

Wireless World: Lawsuit a marketing move?

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A lawsuit filed this week against Microsoft Corp. might be part of a sophisticated marketing and media strategy to better position the wireless software company filing the patent case, Visto Corp., as another, viable alternative to the Blackberry mobile e-mail system, experts tell United Press International's Wireless World.

The maker of Blackberry, the popular, hand-held device for mobile messaging, recently lost a crucial court ruling in a separate patent case which threatens to shutter its national network here in the U.S. That case is ongoing, and a judge may issue an order permanently prohibiting Research in Motion, the Blackberry producer, from operating its network with the technology it currently uses. Another firm, NTP, claims it owns the rights to the technology that Blackberry is using.

That case ultimately could leave millions of users without mobile messaging capability, including the federal government, which filed court papers, asking the federal judge in Richmond, Va.

Redwood Shores, Calif.-based Visto claimed in court papers filed Thursday that Redmond, Wash.-based Microsoft had "infringed upon multiple patents Visto holds regarding proprietary technology that provides enterprises and consumers with mobile access to their e-mail and other data."

A Microsoft spokeswoman said that the company couldn't fully comment on the case. "Until we have an opportunity to review this complaint and investigate Visto's allegations, we're not in a position to

comment specifically on them," said the spokeswoman. "In the meantime, however, we wish to underscore that Microsoft stands behind its products and respects the intellectual property rights of others."

Legal experts, from around the country, however, raised a number of questions about the lawsuit and the timing of its filing.

"Now that RIM is having difficulties, other companies are trying to get into RIM's space, and it looks like Visto is trying to position itself as an alternative to RIM," Scott Doyle, a partner registered patent attorney with Steptoe & Johnson, LLP, told Wireless World. "Visto's suit is an interesting publicity play to get in the news. The big success was RIM, and Microsoft is trying to enter RIM's space, with a few others. Visto is trying to hold off Microsoft's momentum."

The venue in which the Visto vs. Microsoft suit was filed is known as the "rocket docket" for patent claim holders, meaning that a case can go to trial in a year, and the win rate is very high for patent holders, compared to other districts, Doyle added.

The federal appeals courts have, however, taken note of the patent cases coming from the Eastern District of Texas of late, and have increased their skepticism. "Patent filings in the Eastern District of Texas are becoming quite popular with 'patent speculators' and similar enterprises," said Dan Venglarik, an attorney with the Dallas law firm of Davis Munck. "This trend has reportedly come to the attention of the judges in the Court of Appeals for the federal circuit -- the appellate court with exclusive jurisdiction over patent cases -- resulting in apparently closer scrutiny of verdicts and judgments originating from that venue."

Venglarik, however, was cautious to emphasize that he was not implying that Visto itself was a patent speculator, but simply that the choice of venue for the California-based company left them vulnerable to the

"potential to be tarred with a similar brush when questions regarding the merits of their case are debated."

Another patent lawyer told Wireless World that he thought that Visto might actually have a good case to make. "I have examined the patents in the complaint," said Joe Englander, an intellectual property attorney with the firm of Christopher & Weisberg, P.A., which has offices in Washington D.C. and Florida. "The fact that one of Visto's patents has survived the re-examination process bodes well for Visto. You can see that extensive prior art (e.g., evidence) was examined at the Patent Office during the process, so it will be difficult for Microsoft to invalidate it."

Indeed, Visto claims that it developed the technology nearly a decade ago.

But other lawyers said it is entirely possible that Microsoft developed the technology completely on its own, at generally the same time that Visto did. "Reporting on major high-tech patent litigation often assumes that there was some act of misappropriation, where the company is assumed to have been aware of the technology of the patent holder and then copied that," said Phil Albert, a patent attorney with Townsend and Townsend and Crew, based in Palo Alto, Calif. "It is very likely that Microsoft developed their systems entirely without being aware of any Visto patent applications."

A little known facet of patent law is that patent infringement cases do not actually require that a patent be infringed in the same way a copyright infringement case would require infringement -- or unlicensed use. "Quite often, the patent defendant is an innocent infringer that independently developed the technology that the patent is being asserted against," said Albert.

Though that may be true, others note that this is not Visto's first foray into patent litigation, nor its first filing in the Eastern District of Texas. The company sued Seven Networks, Inc., for patent infringement in that very court. There could be another motive in the case -- a targeting of a technology other than Microsoft's mobile e-mail applications. "This case could possibly be an attempt by Visto to target Microsoft's Exchange Server products," said Jay Lytle, a partner with the global intellectual property law firm of Sughrue Mion, PLLC, and a former advisory engineer for IBM. "Visto does not state which Microsoft products it believes infringes its patents, but instead broadly accuses any Microsoft products that enable access to and or synchronization of data in secure network environments of infringing Visto's patents."

If that is the case, there may be motivation for Microsoft to settle the case quickly and avoid a lengthy, legal drama.

"Sometimes, companies sue Microsoft to be bought by Microsoft," said Doyle.

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