

What's In Your Blackberry?

Lee Thornbury J.D.

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INTRODUCTION

Are you one of the many Blackberry users living in suspense, waiting to see if your service through your dependable and indispensable Blackberry goes black? Has your company fed the addiction of Blackberry users around the world, encouraging a dependence on the instant gratification of wireless communication? Do you lay awake at night wondering if your company can survive a shutdown of the Blackberry technology?

THE BIG CHILL

If you answered yes to any of the previous questions, your ability to sleep at night and your fear of technology withdrawal lies in the small print of your company's IT contract with the wireless carrier who supplied your company with the Blackberry units. There is a small but significant clause that can make the difference to your company as to whether you and your professional cohorts can or will suffer a potential black-out after February 24, 2006.

THE LITIGATION

In case you have been in a remote section of the Himalayas or under the Pacific Ocean for the past couple of months, the maker of the wireless messenger Blackberry handheld, Research In Motion (RIM), has suffered consecutive defeats in U.S. federal courts in a lawsuit filed by New Technologies Products (NTP) over the last four years. In 2001, NTP filed a lawsuit in federal court in Richmond, Virginia, alleging that RIM, a Windsor, Ontario-based company, had infringed the 5 U.S. patents held by NTP related to the transmission of instant messaging through wireless technologies. Over the intervening four years, both NTP and RIM have scored significant victories in different federal arenas.

The federal district court and a jury in Richmond, Virginia, held in 2002 that RIM had willfully infringed on the NTP wireless technology patents. Since then, RIM has pursued a two-track appeal: they have appealed through the federal court system, resulting in the January 23, 2006 ruling that the U.S. Supreme Court declined to hear their appeal; and tangentially, RIM has filed appeals through the U.S. Patent Office, with the result that all five of the NTP patents on wireless technology transmissions and receipt of messaging and text messaging have been invalidated, not once but twice.

WHAT DOES THIS MEAN TO US?

How does this affect you and your business? Not much, if your company is not contracting with a vendor whose wireless service includes distribution of Blackberry hardware. But if your company is one of thousands that does depend on the hardware and software to run your business communications, then you can and should be extremely concerned. Unless, that is, your contract with the wireless transmission carrier contains a provision with the substantive equivalent of the following language:

“In the event that Vendor’s hardware and/or software is held to violate a third party’s intellectual property, Vendor shall, at its sole expense and in the following order of precedence: (i) procure for Customer and Customer’s affiliates the right to continue to use the affected Software and/or Hardware; (ii) modify the affected Software and/or Hardware so that it becomes non-infringing and non-violative, without diminishing the form, features, functionality or performance of the Software or Hardware; or (iii) replace the affected Software and/or Hardware with software and/or hardware that are non-infringing and non-violative with equivalent form, features, functionality and performance. In the event that Vendor cannot, after using its best efforts to do so within a reasonable period of time, so procure, modify or replace the affected Software and/or Hardware, then Vendor shall terminated the Agreement with respect to the Software or Hardware involved and promptly refund to Customer the License Fee or any other fees paid by Customer for the Software and/or Hardware involved, and a pro rata amount of the Maintenance Fee paid under the Maintenance Agreement, if any, based upon the unexpired portion of the then-current term of such agreement.”

WHAT ARE OUR OPTIONS?

Although vendors traditionally have not offered this provision unless the customer requests, this provision can make all the difference in the world for your company in the next coming months and years. In typical legalese, this provision provides that in the event that the technology or the software or both infringe on a third party’s intellectual property, the VENDOR is responsible for fixing the problem, by finding a replacement, a workaround, or an additional license (all at the Vendor’s expense) so that you as the Customer can continue seamless business operations. If all of these options are not viable, then the vendor is responsible for refunding any moneys your company has paid for the no-longer usable technology.

What if your vendor contract doesn’t contain this provision? What are your options now? Well, if the vendor is feeling generous, the vendor might figure out an alternative hardware provider (at your replacement expense) or a work-around software package (again, at your company’s expense), or (worst case scenario) recall all hardware/software, and cancel your contract, meanwhile forwarding to your accounting department a bill for early termination. Think this nightmare can’t happen to you? Think again. The Columbus Dispatch reports that the cost to switch to a new device would cost about \$1,000 per user including the price of the new device, software and training.

CONCLUSION

If you find that your contracts with wireless services vendors (or in fact any of your company's vendors) do not include some provision substantively similar to the above language, Maxelerate strongly recommends that your company amend the applicable vendor agreements to include same or similar language, so that you can maximize the protection your company can and should enjoy as a customer.

Maxelerate's goal is to help Sourcing, Procurement, Purchasing, Engineering, IT and other professionals in all industries and government agencies to get better deals from suppliers. We accomplish this by providing Consulting, Training, Seminars and Leadership Implementation.

To get more information about us and find out how you can get better results contact us at:



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