

Microsoft Patent Claims Pose No Immediate Risk for Users

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Microsoft claims that a variety of open-source software projects violate its software patents. A general trend toward more aggressive patent licensing tactics is on the horizon.

Event

On 14 May 2007, Fortune magazine reported that Microsoft General Counsel Brad Smith and Vice President of Intellectual Property and Licensing Horacio Gutierrez have claimed that free and open-source software (OSS) infringes on at least 235 Microsoft patents. Smith told Fortune that the Linux kernel violates 42 Microsoft patents, the Linux graphical user interfaces violate another 65 patents, and the Open Office suite of programs infringes on 45 more patents. E-mail programs allegedly infringe on 15, while other assorted open-source programs allegedly violate 68. Gutierrez refused to publicly identify specific patents or explain how they're being infringed.

Analysis

Gartner believes that Microsoft will not seek to litigate patent claims against users. Instead, we think the company will attempt to pressure technology providers to come to the table and negotiate an equitable licensing or royalty arrangement in instances where Microsoft can prove its claims of infringement.

IT providers have amassed software patent portfolios for many years. Patent agreements among vendors are commonplace among virtually all large technology vendors. The practice is well-established as the equivalent of a legal *détente* among vendors that rely on defensive patents to protect their own business strategies. Vendors can and often do use patents in an offensive strategy to create control points of technology and revenue opportunities as well.

Microsoft appears to be attempting to receive a return on its investments in R&D by creating revenue opportunities from, or cross-licensing deals with, OSS technology providers through its technology patent portfolio. It believes that companies receiving revenue from OSS that is, in part, based on Microsoft's innovations (in instances where this can be proven) should be subject to the same market dynamics that drive any other commercial technology strategies.

Microsoft thinks it can best deal with the issue of open-source patent infringement by creating partnerships (such as the agreement it entered into with Novell). However, the Free Software Foundation (FSF) has strenuously objected to these efforts and has attempted to foreclose on future agreements with its proposed addition to the GNU General Public License v.3.

We believe Microsoft's public announcement of these patent infringement allegations is an attempt to increase pressure on technology providers to accept patent agreements with Microsoft. The company has had some limited success in building such agreements with Novell and a number of other providers (most recently Samsung).

Gartner finds it interesting that Microsoft has chosen to make the patent information public. Vendors typically go out of their way to avoid public disclosure of patent agreements; moreover, companies typically attempt to avoid lawsuits insofar as they potentially threaten the patent portfolios they maintain. Proving patent viability in court is much more difficult and expensive than simply creating a royalty agreement. Such an effort would place further pressure on Microsoft to explicitly list the infringing patents, which it has declared to Gartner that it will do privately with the technology providers — not with individual developers or corporate users.

We believe Microsoft is strengthening its patent portfolio to rectify what it perceives to be exploitation of its intellectual property (IP) by technology providers that generate substantial revenue from OSS, including Linux. We do not believe Microsoft intends to pursue end-user IT organizations. Instead, we believe it will use the fear of legal compliance to pressure IT providers

to enter into individual IP agreements. If suppliers balk or challenge Microsoft, this could escalate into a broader conflict as large-scale commercial open-source vendors (such as HP, IBM and Sun) are pulled into the conflict when their customers and partners turn to them for protection and support.

RECOMMENDATIONS

Organizations using OSS (such as Linux):

- Don't panic or be concerned about paying Microsoft licensing fees. Despite Microsoft's allegations of IP infringements, it will have to fight for the validity of its patents in court. Even if Microsoft were proven correct, it would be highly unlikely to take an aggressive position with end users because most are also Microsoft customers.
- Should Microsoft decide to go to court, the exact nature of its claimed patent infringements would then become apparent. Linux users would then need to consider the community's ability to address those issues.

IT providers:

- Ascertain from Microsoft as specifically as possible where violations may occur. Prepare defensive measures (such as using your own IP for cross-licensing) or collaborative defensive strategies with close partnerships (such as IBM and others).

RECOMMENDED READING

- "MIX07 Conference Marks a Turning Point for Microsoft" — Microsoft's announcements at MIX07 about various aspects of its Web strategy indicate the company is getting serious about the Web in the Web 2.0 era. **By David Mitchell Smith and David Cearley**
- "Microsoft Update: A SWOT Analysis Related to Linux and Open Source" — Microsoft is gradually changing its strategic approach to Linux server distributions and open source, with mixed results. **By George Weiss and John Enck**

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