Microsoft Launches Patent Offensive Against Linux
by James G. Gatto and Tyson Y. Winarski

On February 25, 2009, Microsoft sued TomTom for patent infringement in a Federal District Court and in the International Trade Commission, alleging infringement of eight Microsoft patents, including at least three that allegedly cover TomTom's implementation of the Linux kernel. These are the first patent suits by Microsoft against Linux, but the writing has been on the wall for some time. It has been widely reported that Microsoft has openly alleged that Linux violates over 200 Microsoft patents. Now more than ever, it is important to understand the patent implications of open source and the steps that your company can take to minimize liability for patent infringement.

The Patents at Issue

The allegedly infringing patents include U.S. Patents 5,579,517; 5,758,352; 6,704,032; 6,175,789; 7,054,745; 7,177,286; 6,202,008; and 6,256,642. Some of these patents relate specifically to in-vehicle navigation features and some to the underlying platform, which is referred to in some of the claims as an open platform. Two of the patents relate to a directory structure for long and short file names. Some relate to user interface features.

Open Source Implications

It is no secret that Linux's market share has continued to increase. In a recent speech to shareholders, Steve Balmer (Microsoft's CEO) admitted that Linux is gaining market share on Windows and Microsoft is “focused in on” Linux as a competitor.

It is reported that a recent Gartner survey showed that 52 percent of respondents anticipated that their Linux use would increase moderately in 2008 and another 25 percent said there would be a substantial increase. Gartner's research also showed that Linux was ranked by 39 percent of respondents as the
operating system expected to have the most growth during the next five years, which outpaced the
respondents who thought Windows would see the greatest growth.

In part, Microsoft has been rattling the patent saber against open source for years. At least as early as
2004, Balmer was reported to have claimed that Linux violates over 200 software patents, but have not
identified the patents.

As Microsoft faces greater competition, including in the operating system market, it appears to it appears
to be turning more and more to patents for a competitive advantage. Microsoft has touted that it has insti-
tuted “a very comprehensive and successful IP licensing program, with well over 500 agreements in place
since the company opened up its patent portfolio to licensing in December of 2003.” This licensing pro-
gram started shortly before Balmer’s statements regarding the alleged patent infringement by Linux.

Patents are relevant to all software. Open source is no exception. But many companies that focus on open
source have not paid careful attention to patents. If you do not have a patent strategy that at least provides
for defensive positioning to minimize patent claims against you, perhaps it is time to discuss this with a
patent attorney who specializes in software patents and open source.

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