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Apocalypse Averted

The BlackBerry Settlement and Patent Reform

After a grueling five-year legal battle, Research In Motion Ltd. (RIM), the Canadian company that makes the popular wireless handheld device called the BlackBerry, paid hundreds of millions of dollars in a settlement with a small firm that sued the tech giant for patent infringement. The settlement, one of the largest of its kind, capped what some have characterized as a David-and-Goliath struggle between Virginia's tiny New Technologies Products (NTP) and the multi-billion-dollar Ontario-based RIM.

NTP is a patent-holding company. It has no employees and exists only to profit off of a collection of patents, most of which were awarded in the 1990s to inventor Thomas J. Campana, Jr. These patents relate to the wireless transmission of information, including electronic mail, to "mobile processors." Campana (who died in 2004) and patent-attorney Douglas Stout founded NTP in 1992 for the sole purpose of making money from licensing the patents to other companies. The company has never made any effort to develop actual products.

In 2001, NTP sued RIM on the grounds that the BlackBerry—first sold in 1999—infringed on NTP's patents for wireless e-mail. The suit was decided the next year in NTP's favor, and RIM was ordered to pay over $50 million. RIM appealed, NTP sought an injunction that would force RIM to shut down its wireless e-mail system, and the litigation wended its way through the courts, eventually reaching the Supreme Court, which refused to hear the case. A settlement agreement was almost reached in 2005, which would have required RIM to pay $450 million, but it fell apart at the last moment. Then, in March 2006—as talk of a potential shut-down of BlackBerry service reached a frenzy—the parties reached a settlement requiring RIM to fork over $612.5 million.

Meanwhile, the U.S. Patent and Trademark Office (USPTO) launched a review to reexamine the validity of the patents relevant to the case. The review, which is independent of the various court rulings and will apparently have no effect on the recent settlement, is still going on as of this writing, but the USPTO has already revoked some of NTP's patents and seems likely to revoke others. (NTP has appealed these invalidations.)

As the legal conflict dragged on, tech companies and individual BlackBerry customers alike worried vocally about RIM's legal strategy. There are over 4 million BlackBerry users worldwide, who depend on the device's e-mail, phone, and digital-assistant functions. Many of them are so addicted to their wireless devices that the nickname "crackberry" has passed into popular usage. While their thumbs might ben-

efit from some respite—habitual users develop a condition informally called "BlackBerry thumb"—the BlackBerry devotees themselves were far from sanguine about a possible shutdown.

Government and emergency personnel, about ten percent of BlackBerry customers, would have been exempt from any injunction shutting down BlackBerry service—a decision that created significant resentment among private-sector BlackBerry users, and may not have been technically feasible anyway. Companies faced with a BlackBerry shut-down needed a Plan B. By February 2006, RIM had developed a workaround—a software update that the company said would allow BlackBerry service to continue in case of an injunction. But some unconvinced corporate users reportedly decided to delay further BlackBerry purchases or upgrades until a settlement had been reached. Others began investing in rival devices, such as Palm Inc.'s Treo. For companies heavily reliant on BlackBerrys, a switch would have been quite costly. According to one estimate, based on a survey of seventeen Fortune 500 companies, each corporate BlackBerry has a total cost of $844 per user—including the costs of buying the new device, installing new software, and training employees to use it. Buying replacement devices for the hundreds of thousands of corporate users in the United States would have cost hundreds of millions of dollars.

The high profile of the NTP-RIM litigation has shone a spotlight on the American patent system and led to calls for reform at USPTO in the business pages of the nation's newspapers. The dysfunctions are severe: USPTO's roughly 4,200 examiners—mainly recent college grads—face a tremendous backlog of applications. Many of the applications contain hundreds, even thousands, of claims on behalf of their inventions. It is widely reported that examiners are pressured to process applications too quickly due to a point system for applications that, critics say, prizes speed over accuracy. As John J. Doll, the Commissioner for Patents, recently explained: "When you've got 1.3 million cases in the backlog, and it's taking [four to six] years to take a first office action, you've got to ask the question: Is the patent system still actually working, or are we just stamping numbers on the applications as they come through?"

Such concerns seem justified: The patent office approved almost 90 percent of applications in 2000, up from 69 percent in 1984, even as applications have more than doubled since 1991. The BlackBerry case—and the USPTO's subsequent revocation of some of NTP's patents—is an illustration of how issued patents sometimes fail to meet the patent office's own standards.

Recent changes in patent law have only exacerbated the patent system's flaws. Prior to the 1980s, patents were issued only for material objects, while such things as software and business methods were considered too abstract and too costly to cover. But as Columbia law professor Tim Wu points out in

Slate, that changed when Congress concentrated patent appeals in one court, the Court of Appeals for the Federal Circuit. The court redefined patent law—in part, as a response to the technology boom of the 1990s—making it much more liberal. But, argues Wu, the very nature of software means that "measurement costs"—who owns what algorithm—will be "inescapably high." Indeed, software companies and programmers cannot determine whether they are infringing on someone else's patent and so always assume that they are. "Property without discernible borders," writes Wu, "brings all the costs and none of the benefits."

The weaknesses of the patent system make successful companies into easy targets for so-called "patent trolls," small firms that do nothing but collect scores of patents—hoping that one just might hit gold. The trolls often turn out to be former examiners or patent lawyers, such as Donald Stout of NTP—experts, in other words, at fashioning the kind of long-winded, overly technical claims that can go over the heads of overworked patent examiners. The trolls then use their new patents in court to force companies into a high-stakes game of chicken. As RIM found out, it can take years for USPTO to plod through reviews of patents while the judicial system moves relatively quickly. This means that companies can be forced into settling with trolls to forestall an injunction—only to be vindicated later when the patent office rules that the relevant patents should never have been issued in the first place. While RIM's hardball litigation tactics admittedly did it more harm than good—it could have settled years ago for a small fraction of the money it shelled out in 2006—there's little doubt that the odds were stacked against it.

Surely patent trolls shouldn't be able to hold millions of consumers and corporations hostage by bringing an innovative industry-leading corporation to the brink of a shut-down. But it is also wrong to assume that USPTO's flaws and the avarice of patent trolls is necessarily crippling the very innovation that the patent system exists to protect. In reality, in its own messy way, the system may still work. As Holman W. Jenkins recently noted in the *Wall Street Journal*: "In the fastest-moving technology businesses…everybody has always sued everybody, on the assumption that, after a period of testing in the marketplace and courts, some money will change hands, the parties will 'cross-license' each other's patents, then go about their business.…From the looks of it, then, innovation is just fine in America even with the nuisance of patent litigation. We boldly suggest that a certain background hum of litigation is even a healthy sign: It shows progress and competition aren't being hampered by, ahem, undue regard for patent rights."

Still, it's good to see that reforms are coming. USPTO has hired hundreds of additional examiners in the past few years, with more on the way. To reduce the application backlog, USPTO plans to limit the number of claims in an

application to ten and to crack down on inventors who repeatedly re-file applications that have already been rejected. The Bush administration is reportedly proposing to outsource the labor-intensive search for "prior art," and Congress is considering legislation to allow third parties to challenge patents that are under investigation or already approved. (Currently, a company can only challenge a patent if it is being charged with infringing on the patent.) And the Supreme Court—which, after a prolonged absence from patent law, is currently considering several patent cases—might give judges more leeway in deciding whether or not to grant injunctions. Changes like these should help ensure that the "background hum" doesn't become unbearably loud, and that the culture of innovation that the patent system was designed to promote continues to flourish.