

LITIGATORS CORNER: People In Glass Houses



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Of course, almost everyone knows about Jim Balsillie's appearance before Congress, just after RIM shot itself in the foot, paying over six hundred million dollars to settle a case it could have settled for less than a tenth of that. If you haven't read the testimony, it's online¹. Balsillie neglects to address how the wound suffered by RIM was actually self-inflicted, nor does he report to Congress the criticisms leveled at RIM by the district court, or the opportunities the court offered RIM to settle the case much earlier. Without any justification, Balsillie cites *Graham v. John Deere*, 383 U.S. 1 (1966), for the notion that the district court had violated the holding of *Graham*, and had followed the view that injunctions prohibiting infringement were automatic. Truthfully, no such thing happened in the *NTP* case and, so far as I can tell, no one in Congress has criticized, much less noticed, the lop-sided unfairness of Mr. Balsillie's contentions.

Ironically, RIM is doing just fine today, despite its hefty payment to NTP. The terrible corporate suffering imagined by Balsillie is just that: imaginary. According to *Forbes'* website, RIM doubled its profits in the third quarter, and its stock has risen in value by 164% in the last year². According to another website, RIM's market share has increased for five straight quar-

ters, from 7.2 % in the third quarter of 2006 to 9.5 % in the third quarter of 2007³.

Balsillie isn't going broke, either. His annual salary is \$549,000, and he has \$135,000,000 in stock options, both exercised and unexercised⁴. Boo-hoo; Jim and his company are doing so badly after paying NTP. I can't keep my handkerchief dry.

Balsillie raised the usual complaints about patents in his testimony: The PTO issues too many patents, reexamination doesn't work, too many patents are obvious and claim technology that is in the public domain, the number of claims in a patent ought to be limited, continuations are abused, "patent assertion companies" are bad, and accused infringers spend much more money that they should have to spend because of the number of patents and claims. Apparently no individual who owns a patent should exploit his property for his own benefit.

But what does RIM itself do? In other words, does Balsillie walk his talk? No. RIM uses the patent system for its own benefit, just like all of the people Balsillie complains about.

A review of the PTO's website reveals that RIM has about four hundred patents. NTP has, what, six? What could RIM possibly do with four hundred patents? It is doing what every other patent owner does: excluding others from walking on his lawn or parking in his garage, or making them pay for the privilege of doing so. It is just that RIM, with all its money, can afford more patents than the small guy can. RIM has four hundred because it is rich. That isn't necessarily bad, but Balsillie should not whine about NTP, which had a genuine inventor, Tom Campagna, an electrical engineer who had real ideas.

Nor should Balsillie complain about the quality of patents, or that too many involve technology that was already in the public domain. RIM has a fair number of its own patents that might be subject to the same criticism. Among the four hundred RIM patents are no less than thirty-eight utility (not design) patents addressing the keyboard. Patent No. 7,063,964 is for a keyboard with staggered keys. Claim 1 covers a QWERTY keyboard, staggered along arced reference lines, with some superkeys. The verbiage in the claim reminds me

of how an out-of-control patent prosecutor might claim a steel rod:

I claim a rigid member comprising:

A first end;

A second end, said second end distal from said first end;

An elongated structure connecting said first and said second ends;

Said elongated structure having a continuous, smooth surface between said first and second ends;

Said elongated structure comprised of a metallic material which resists bending; and

Said elongated structure being circular in a cross-section perpendicular to an axis extending along said elongated structure and extending through the centers of said first and said second ends.

And I can't resist citing another claim, this one from RIM's US Patent No. 6,611,255, "Hand-Held Electronic Device with a Keyboard Optimized for Use with the Thumbs." In my 2006 column, "Is IBM a Patent Troll?", I said this claim "reminds me of Jimmy Carter's smile." It still does:

1. A hand-held messaging device, comprising: a keyboard that is horizontally positioned symmetrically between a left edge and a right edge of a face of the hand-held messaging device and having a plurality of keys arranged in a plurality of rows across the face, wherein each row of keys is arranged in a concave pattern; a display that is vertically positioned between the keyboard and a top edge of the face and horizontally positioned symmetrically between the left edge and the right edge of the face; an auxiliary input device; and a processor coupled to the keyboard, the auxiliary input device and the display that controls the operation of the hand-held messaging device.

Does RIM cite a lot of art to help the examiner and to be sure that RIM is not trying to patent something that is in the public domain? It does not seem to. Its U.S. Patent No. 7,106,306, "Keyboard Assembly Optimized for a Mobile Device," cites only seven U.S. references. Its U.S. Patent No. 7,190,314 is for an antenna nut. It cites only nine U.S. references. RIM's U.S. Patent No. 6,278,442, for a hand-held electronic device, cites only eight U.S. references; every one of them was cited by the examiner, so RIM cited nothing. This patent is broad, too; claim 1 covers a thumb-operated mobile device with a keyboard having

oblong keys tilted at two angles, an input device (the thumb wheel), a display, and software inside the device. If this were not his company's patent, I can imagine Mr. Balsillie saying something snide like, "Wow. There's the invention of the century." Another similar patent is RIM's 6,073,318, "Retaining Clip Assembly." This covers the belt clip. If it weren't his patent, Balsillie would be complaining that someone patented the holster and the PTO let it through. RIM's U.S. Patent No. 6,396,482, also for a hand-held electronic device, cites only fourteen references. Ten were cited by the examiner, not RIM.

Does RIM avoid use of continuation applications, which were denounced by Balsillie in his testimony? It does not seem to. The '306 keyboard patent is a continuation, based on a prior application, which was in turn based on a provisional application. The '314 antenna nut patent is a continuation of a prior application that was in turn based upon a provisional application. RIM's '442 patent, for a hand-held electronic device, is a continuation, too. The '482 patent is a continuation-in-part of a continuation-in-part. Yet another patent on a hand-held mobile device is RIM's Patent No. 6,867,763. It is a continuation of a continuation-in-part of a continuation-in-part. RIM's views on continuations, as expressed by Balsillie, apparently do not apply to RIM itself.

Does RIM avoid using too many claims in its applications? Again, it does not seem to. The '442 patent, as one example, has forty-eight claims. Even the '314 nut patent has thirteen claims. The '482 patent has twenty-two claims. Balsillie said in his testimony that he supported the proposed restriction to ten claims in any application unless the applicant provided an examination support document. As one of my friends says, "Consistency is the hobgoblin of little minds." Balsillie certainly does not believe in consistency.

RIM files for lots of patents. They are repetitive, so that RIM can best protect its technology with hundreds or thousands of claims filling the nooks and crannies and covering keyboards, mobile devices, and belt clips. Its goal is plainly to protect every aspect of a mobile device operated by human thumbs, so as to protect it from others who might otherwise use its inventions. RIM exploits the continuation process in the Patent Office. Like many patent applicants of the past, RIM files applications citing few references. It files applications even on the simplest aspects of its devices,



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like belt clips and keyboards. On top of that, RIM has many design patents that I have not even mentioned.

I don't criticize RIM for protecting its intellectual property. But I do criticize those hypocrites who say that only the giants – RIM, Stanford, IBM, and the like, who have hundreds or thousands of patents – should be able to erect a fence to keep trespassers out. Of course the Patent Office should not issue those lousy patents Balsillie abhors, which should fairly include some of his own. Referring to a recent application (#20070287391) by RIM for an angled Blackberry keyboard, the popular technology blog, Engadget, stated: "Of course, since all kinds of crazy designs get filed with the patent office, we wouldn't put too much faith in this seeing the light of day, though it is an intriguing look into RIM's design process."

But the solution is not to ask the PTO to do more jobs, as the Patent Reform Act would do, if one believes that the PTO has failed to do its first job well. That is about the same as not putting fuel in an airplane and then complaining that it doesn't fly well.

The Constitution refers to individuals, not companies. Congress certainly has much latitude in designing a patent system

that fits within the Constitution. But it cannot ignore the rights of those individuals whose brilliant minds and tenacity – the Wright brothers, Edison, Westinghouse, Carlson, to name a few – created industries. Like the founders of Intel, those inventors were alone when they began. To enact the Patent Reform Act – which really ought to be called the "Corporate Patent Relief Act" – would damage, perhaps beyond repair, the ability of the lone inventor or small company to succeed. How ironic that, during this campaign season, when we are hearing about the neglect of the little guy, even the Democratic candidates think this legislation is a good idea. **IPT**

ENDNOTES

1. <http://judiciary.house.gov/media/pdfs/balsillie040506.pdf>
2. http://www.forbes.com/markets/economy/2007/12/31/rimm-blackberry-technology-markets-equity-cx_ra_1231markets21.html
3. <http://www.teleclick.ca/2007/12/research-in-motion-ends-2007-with-10-of-global-smart-phone-market/>.
4. <http://investing.businessweek.com/research/stocks/people/person.asp?personId=742044&symbol=RIM.TO>