

## BlackBerry playing 'Russian roulette'?

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A federal judge this week ruled that the maker of the BlackBerry mobile e-mail device did not have a binding settlement deal with the company that holds the patent for the wireless technology -- an order that continues the litigation and might just upend the mobile-communications market for consumers in the United States, legal experts told United Press International's Wireless World.

The case has been going on for years already, but is now reaching an arc. Patent holder NTP has been pursuing Research in Motion Ltd., the maker of BlackBerry, the wireless e-mail device popular with private-sector CEOs and government workers, seeking a payment in excess of \$450 million for damages. The matter is being heard in federal court in Richmond, Va.

"Judge Spencer's rulings that there was no settlement between RIM and NTP and that lawsuit should not be staying pending possible completion of the Patent Office's re-examination means that it is possible that he could issue an injunction banning use of the BlackBerry system sometime soon," Stan Young, an intellectual-property attorney with the firm of Heller Ehrman, based in California's Silicon Valley, told Wireless World. "If neither a settlement, nor a work-around occurs, the BlackBerry service would likely become unavailable in the U.S. upon issuance of an injunction."

The current ruling is under seal, but the federal judge is said to have found that the parties' earlier discussions did not lead to a binding settlement deal. The companies are now filing briefs that would discuss

the impact a permanent order stopping BlackBerry from operating in the U.S. would have.

"RIM continues to play Russian roulette with BlackBerry consumers and partners," Robert Green Sterne, a partner with the law firm of Sterne Kessler Goldstein & Fox, told Wireless World. "They need to respect the patent rights of NTP, the inventor and property owner. Instead, RIM is acting like a patent squatter by pursuing a scorched earth legal strategy that will, in the end, burn its users and stakeholders."

Intellectual-property lawyers speculate that the companies will work feverishly to reach a definitive settlement.

"Because 70 percent of RIM's business is in the U.S. domestic market, it is highly likely that RIM will either strike a new settlement agreement, or attempt to implement the 'design around' that RIM contends it has available in the event of an injunction by the court," said Joanna Esty, a partner with the firm of Liner Yankelevitz Sunshine & Regenstreif in Los Angeles. "Most likely, RIM is using the threat of the design around in an attempt to obtain leverage during continuing negotiations with NTP."

Customers in fast-moving businesses, like marketing, rely on BlackBerry, and are hoping for a resolution of the case soon.

"BlackBerry permits us to provide cutting-edge service for our clients, while on the move," said Wesley Schneider, managing director of Chicago-based Creative Marketing Communications Inc., a marketing-services company that develops games and sweepstakes for companies like GE, GM and the Tribune Companies. "Mobility is a key to maintaining that competitive edge -- and BlackBerry supports that objective."

Esty said that NTP will not benefit if RIM goes out of business. "NTP is

a patent holding company," said Esty. "It is not a competitor of RIM. Its business is to receive royalties from the licensing of its patents."

That being said, the maker of the BlackBerry still has the right to appeal the case to the U.S. Supreme Court, said Joseph Calvaruso, an intellectual-property partner with the law firm of Chadbourne & Parke LLP, based in New York. "There may also be an appeal with respect to the scope on any injunction and damages," said Calvaruso.

Some have been claiming that Research in Motion, which is based in Canada, has been unfairly subjected to U.S. law during the case. But lawyers dismiss that claim. "All the frenzied claims that RIM is being unfairly treated by being subjected to U.S. law is hype when measured against traditional patent law and patent dispute resolution," said Sterne.

RIM -- represented by a number of lawyers, including the firm Jones Day, which was not available for comment for this column -- has an incentive to settle the case soon.

"My guess is that there is a better than even chance that RIM will settle this case shortly in order to avoid risking a real meltdown for their company," said Sterne. "Such a meltdown could result in shareholder liability for RIM management and possibly for its board of directors."

But there is one complicating factor that could make all of the in-court maneuvering irrelevant: The patents underlying the case continue to be re-examined by the U.S. Patent and Trademark Office, said Professor Tim Holbrook, of the Chicago-Kent College of Law at the Illinois Institute of Technology. "If the PTO finds the patent claims invalid, then the injunction will go away," said Holbrook.

Not many experts think that will happen, however.

"Final judgment from which no appeal can be taken is looming," said Paul Andre, a partner with the law firm of Perkins Coie in Menlo Park, Calif.

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