Open Source Licensing Litigation

Past, Present and Future

Edmund J. Walsh, Esq.
Counsel
Wolf Greenfield

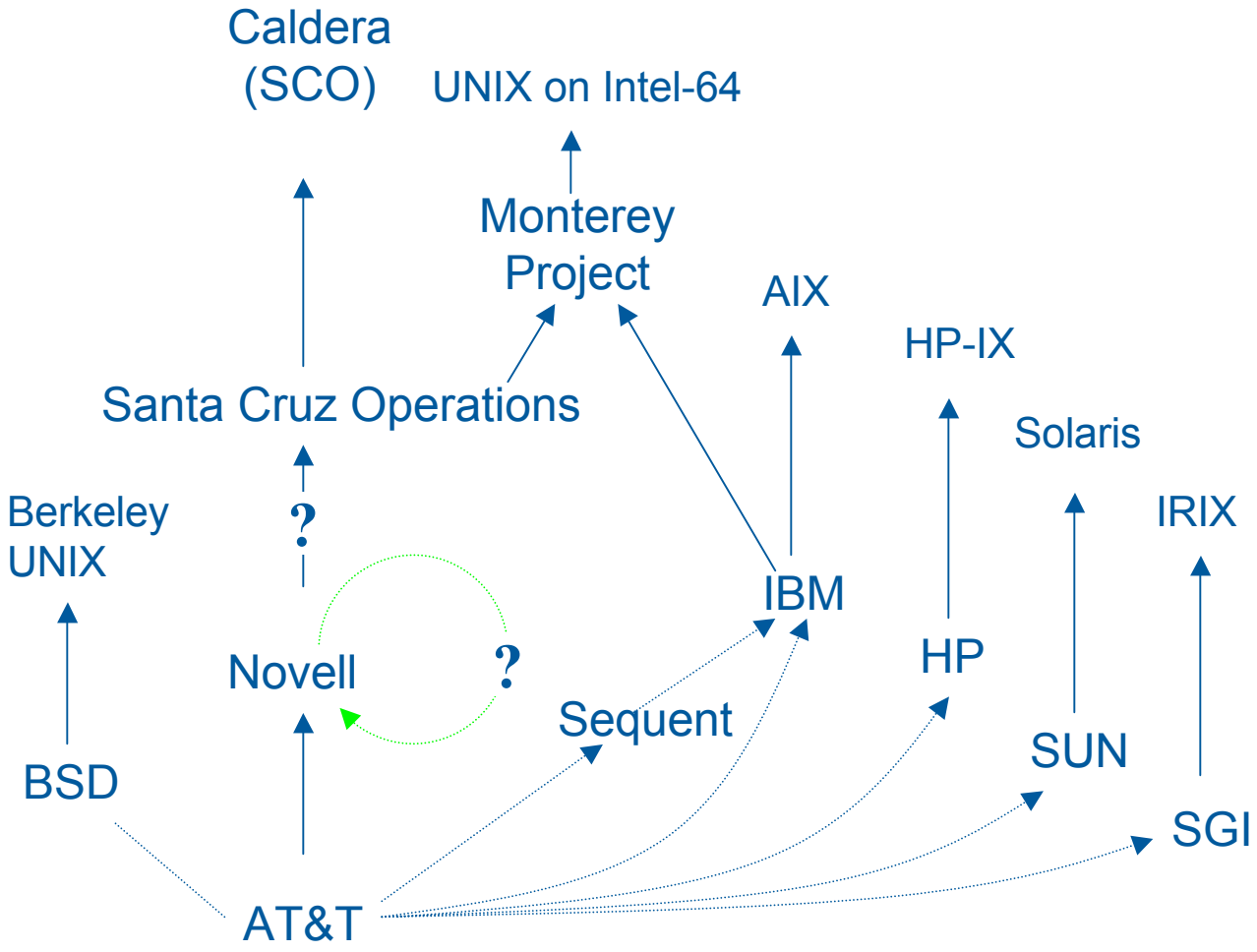
Franklin Pierce Law Center
Concord, NH

March 26, 2005

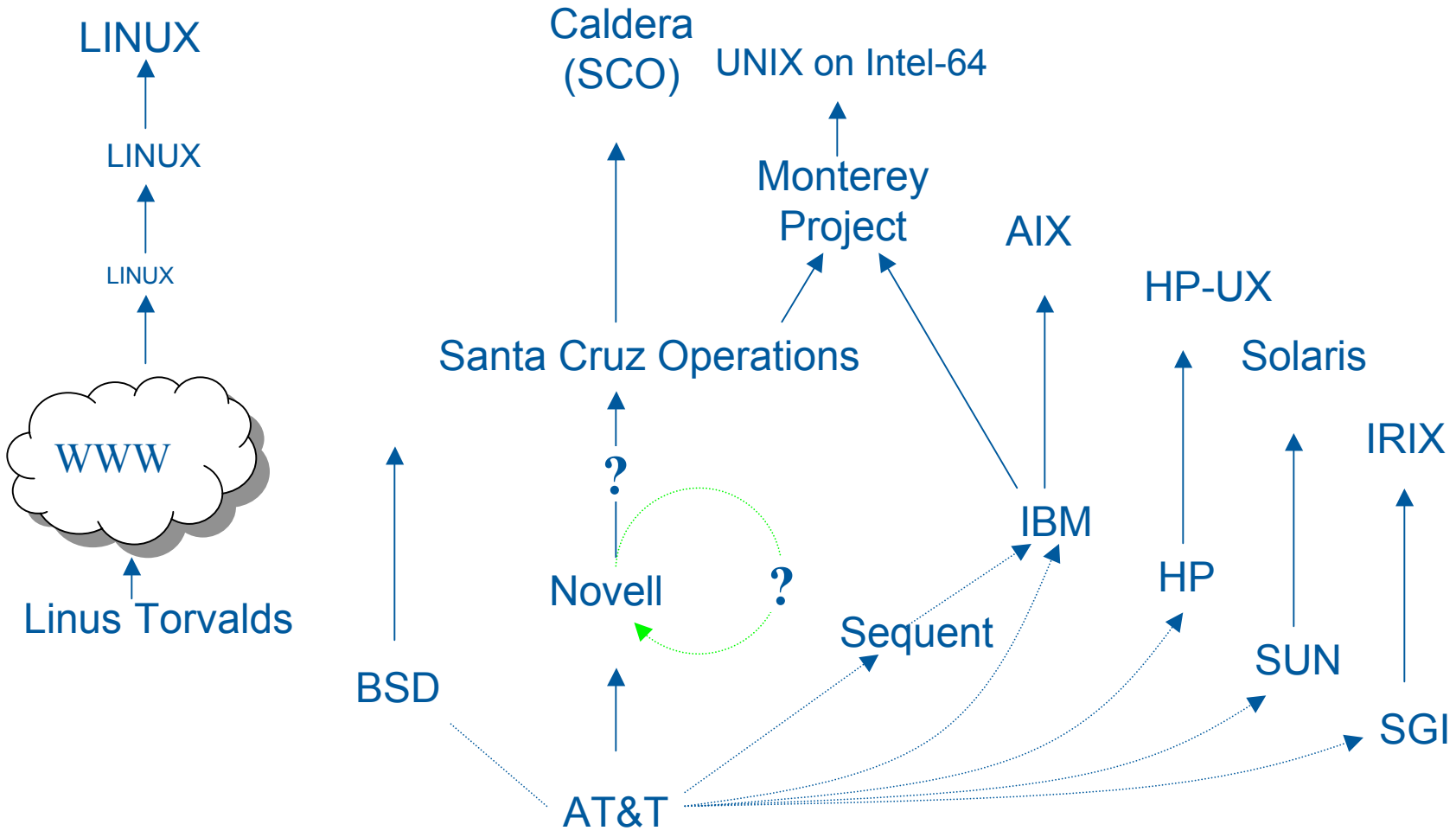


Wolf Greenfield
SPECIALISTS IN INTELLECTUAL PROPERTY LAW

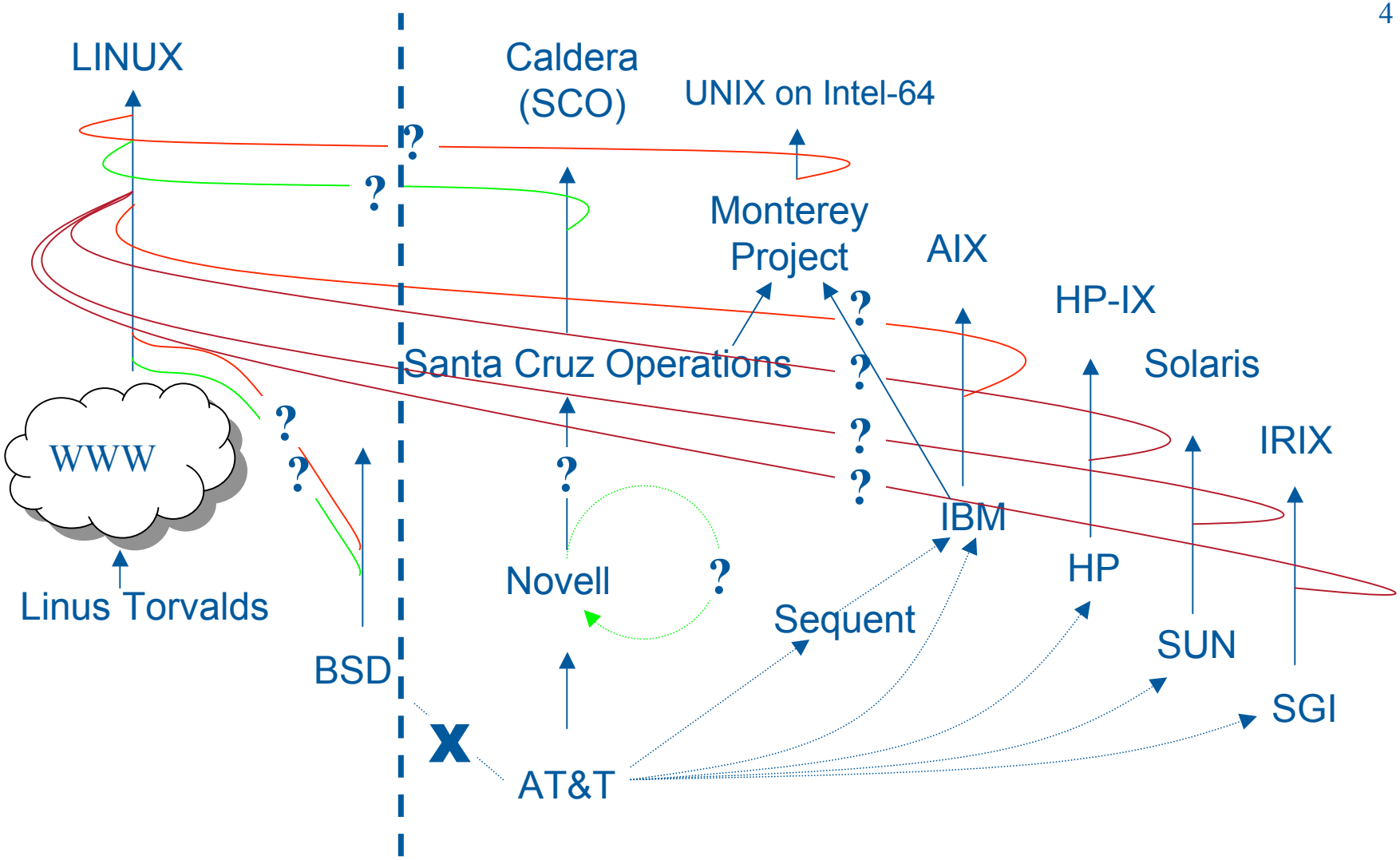
SCO Litigation: The UNIX Family Tree



SCO Litigation: Cousin Linux



SCO v. IBM


LINUX
Caldera
(SCO)
UNIX on Intel-64
?
?
Monterey
Project
AIX
HP-IX
Solaris
IRIX
Santa Cruz Operations
?
?
?
?
?
?
WWW
?
?
?
IBM
HP
SUN
SGI
Novell
?
Sequent
Linus Torvalds
BSD
X
AT&T

SCO v. IBM

SCO Claims Against IBM

- Contributing SCO's Proprietary Material to LINUX
  - Breach of UNIX software licenses and licenses have been terminated
  - Copyright infringement
- Trying to "Kill" UNIX
  - Unfair competition
  - Interference with contracts with other UNIX licensees

SCO v. IBM

IBM Claims Against SCO

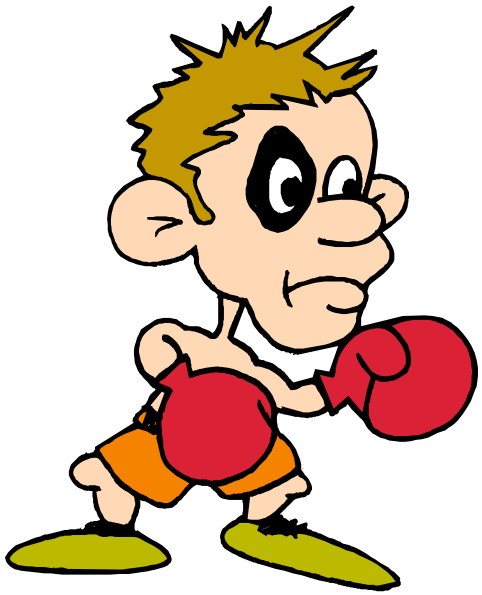
- Breach of contract (improper termination of UNIX license)
- "Talking Trash"
  - Lanham Act violation
  - Unfair competition
  - Interference with economic relationships
  - Unfair and deceptive trade practices

SCO v. IBM

IBM Claims Against SCO

- **"You Did It, Too"**
  - **Breach of open source license and copyright infringement**
  - **Consequence of GPL violation:**
    - Copyright infringement
    - Promissory estoppel
- **Patent infringement (4 counts)**

SCO v. IBM



Where the Case Stands

- **SCO is still fighting**
  - Will get to take discovery
- **SCO defeated IBM's motion for summary judgment**
  - But SCO came out of it with a black-eye
- **Copyright dispute will be resolved in this litigation**

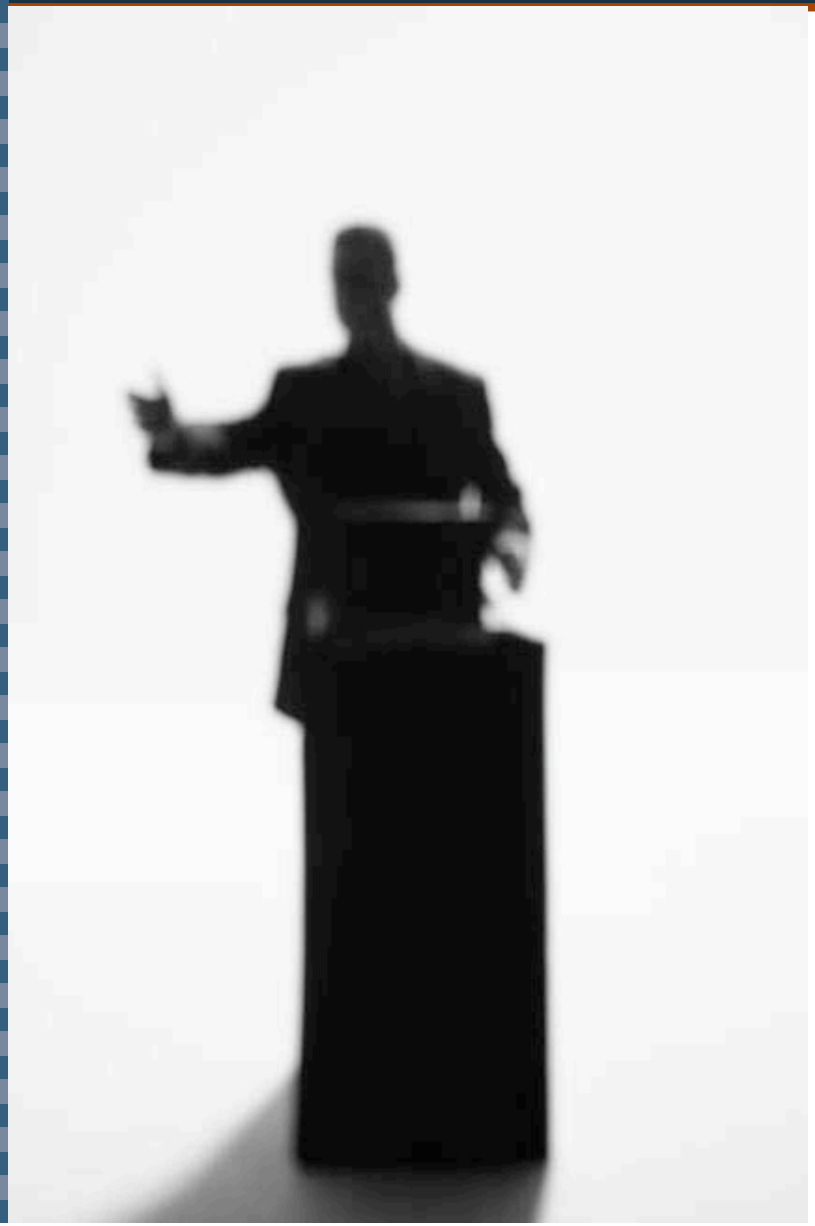
SCO v. Others

- ***SCO v. Novell***
  - **Slander of title**
    - SCO bought "All rights and ownership of UNIX…"
    - ***But only*** those copyrights "required for SCO to exercise its rights with respect to the acquisition of UNIX…"
- ***SCO v. LINUX Users***
  - **AutoZone**
  - **Others?**
- ***SCO v. Daimler Chrysler*** **(refusal to certify)**
  - **Seems to be over**
- ***Caution:*** **SCO case is not a good indicator of future risks**

Others v. SCO

- ***RedHat vs. SCO***
  - **Torts related to public statements**
  - **Declaratory judgment of no copyright violation**
- ***Tarent v. SCO* (Germany)**
  - **Unfair competition: don't say LINUX infringes your copyrights unless you are prepared to prove it**

The Public Debate



- **Open Source …**
  - **Is "Unconstitutional"**
  - **Impacts IP Rights**
  - **Is more risky**
    - *Davidson & Associates v. Internet Gateway*

The Public Debate

- **Open Source Is Unconstitutional**
  - **Clarified**
  - **Not a legal debate:**
    - license terms are different in economic effect, but not different in kind
    - cases accept that Open Source license terms are effective
      - *Netfilter v. Sitecom* (Germany)
      - *Progress Software v. MySQL*
      - *Micro Star v. Formgen Inc*

The Public Debate



"The GPL has this sucking effect of grabbing your IP, sucking it in and destroying your property rights."

-Darl McBride, CEO of SCO, whose company is suing IBM and others for alleged IP violations

"Having a hole in your head has this sucking effect."

-Linus Torvalds, founder of Linux, in response to McBride

***Washington Post*, Thursday, June 10, 2004; Page E01**

RISK: Loss of IP Rights



- **Express license**
  - **Have to pass on open source terms**
    - must reveal source
    - no
      - $ opportunities from redistribution
      - control over redistribution
      - basis for other deals
- **Implied licenses**
  - **Patents**
    - uncertainty about what is licensed and to whom
  - **Losing trade secret status is like giving a license**

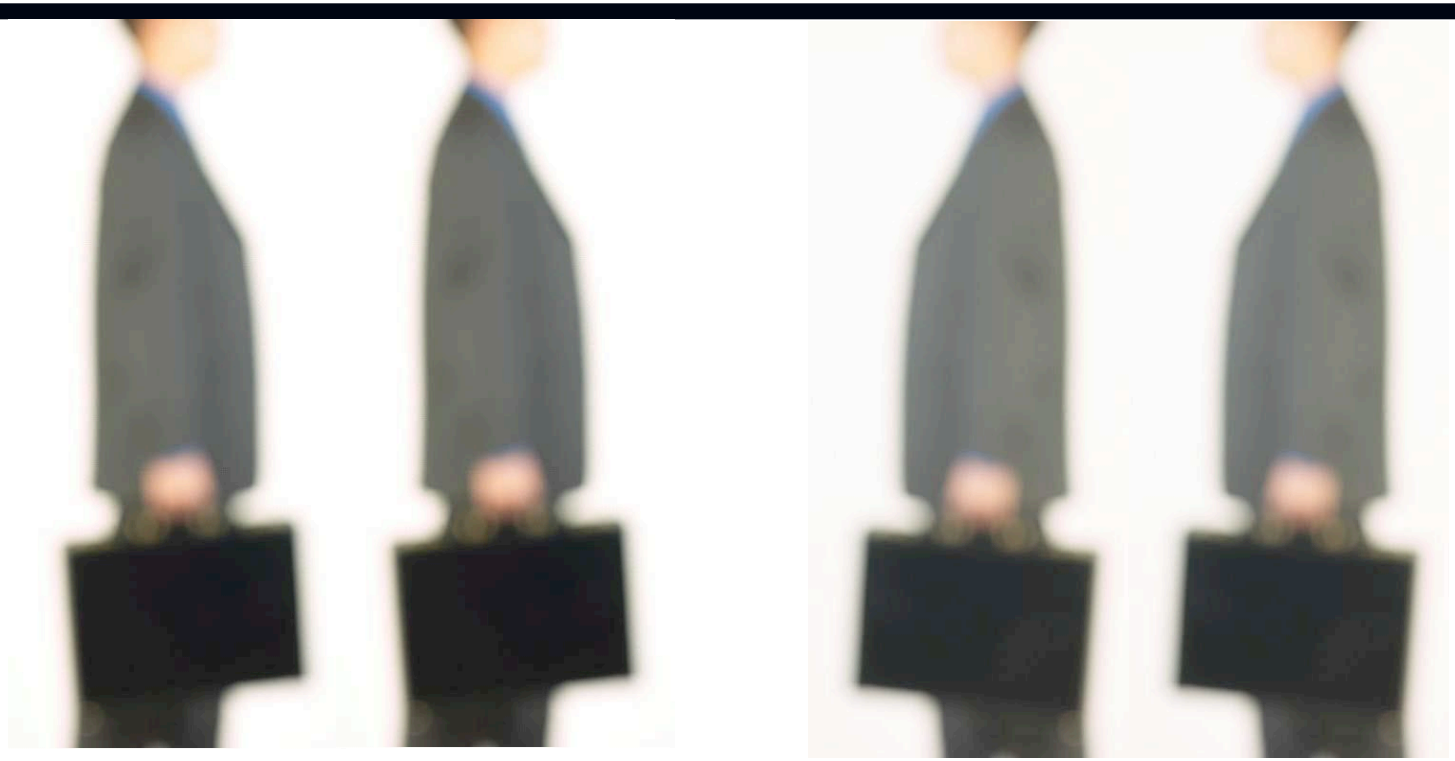
RISK: Loss of IP Rights



Mozilla

- **Disincentive to asserting patents**

Litigation -- Future



What will they fight about next?

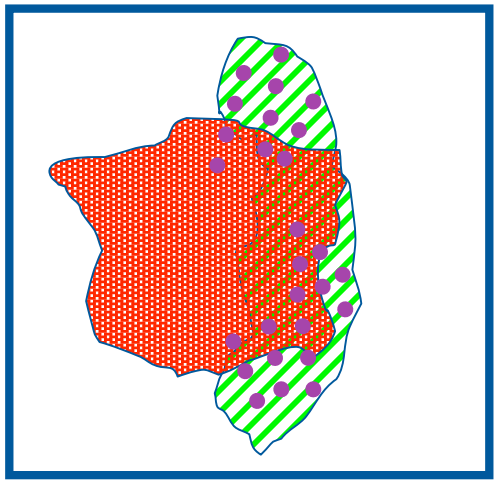
Areas of Uncertainty

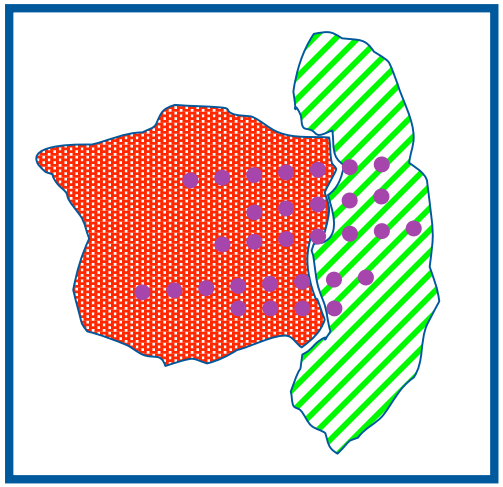


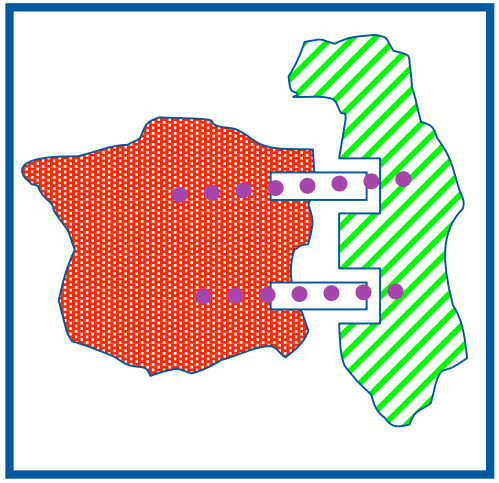
- Who cares?
- What rights are lost?
- What is the effect of violating open source terms?
- Is there really more risk?

Uncertainty: Loss of IP Rights

A "derivative work" is a work ***based upon*** one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be ***recast, transformed, or adapted***.





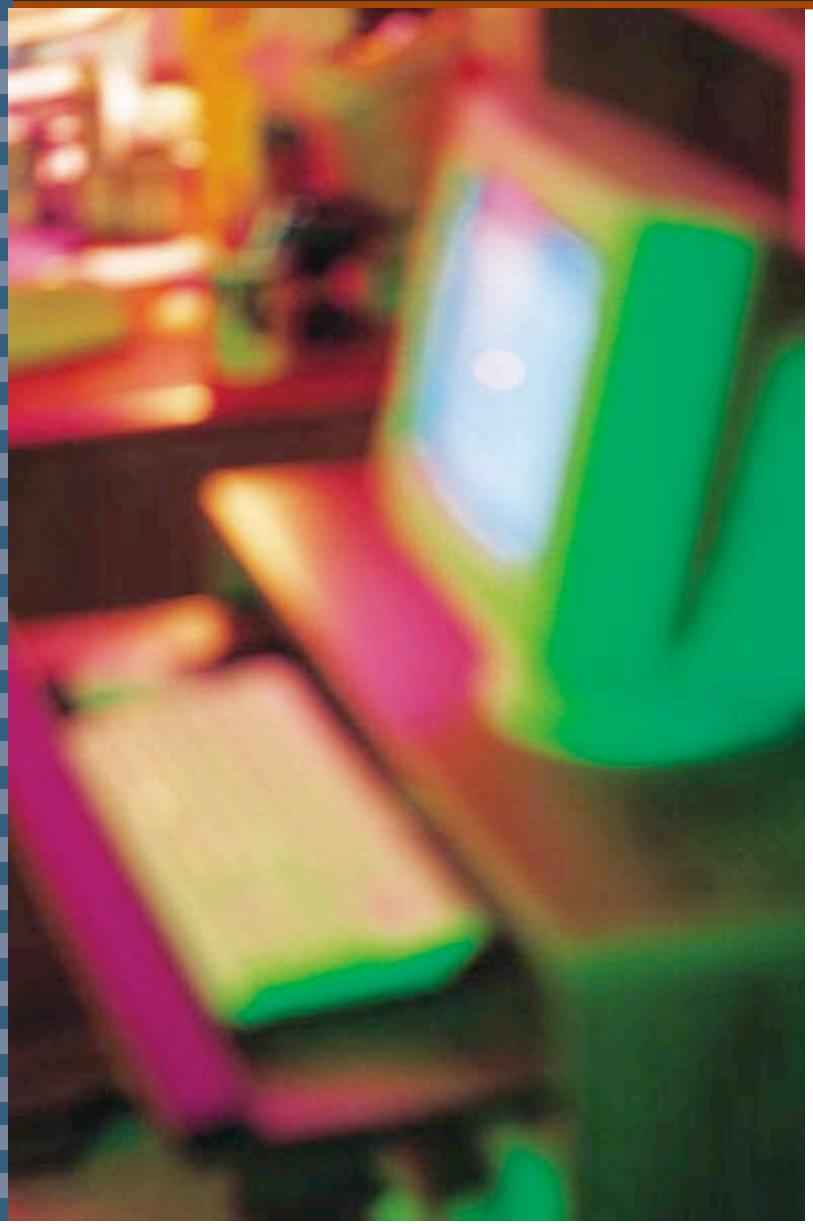


Derivative Work



- **Best guess of legal standard**
  - **Derivative work must incorporate recognizable pieces of the original work**
  - **Original must be transformed—not merely used in making the derivative work**
  - **Transformed work must be "fixed" or permanent**

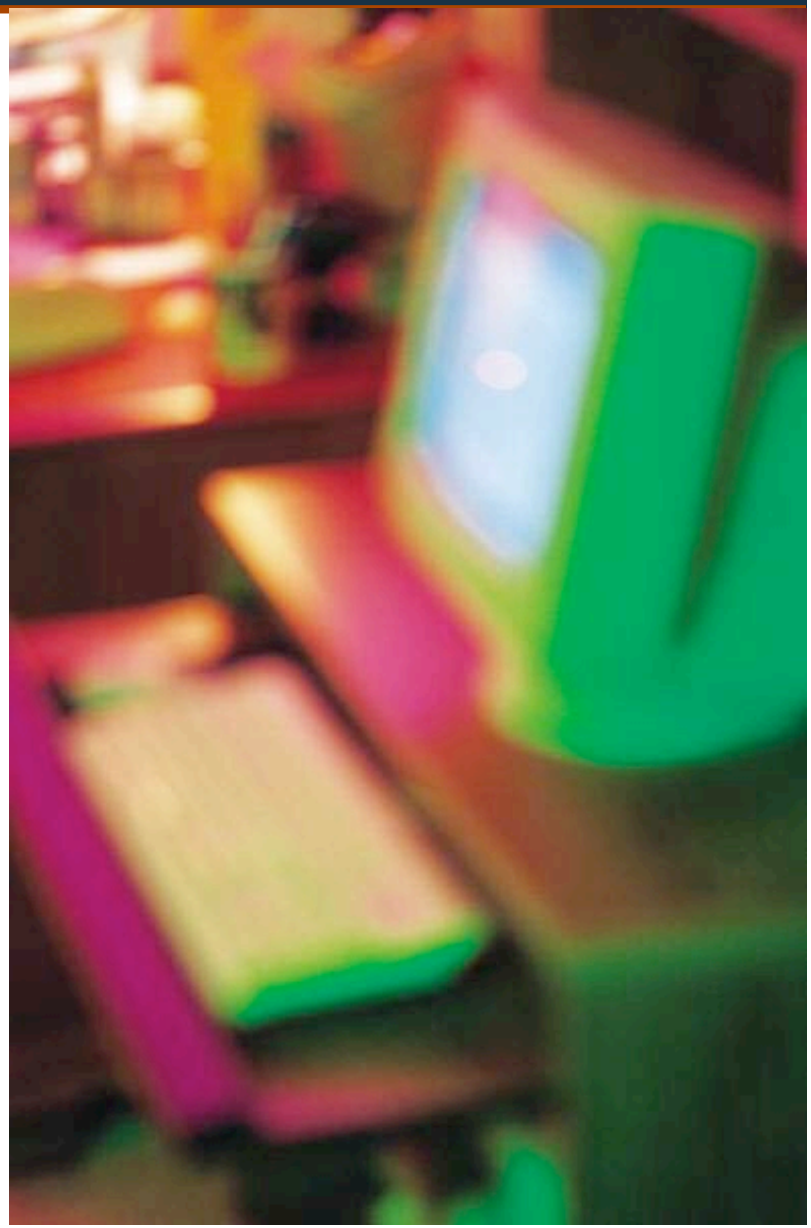
Derivative Work



- **Emerging technical view**
  - **Derivative work must incorporate recognizable pieces of the original work**
  - **Form of interface matters**
    - works are
      - separate if dynamically linked
      - derivative if any other form of interface is used

Derivative Work

- Mozilla
  - "addition to or deletion from the substance or structure of" the code
  - "safe harbor" for code in separate files



What is the Remedy?



What if I violate the GPL?

- Monetary damages
  - Actual damages
  - Statutory damages
    - $750 to $30,000
    - Up to $150,000 if willful
  - Costs of enforcement
- Injunction
  - Stop shipping product?
  - Release source code?

Effect of Open Source Violation

- ***Netfilter v. Sitecom*** **(Germany)**
  - **If violate the GPL, license terminates and violator is an infringer**
  - **Forfeiture not too severe because violator can re-acquire rights by complying with terms of GPL**
    - unique issue of German Law
    - but, many states have comparable notion of "unconscionability"

Who Would Fight?



- **Individuals?**
- **Commercial developers?**
- **Free Software Foundation?**
- **Your competitors?**
  - ***Computer Associates International v. Quest Software*** (You can't sue me for copying your product if you used open source.)

RISK: IP Claims



Is open source software more risky?

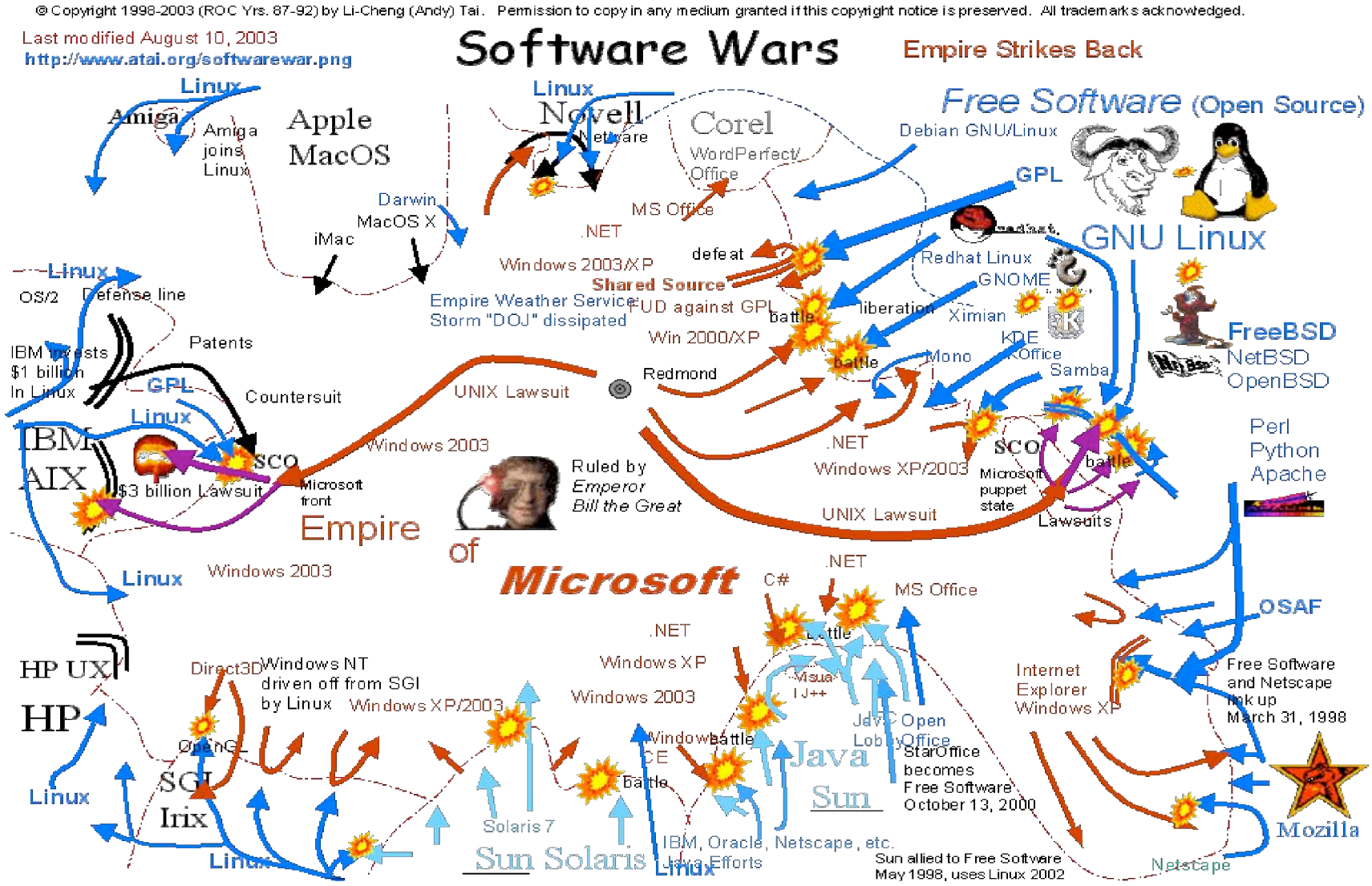
RISK: Infringement of IP



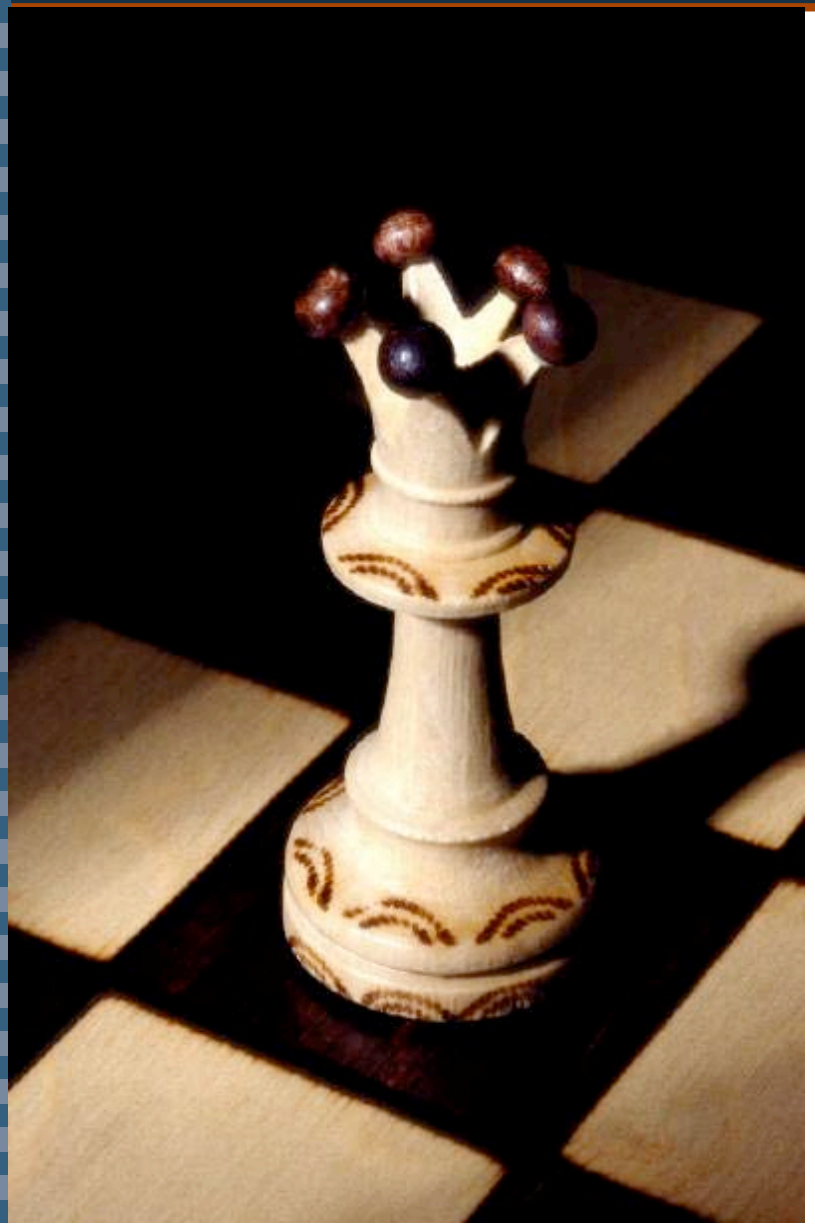
However with the spread of the Internet, the Free Software community, composed of GNU, Linux, Apache, Perl, BSDs, etc., quietly continued to develop more Free source code and gathered strength. Finally in 1998, beginning with Netscape looking to Free Software for allies in resisting Microsoft, the New Hope is shown to the world. **The vision of the original hackers, a world where the *Software is By the People, Of the People and For the People*, is coming into being. The Revenge against Bill Gates is in full swing. The war for liberation is intensifying!**

http://www.free-soft.org/softwarewar.html
(emphasis added)

RISK: Infringement of IP



Are They Ready for a Counter-Attack?



US005758352A

United States Patent [19]

Reynolds et al.

[11] **Patent Number: 5,758,352**

[45] **Date of Patent: May 26, 1998**

[54] **COMMON NAME SPACE FOR LONG AND SHORT FILENAMES**

[75] Inventors: **Aaron R. Reynolds**, Redmond; **Dennis R. Adler**, Mercer Island; **Ralph A. Lipe**, Woodinville; **Ray D. Pedrizetti**, Issaquah; **Jeffrey T. Parsons**; **Rasipuram V. Arun**, both of Redmond, all of Wash.

[73] Assignee: **Microsoft Corporation**, Redmond, Wash.

[21] Appl. No.: **711,692**

[22] Filed: **Sep. 5, 1996**

Related U.S. Application Data

[63] Continuation of Ser. No. 427,004, Apr. 24, 1995, Pat. No. 5,579,517, which is a continuation of Ser. No. 41,497, Apr. 1, 1993, abandoned.

[51] **Int. Cl.**[6] **G06F 17/30**

[52] **U.S. Cl.** **707/200**; 707/1; 707/6

[58] **Field of Search** 395/600; 364/200

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(List continued on next page.)

Primary Examiner—Thomas G. Black
Assistant Examiner—Cheryl R. Lewis
Attorney, Agent, or Firm—Christensen O'Connor Johnson & Kindness PLLC

[57] **ABSTRACT**

An operating system provides a common name space for both long filenames and short filenames. In this common namespace, a long filename and a short filename are provided for each file. Each file has a short filename directory entry and may have at least one long filename directory entry associated with it. The number of long filename directory entries that are associated with a file depends on the number of characters in the long filename of the file. The long filename directory entries are configured to minimize compatibility problems with existing installed program bases.

28 Claims, 8 Drawing Sheets



RISK: IP Infringement



- First Rule of Litigation
  - Sue Someone with Money
- Patents as Trading Cards
  - If you have nothing to trade, you have to pay to play
- Infringement is easy to detect
- But, is there safety in numbers?
  - Public Patent Foundation
  - Open Source Law Center
  - Novell Patent Pledge

Summary

- Past
  - Old news
- Present
  - Relative Calm
- Future
  - Growing Pains

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