company; that the indemnifier has to have audited your code (or you must not have changed it in any way); that you have to have spent a certain amount of money with the company or taken out support and maintenance contracts with it; that only certain kinds of lawsuits might be covered; that you might have to agree to hand over your legal defence to the indemnifier; that you might have to change your working practices; that there may be an upper limit on how much the indemnifier is willing to pay out or which parts of your total costs are covered (is it just your legal defence or does it include expenses or damages if you lose the case?); or that the indemnifier may only offer to replace "bad" code with new code.



"Our indemnity programme is basically targeted at an issue in the market. It's very specific as to the need. I can't recall any time we've needed to do this in the past"
Efrain Rovira, Worldwide Linux Marketing Director, HP

Currently, there are few companies offering indemnification for customers of GNU/Linux, although indemnification is more common in the closed source/proprietary world.

"If you look at things like consumer software, they're likely to provide limited or no indemnity," says John Salmon, a partner at law firm Masons. "With more specialist software to a more limited market which is expensive, some would expect some further indemnity."

"When you pay to use someone's software, you want

to be sure you're entitled to use this thing," adds Simon Halberstam, a partner at Sprecher Grier Halberstam. "That it's not ripped off from some third party. You're paying for the right to use this, so you want to make sure it's a valid right.

When I advise my clients, I advise them to demand an intellectual property indemnity. I'd find it very difficult to advise clients to go through with a contract if they didn't get that comfort. With Open Source, it's a different environment though; although it would be desirable to get an indemnity, it's

understandable if I don't get it because I'm getting such a good deal anyway: it's unreasonable to expect the owner to take on liability for that as well."

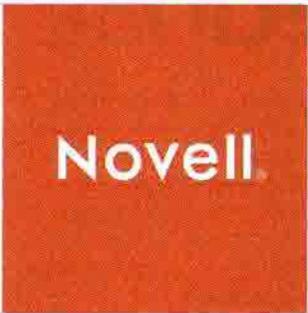
NON-UBIQUITOUS

Closed-source indemnities are not as ubiquitous as might be thought, even in the enterprise software world. HP, for instance, does offer an indemnity policy for end-users running Red Hat and SUSE Linux users on its hardware but doesn't offer an indemnification on its other products.

"Our indemnity programme is basically targeted at an issue in the market [the SCO lawsuit]," explains HP's worldwide Linux marketing director Efrain Rovira. "It's very specific as to the need: I can't recall any time we've needed to do this in the past."

Notably, open source champion IBM is an indemnification-free company. It refuses point-blank to indemnify its GNU/Linux-using customers, arguing that it would be impossible to put in place a sensible indemnification policy that is in keeping with the spirit of Open Source; since no single company provides it, users understand that there are no warranties or indemnities that come with Linux, and even that since the claims that have been alleged by SCO against IBM "have no basis", no indemnification is needed.

WHAT'S ON OFFER



Novell

The proud new owner of SUSE Linux, Novell wants everyone to think of it as the premiere supplier of GNU/Linux to the enterprise. Of all the suppliers, it has the most extensive indemnification policy, and it is the only GNU/Linux distributor that offers actual indemnification.

The entry requirements for Novell's indemnification are quite strict, however: you have to be running SUSE Linux Enterprise Server 8.0 (although you don't have to have bought it directly from Novell), you have to have a technical support contract with Novell (the lowest priced contract is US\$1,500), and you have to buy upgrade protection or maintenance (minimum spend: US\$50,000). You also have to register your details with Novell.

In return, you get one of the broadest indemnification policies available. For starters, you'll be covered against any copyright suit, not just from SCO. Novell will take over the suit for you, and all legal fees, damages and penalties that you might incur will be covered (although there is a cap on the damages Novell will cover you for, equating to 125% of your SUSE Linux outlay or US\$1.5 million, whichever is lower). And you can run SUSE Linux on any hardware and it will still be covered.

"We're trying to address the actual crux of the matter which is the enterprise customer," explains Nitin Maru, Vice President of Legal Affairs for Novell EMEA. "If you look at the litigation out there and look at the comments of a certain vendor, they're going after enterprise customers. If we'd gone with blanket coverage, all of our customers would have had to pay for something that 90% of them don't need: they'll never be touched by litigation or claims."

Maru also argues that most of Novell's enterprise customers that are using SUSE Linux already meet the entry requirements for the company's indemnification policy, and so the entry requirements are not as harsh as they might appear.

WHAT'S ON OFFER



i n v e n t

Systems and software giant HP's indemnification has no limit, according to the company's Worldwide Linux Marketing Director Efrain Rovira.

"Once we decided we were going to do it, we had to decide what to offer," he says. "The discussions about this went all the way up to Carly [Fiorina, CEO of HP]. It was

Carly's decision that we put no limit whatsoever on how much money was going to be spent on lawyers or debt. [She said:] 'If this is going to make sense and customers are going to get excited about this, you can't go putting caps on it. You've got to show them you're really committed to this.'"

HP's no-limit policy does have a few requirements. Firstly, you've got to get your GNU/Linux distribution from HP. Then you have to run it on HP hardware. You also have to have an HP service contract (which "can be as low as a few hundreds of dollars," says Rovira). Finally, you have to agree to surrender your defence in any prospective lawsuit to HP's lawyers. After that, you're fully indemnified.

Note that in common with all other indemnities, you're not covered against patent-abuse suits. Also importantly, you're only indemnified if SCO decides to take you on. If anyone else decides to sue you, you're on your own.

HP is already considering whether it will indemnify desktop Linux users once it starts to ship SUSE Linux equipped PCs in the second half of the year. Rovira says, "We have to be consistent. We're going to do it. We've got to do it. If we're doing it on the server, the customers are going to say, 'Why can't you do it on the desktop?'"

The company has received a lot of abuse for this failure to indemnify.

"IBM is being hypocritical," accuses Sun president and chief operating officer Jonathan Schwartz. "If the issue is a non-issue, why don't they indemnify their customers? And if they don't need to indemnify, why do you have the world's largest patent litigation team inside IBM suing the bejesus out of the entire industry?"

IBM is at least consistent, since no piece of its Open Source code is indemnified, including its highly popular WebSphere Application Server,

and neither is AIX, its closed-source Unix operating system. IBM doesn't have its own GNU/Linux distribution and doesn't install it onto servers or desktops. It relies on third-parties or end users to add the operating system to its hardware, so can happily argue it shouldn't have to indemnify a product it doesn't actually sell.

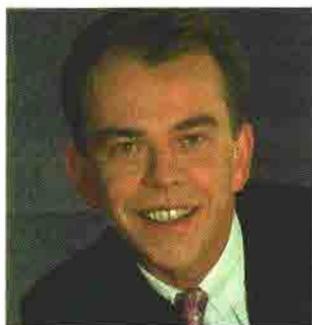
IBM raises another major issue that other companies have had to grapple with: it didn't develop Linux by itself and doesn't know for sure where all the code comes from, so how can it take the risk of indemnifying its customers

against possible copyright infringement when it doesn't know for sure there isn't some other company's code illegally embedded in Linux?

For companies such as Novell, it's a balance of risks. Novell automatically indemnifies users of all its closed source software because "we developed it, we have control over it, we know the engineers who developed it and we have the engineers with appropriate agreements that transfer the intellectual property rights to Novell," says Nitin Maru, Vice President of Legal Affairs for Novell EMEA.

the duties we have to our shareholders against our duties to the Open Source community and what is needed out there to push open source further and further into the enterprise."

This lack of control over Open Source developments and the possibility that more companies may try to repeat SCO's stock-price-raising lawsuit – one with perhaps greater chances of success or maybe even a stronger case – means that Novell is one of the few companies that have been willing to go out on a limb and indemnify customers of an



"We are taking the firm position of saying the IBM case and the customer usage of Linux are two completely different cases"
Gregory Blepp, Vice President, SCOSource

But Novell's open source indemnification is comparatively limited in scope.

"On the Open Source side, you never know: the risks are greater," Maru continues. "What we've taken is a calm and measured approach, balanced against the risk to Novell and

Open Source product against any copyright suit that might emerge. And it thinks it has a competitive advantage in doing so.

"I strongly believe it has given us an advantage," maintains Maru. "It's been proven in several customer situations. I've

WHAT'S ON OFFER



For those who cannot afford an indemnity or do not meet the criteria other companies', the last recourse is the Linux Legal Defense Fund. Setup by the Open Source Development Labs, an industry-funded body dedicated to improving and advancing Linux for enterprises, the fund was created to help cover the legal expenses of Linux end-users who may become involved in litigation with SCO on issues that affect the Linux community and

industry. The fund will also cover the legal expenses of Linus Torvalds and OSDL during the SCO/IBM litigation.

The fund doesn't have many entry criteria: you need to be sued by SCO for running Linux and the OSDL board of directors has to decide that your case meets its criteria. To get its approval, you'll need to provide a brief statement indicating how the resolution of the lawsuit against you could help resolve intellectual property

issues that could affect the Linux kernel, GNU/Linux or Linux-based applications. In other words, your case has to be important.

The fund will cover some or all legal fees, costs and expenses of anyone sued (the amount will be decided by the OSDL board), and has a current pool of US\$3 million, donated mostly by OSDL members such as IBM, from which to pay. It hopes to increase that fund to \$10 million.

had emails from two or three customers looking at different distributions, and while there were other areas that interested them, a key differentiator was the fact they would get indemnity from Novell."

MARKETING HYPE

Other companies agree that indemnification is definitely proving attractive to some customers. JBoss's European general manager Sacha Labourey says that companies are interested in talking with the firm because of the indemnification it now offers

on its Open Source application server.

"We had some different opinions inside the company at some point," he says, "but now the result is clear. Large companies do care about indemnification."

HP's Rovira says his company's policy is "of great value and a leading differentiator for our sales people", while Forrester's survey of North American companies showed that 27% of them would be interested in an indemnification programme.

But how much of this is marketing hype, cashing in on



"The result is clear. Large companies do care about indemnification"
Sacha Labourey, European General Manager, JBoss

WHAT'S ON OFFER: JB OSS

It's not just GNU/Linux vendors getting worried by SCO: other Open Source software suppliers are feeling a knock-on effect from the case.

"There's a fear that's grown a lot since the SCO case that Open Source is not safe," says Sacha Labourey, European General Manager at application-server provider JBoss.

"People in legal departments of big companies don't care much if it's Linux, Java or whatever; they see it as Open Source. We need to fight that because what we are trying to push is the notion of 'professional Open Source', which brings the exact same kind of features as any software vendor, such as indemnification."

JBoss's indemnification policy is broader than many. It will cover any copyright suit (SCO so far hasn't claimed that any part of the JBoss code is its property, so a SCO-specific policy would be meaningless) and JBoss will try to take over any end-user suit and amalgamate it with any others. But it will only indemnify you up to the value of your contract with JBoss.

"If you ask a customer directly whether they would prefer indemnification up to the total cost of the contract or would they prefer more, the customer would be a fool to say, 'Oh no, the amount of the contract is enough'," points out Labourey. "But what we see is that customers are already happy with the fact indemnification is in the contract."

the fears of end-users that SCO has raised? Does anyone really need an indemnification policy or is it just a tool to get companies to buy from one vendor rather than another?

UK users certainly appear to have little to fear at the moment.

"Check your license agreement and see what it covers," advises Masons'

Salmon. "But as far as the UK user is concerned, sit and wait and see what happens. There's no certainty SCO will win the case and there's no certainty there'll be any case at all in the UK or they'll try anything in the UK.

"That's not to say people shouldn't be commercially sensible," he adds. "When buying any software, whether

WHAT'S ON OFFER

Sun's indemnification policy is clear in one respect: if it's a Sun product, the company will indemnify it. If it's not, you're on your own.

This means that, oddly, Sun won't indemnify Linux running on a server (it resells Red Hat and SUSE Linux), but is the only company so far that will indemnify Linux on the desktop as part of its Sun Java Desktop System.

There's another big contrast with the other vendors: Sun will indemnify not because it wants Linux to succeed or because it

think SCO has a poor case, but because it's bought licenses from SCO to cover any alleged copyright improprieties.

"We can indemnify our products because we have paid SCO for the license," says Sun's new President and Chief Operating Officer Jonathan Schwartz. "If we incorporate someone else's component, we will make sure we can indemnify it. I have licenses to all those issues that SCO is suing IBM for. If I didn't have them, I certainly wouldn't indemnify them."

The motivation for

indemnifying at all, says Mark Littlewood, UK Product Market Manager, Volume Systems at Sun and the company's UK spokesperson on indemnification, comes from research into enterprise attitudes towards Linux.

"We did some research on Open Source and one of the key things is due diligence," he explains. "The customer has some concerns that they want to be assured their vendor, who they license or buy this stuff from, won't put them into a situation which compromises them. It's reassurance at the end of the day: it's just for large organisations that want to have a tick in the box to make sure there isn't any liabilities and they won't get themselves into trouble by going down this route."

Since Sun - and Sun

customers - essentially doesn't have anything to worry about from SCO because of the company's licensing agreements, it is perhaps understandable that no one at Sun is really sure about the extent of the indemnification. While Littlewood says that Sun customers are protected by the Java Desktop System's license agreement, he's unsure how much of a customer's costs are covered, whether there's a maximum liability (there isn't) or whether it's simply threats from SCO that are covered (it is).

When we asked Sun to expand on the previous details provided, it took a week before they gave us a statement, and it contained exactly the same information as they had previously provided. As one Sun spokesperson confided in us: "It's not detailed because the whole area is a very dodgy area for [Sun]."



WHAT'S ON OFFER OPEN SOURCE RISK MANAGEMENT

Currently only operating in the US, OSRM is a new breed of indemnifier. An independent company, it's the only company that will indemnify any open source user or developer (subject to certain conditions).

"Our focus is in two primary areas," explains John St Clair, executive director of OSRM. "The corporate user and the developer. The corporate user includes those using Open Source in their own product or distributing Open Source in some way. We're also looking at providing supplemental indemnification to developers who might already have professional indemnification."

By paying US\$30 for every \$1,000 of coverage required, anyone using Open Source software can be indemnified by OSRM. And while vendor indemnifications often stipulate that the end-user can't alter the code in any way without voiding the indemnity, OSRM will still indemnify users that change the code.

All this comes with caveats, however. For one

thing, OSRM has to audit the code before agreeing to indemnify it. The company has already done this with the Linux 2.4 and 2.6 kernels, and it is now working out from the kernel to look at some of the more common parts of GNU/Linux distributions.

"We've done a very detailed study of the Linux kernel against a database of other prior art software to identify possible areas of copyright infringement," St Clair says, "but we've not been able to find any that would be a cause of concern for indemnification".

OSRM also requires that organisations doing development with Open Source code follow its best practice procedures to reduce the risk of IP violations. It's the combination of audit and procedures that makes OSRM feel confident enough to "put our money where our mouth is".

The motivation for the OSRM indemnification policy is partly business but also partly altruistic, according to St Clair. "Clearly, there was a recognition that SCO and

our litigation-friendly society in the US was trying to create a vulnerability in the Open Source development model. We looked very closely at SCO, to understand the dynamics behind it, what the motivation was and what the risks and exposures were to users and distributors and really identified a potential vulnerability that others might in the future try to take advantage of. We clearly saw that there were lots of organisations slow in their adoption of Linux and questioning their adoption of Linux. It was important for an organisation to come forward and take a leadership role by providing a solution that maintains and ensure the benefits of open source remain."

Whether OSRM makes it over to the UK and the rest of the world is still being decided upon.

"At the moment, we're focused on the US," reveals St Clair. "We're seeing how beneficial it might be in other markets. We have lots of advisors and contacts in other countries who are helping."

"When you pay to use someone's software, you want to be sure you're entitled to use the thing"

*Simon Halberstam, Partner,
Sprecher Grier Halberstam*

have a serious attribution problem in software development because people have chosen to scrupulously borrow or imitate Unix."

Even if SCO's suit is unsuccessful, it's likely that some companies that saw SCO's stock-price leap in response to its ongoing legal proceedings will consider copyright suits, particularly if Brown can support

their arguments.

"The main question is how society will evolve," argues JBoss' Labourey. "We've seen the growth of legal issues all over the place, and it was much less of a problem 15 years ago." More copyright suits are likely in the future, he maintains.

At the moment, indemnities are mostly designed to differentiate their providers in

the marketplace and to reassure larger companies that Open Source is enterprise-ready and is not a risk. While they offer some protection, they often overlap with existing policies, are unlikely to be ever used, are not available to smaller customers and may provide little coverage if the worst happens – an unlikely event in any case. But those same accusations can be leveled at any form of insurance.

With the chances of future SCO-like lawsuits occurring by no means unlikely and a SCO win not totally out the question, the issue comes down, as with any insurance policy, to risk: the worst will probably never happen, but if it did, could you afford it?

