

LITIGATORS CORNER: TrollTracker, Cisco and the Coalition for Fairness to Foxes in the Hen House



BY JOSEPH N. HOSTENY,
OF NIRO, SCAVONE,
HALLER & NIRO

*Regular IP Today
columnist Joseph
N. Hosteny is an
intellectual property
litigation attorney*

with the Chicago law firm of Niro, Scavone, Haller & Niro. A Registered Professional Engineer and former Assistant US Attorney, his articles have also appeared in Corporate Counsel Magazine, The Docket (American Corporate Counsel Association), American Medical News, Inventors' Digest, Litigation Magazine and Assembly Engineering Magazine. Mr. Hosteny can be reached at (312) 236-0733, or by e-mail at jhosteny@hosteny.com, or by visiting his web site at <http://www.hosteny.com>.

Well, well. Now we know who TrollTracker is. Some of the questions I raised in my column last month ("The Cowardice of Anonymous Bloggers") can now be answered. One of the questions I asked was: Wouldn't it be nice to know if TrollTracker represents, for example, companies who are members of the misnamed Coalition for Patent Fairness? TrollTracker revealed his identity in late February. After a storm of comments, he stopped his public blog. It is now open "to invited readers only." One must sign in with a password at <http://trolltracker.blogspot.com>. From anonymous to by invite only. There's progress for you. Apparently he only wants to hear from people who agree with him. He's gotten bashful; even his past pages appear to be no longer available online. So, first, we had anonymous blogging, with anonymous comments, including the comments I described last month. Now we have the complete removal of items from the public domain, as if they never existed. George Orwell might

like this. Don't like a book? Take it off the library shelf.

It turns out that TrollTracker is a patent attorney, Rick Frenkel. The PTO says he got his registration in 2001. What's even more interesting is that he is employed by one of the founders of the Coalition for Patent Fairness, Cisco Systems, Inc. What a surprise. Before working at Cisco, Mr. Frenkel worked as a law clerk and lawyer at Lyon & Lyon, a firm that dissolved in about 2002. He next worked at Irell & Manella, a firm that now has over 200 attorneys. Then he went "in house" at Cisco.

He's modest about "in house." He's not exactly at the bottom of the Cisco heap. According to an article issued on February 25 by Dow Jones Newswires, his title is Director of Intellectual Property at Cisco. According to the same article, "Cisco spokesman John Noh said the blog represented the personal opinions and personal research of Frenkel and that Cisco didn't fund, edit or maintain it in any way." If Mr. Frenkel did his blog on a computer at Cisco, one might ask who was paying for that, and how much of Mr. Frenkel's time at Cisco was spent on his blog as opposed to his work.

Mr. Frenkel says that his blog was done with the knowledge of his "direct manager" at Cisco, but without the company's control. His direct manager, according to an article on February 22 by Niraj Choksi in "The Recorder," a legal newspaper in San Francisco, is Mallun Yen, the Vice President of Cisco's intellectual property group. She is described on various Internet pages as Cisco's chief patent counsel. Before assuming that position, she held the same position as Mr. Frenkel, Director of Intellectual Property.¹ The blog appears to originate from within Cisco. Cisco's spokesman, Mr. Noh, told "The Recorder" that Mr. Frenkel was unavailable for comment. I wonder why Cisco speaks for a man who says he speaks for himself, without editorial control. That leads to more questions.

In light of Mr. Frenkel's position, anyone reading his blog should have known that he is employed by a company with a big intellectual property ax to grind. One might even consider Mr. Frenkel to be an anonymous spokesman for the Coalition for Patent Fairness. One of my partners suggested a better name: Coalition for Fairness to Foxes in the Henhouse. Three of the Coalition's members are Cisco, Intel and HP. Intel, of course, resorted to the shenanigans I have described before: saying entirely contradictory things to two federal courts at the same time about the same patent. See "Intel's Bold Steps To Thwart Foe In Patent Case," by Dean Takahashi in the "Wall Street Journal," April 16, 1999.

HP got blistered, publicly and judicially, for using false statements in an investigation meant to identify the source of leaks of information from meetings of its board of directors. HP's investigators used "pretexting," meaning they lied, pretending to be customers of a telephone company in order to get caller information from the companies. Supposedly, HP also tried to plant spyware on a reporter's computer.² The criminal charges, Congressional hearings and assertions of the 5th amendment were flying.

So we have three members of the Coalition; two have been caught lying, and abusing the law. The third asks us to believe that it has no influence on a blog written by its Director of Intellectual Property. Should we believe any of these three companies when they claim to advocate patent reform? More importantly, should Congress accept, without question, arguments, lobbying or testimony by officers of these companies when they argue in favor of the Patent MisReform Act, and claim that the patent laws are being abused? To quote the ancient Roman poet and satirist, Juvenal: "Who guards the guards?" Skepticism is even more important when those claiming abuse of the law, abuse it themselves, like HP and Intel.

Cisco is taking some heat, but on another front in Congress. It, Microsoft, Google and Yahoo are being criticized by Congressman Smith of New Jersey and Congressman Lantos of California for caving in to Chinese government demands to restrict public expression on the Internet. See the "New York Times" on February 15, 2008. China, with the help of these companies, keeps words like "democracy" and "human rights" from appearing on the

Internet in China. As Orwell recognized, the path to controlling thought is through control of speech. Take away words, and thoughts cannot be expressed. Next, they won't even be conceived. Can you imagine the outcry from these companies if our government sought to impose the same restrictions? Skepticism is important here, too. Cisco has caved to a totalitarian regime.

Cisco, and other members of the Coalition for Fairness to Foxes, are going to regret twisting Congressional arms for passage of the Patent MisReform Act of 2007. There's the old saw about being careful about what you want because you might get it. Why would Cisco and other large companies regret having their wish granted? Some of you might remember the film, "A Man for All Seasons." In it, one of the characters says he would knock any law flat to catch a murderer. Thomas More responds, "And, having knocked flat all the laws in the land, what would protect you when the murderer turned and faced you?"

David Packard and William Hewlett started HP in a garage in 1939, where they built an oscillator. Robert Noyce and Gordon Moore started Intel in 1968 when they left Fairchild Semiconductor. Cisco was started by Len Bosack and Sandy Lerner in 1984; they had been tinkering with connecting networks at Stanford. (The Cisco bio says the company was named for San Francisco; I wonder if they realized that a cisco is also the name of a fish.) All have grown, and all have substantial patent portfolios. Cisco has about 3,000 patents. HP has about 18,000. Intel has about 15,000. All of them have used litigation to protect their intellectual property.


In 2003, Cisco sued a giant competitor, Huawei Technologies. The complaint said:

Unlike Cisco, however, which invested substantially in the development of its own proprietary router technology and software, Huawei has chosen to misappropriate and infringe Cisco's intellectual property in an attempt to develop a cheaper, inferior router which Huawei claims is completely compatible with Cisco's routers. In doing so, Huawei and its U.S. subsidiaries have shown a complete disregard for Cisco's intellectual property rights and the laws which protect those rights.

Cisco's complaint included claims for infringement of five patents. Huawei admitted copying Cisco source code.³ Cisco got a preliminary injunction, too.⁴ The docket says all claims were dismissed with prejudice based on an agreement, a sign of a confidential settlement. "The Economist" reports that the case was settled, and that Huawei had to "take the offending products off the market." See page 12 of the October 22, 2005 issue. Cisco used its patents to protect itself. Cisco's Vice President and chief counsel, Mark Chandler, said:

The completion of this lawsuit marks a victory for the protection of intellectual property rights. Innovation is the lifeblood of the industry, and protecting our intellectual property is of paramount importance to Cisco. We are pleased to conclude the litigation as a result of the steps that were taken to address our concerns.

But what will Cisco, and other large companies, do to protect themselves — and American jobs — from infringement by foreign companies if the Patent MisReform Act gets passed? The patent laws will have soft gums instead of teeth: injunctions nearly impossible, oppositions in the Patent Office to prolong the inability to enforce patents, damages reduced to some measure of the novel component (Would the Wright brothers get a royalty only on the curve in the wing, or just on the rudder?), and willfulness nearly impossible to prove.

One might reasonably argue that Congress should be strengthening patent protection and reversing the effects of some CAFC decisions, not weakening it. If Huawei makes another run at Cisco's router business in the United States, it will be in a tactically better position if the Patent MisReform Act passes. In fact, infringement will be a no-brainer. The foxes might be eaten by wolves. Cisco and its Coalition partners can blame themselves for the inability of the patent system to protect the "hard work" the company did to develop its own routers, and the resulting damage to America's economy and jobs. 

ENDNOTES

1. See <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1122992907451%26amp;rss=ihc>.
2. <http://www.securityfocus.com/columnists/417>
3. http://www.lightreading.com/document.asp?doc_id=30269.
4. http://www.lightreading.com/document.asp?doc_id=35058, and see docket entry 91 in the lawsuit.

Secure Computing Responds to Finjan Patent Infringement Lawsuit Verdict

Secure Computing Corporation (Nasdaq: SCUR), a leading enterprise gateway security provider, today issued a response to the verdict announced March 12, 2008 regarding the company's lawsuit with **Finjan**. Secure Computing does not believe that it infringes upon Finjan's patents in any way, and the Company further believes that Finjan's patents are invalid. Webwasher's proactive scanning technology accused of infringement by Finjan uses heuristic rules to categorize the behavior of executable code. The use of heuristics in general to analyze code was known and in use prior to the filing of any of Finjan's patents. The specific complex heuristics in the proactive scanning module were developed by Webwasher and are the product of Webwasher's original research. Secure Computing intends to request that the trial court set aside the jury verdict and, if necessary, the Company intends to appeal to the Federal Circuit Court of Appeals.

The jury rejected Finjan's accusation of infringement with respect to the hashing function in Webwasher and therefore found no infringement of one of the three patents asserted by Finjan. Another accused feature accused of infringement under another of the three Finjan patents known as script code mitigation has been replaced with other technology for filtering malicious scripts in the latest release of Webwasher.

The only technology accused of infringement in the latest release of Webwasher is the proactive scanning feature of a single module of Webwasher. Other modules, including Webwasher's URL-filtering technology, do not use the behavior categories accused by Finjan. Nevertheless, Secure Computing intends to defend and support its unique heuristic scanning technology.

Secure Computing's separate patent infringement suit against Finjan's load balancing technology remains pending in the District Court for the Federal District of Delaware.