



**The Blackberry Patent Saga - - How Will It End?
Robert G. Sterne & Robert F. Redmond, Jr.
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The line started forming a little after 7 am on the morning of Friday, February 24, 2006, of people wanting to attend the Blackberry patent hearing before Judge James R. Spencer at the federal court house in Richmond, Virginia. When the doors opened at 8:15 am, the crowd had swelled to the point that the federal marshals had to open the jury box because the spectator section was filled. Attorneys, the press, financial analysts and other interested individuals were in attendance along with the attorneys and representatives of NTP (the patent owner), RIM (the owner of the alleged infringing Blackberry) and U.S. Department of Justice.

The court came to order promptly at 9:00 am. Judge Spencer immediately asked NTP to go first. Two attorneys for NTP -- James Wallace on the patent injunction issue and John Wyss on the patent damage issues -- then made a detailed presentation that ran for over 90 minutes. RIM went second. Two attorneys for RIM -- Henry Bunsow on the patent injunction issue and Martin Glick on the patent damages issues -- also made a detailed presentation that ran for over 90 minutes. Then the U.S. Government was called. John Fargo from the Department of Justice argued for about 30 minutes that the U.S. Governments, its critical suppliers (such as SAIC, Bechtel and IBM), critical responders and health and safety people should be put in an excluded group of any injunction so that they would continue to receive their Blackberry service. NTP then presented a short rebuttal remarks.

Judge Spencer spoke little during oral argument and did not address the court until around 12:30 PM. He was brief but direct. He told the parties that he was very surprised that no settlement had occurred because business solutions are always the best: "I am surprised, absolutely surprised, that you have left this incredibly important decision to the court." Instead he said that the court was being forced to reach a judicial solution, which he promised he would provide, but cautioned that it would invariably not be optimal. He said that he was under a mandate from the Federal Circuit on two issues - - damages and the injunction - - and he intended to discharge that duty promptly. He noted that the case had been tried to a jury in an 11 day trial in late 2002, and that the jury had done a competent job. He said that the case had been reviewed twice by the Federal Circuit and now was back before him. He said that his schedule would be to address a possible damage order first, followed by a decision on a possible injunction. He indicated that he had not made up his mind about the injunction. His forceful but passive demeanor perhaps indicated that he was siding somewhat with NTP and was frustrated with RIM.

The throng left the courthouse. Henry Bunsow and James L. Balsillie, co-CEO of RIM, then held a lengthy press conference on the courthouse steps in front of TV cameras, microphones and a crush of reporters. Bunsow assured the press that there would be no legal interruption of Blackberry service and that the reexamination events the past week from the USPTO were unprecedented and indicated ultimate RIM success. Balsillie calmly reiterated that RIM was a hugely viable company that would take care of its customers and that its possible design around would go effortlessly if adopted, even though Bunsow in court had claimed it would require 2 million man hours to implement. Balsillie stated repeatedly that RIM wanted to settle the dispute under reasonable terms. The press peppered questions for over 30 minutes.

NTP in contrast left the courthouse without minimum comment and then issued this press release: "We have repeatedly attempted to settle this issue with RIM, including trying to meet with them this week. Contrary to RIM's public stance, we always have and continue to offer RIM a license that fully protects everyone - - its customers, carriers, and partners. RIM has rejected our efforts, stalled the proceedings and attempted to undermine the process every step of the way."

The authors, who do not represent either party and have no financial interest in the case, have been following this saga very closely and are frequently asked by the press to comment on its status and possible conclusion. In this article we would like to prognosticate what Judge Spencer could do and how the Federal Circuit will react to his actions. Ultimately, we are trying to predict under what terms and when this case will be concluded.

Globally it is clear that Judge Spencer is frustrated that this case has not settled. We believe Spencer thinks, based on the trial and the Federal Circuit appeals, that NTP is entitled to significant damages. We do not think he is distracted by the recent reexamination events in the USPTO that occurred up to the day of the hearing (where all of the claims in suit are under final rejection) because that administrative proceeding will take several more years to complete. Instead, we think Spencer wants to act forcefully and rapidly to discharge his duty as a federal trial judge and to urge settlement in the case.

So consider the following two possible scenarios.

Assume that Judge Spencer is leaning in the direction of NTP. This could be due to alleged bad conduct of RIM before the suit, during discovery and at trial. It could be due to RIM's vigorous, arguably "scorched earth" litigation conduct, relentless appeals and many activities at the USPTO. It could be due to the inconsistent arguments RIM presented in court on the 24th when Spencer noted that RIM had said that \$50 B of the U.S. economy would be impacted if the Blackberry was enjoined, that it would take 2 million man years to implement the alleged software design around, and yet RIM's website assured that such design around would be seamless and automatic. It could be the failure of RIM to disclose the alleged software design around to the court despite frequent assurances to users and the financial community that it existed and was legally viable.

Under this scenario, Judge Spencer will rule first on damages, probably in the next 7 business days, and award NTP its enhanced damages and attorneys fees from trial, additional damages (compensatory and not enhanced) for the time period from the jury verdict to the hearing, and the 5.7% royalty rate for on going damages. He will defer on whether he will award enhanced damages since the jury verdict. RIM will file an emergency motion to stay the damages order pending appeal to the Federal Circuit. This motion will be decided by a motions panel, which most likely will be different from the merit panel on the earlier appeals. The motions panel will refuse to vacate the order. This will result in the first actual payments to NTP for damages.

Additionally, within 30 days of the damage order, Judge Spencer will issue an injunction against the Blackberry products and services. Specifically, it will enjoin present Blackberry users and future sales of Blackberry products and services. It will grant the U.S. Government 90 days to work out terms with NTP of which users will be exempt from the injunction under Section 1498 and for public health and safety. NTP will grant a broad exemption to satisfy the Government and to assuage Judge Spencer. After the terms are worked out, RIM will again file an emergency motion with the Federal Circuit to stay the injunction. The motions panel will not grant the stay. RIM meanwhile will finally present the software

design around to Judge Spencer who will hold a contempt hearing. NTP will oppose the design around and Judge Spencer will rule in NTP's favor. RIM will now settle for huge damages in order to keep the Blackberry system operational. The financial community will penalize RIM shares due to the level of the settlement. NTP will be heralded in the press as the victorious small inventor against the huge corporate patent squatter.

Assume instead that Judge Spencer is leaning in the direction of RIM. This may be due to NTP demanding a paid up license from RIM despite the final rejections of all of the claims in the re-exams. It may be that he is swayed by arguments by Roger Milgrim, RIM's licensing expert. It may be that Judge Spencer is concerned that the re-exams may ultimately find that all of the claims in suit are not patentable. It may be due to a belief that NTP does not really want to settle the case at this time because of bad blood between the parties (that could also cut against RIM).

Under this scenario, Judge Spencer will rule first on damages, probably in the next 7 business days, and issue an order only awarding NTP its enhanced damages and attorneys fees from trial. The decision on additional damages (compensatory and enhanced) for the time period from the jury verdict to the hearing, and the 5.7% royalty rate for on going damages will be deferred pending the decision on the injunction. RIM will take an emergency appeal to the Federal Circuit and the motions panel will refuse to vacate the order. This will result in the first actual payments to NTP for damages, but a level much lower than the first scenario.

Additionally, within 60 days of the damage order, Judge Spencer will defer issuing an injunction against present or future Blackberry products and services. He will grant the U.S. Government up to 360 days to work out terms with NTP of which users will be exempt from the injunction under Section 1498 and for public health and safety. NTP will not be able to file an emergency appeal. RIM's negotiation position will be enhanced and no settlement will be reached. Alternately, Judge Spencer will issue an injunction against future Blackberry sales but request that RIM present its software design around to the court. He will approve the design around as non-infringing. He will refuse to grant an injunction against Blackberry devices adjudicated at trial and impose the 5.7% royalty rate for their continued use. NTP will file an emergency appeal and the motions panel will refuse to stay. RIM and NTP will not settle and a defacto compulsory license will be imposed on NTP. The financial community will be thrilled and RIM shares will surge. NTP will continue to be vilified in the press and the case will be remembered as a evil patent "troll" getting its due.

On balance we think the first scenario is more likely. The press by in large disagrees. Time will tell.

Robert Greene Sterne is a director and founding member of Sterne, Kessler, Goldstein & Fox P.L.L.C. He can be reached at rsterne@skgf.com.

Robert F. Redmond, Jr. is a partner at Williams Mullen in Richmond, Virginia. He can be contacted at redmond@williamsmullen.com