

# Day Of Reckoning In BlackBerry Courtroom Drama

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The Blackberry courtroom saga discussed at water coolers across the United States has reached its day of reckoning, with IP attorneys agreeing Friday's hearing could result in the worst conceivable nightmare for millions of users: a total blackout of the device's wireless e-mail network.

U.S. District Judge James R. Spencer in Richmond, Va. is expected to make his final determination as to whether or not a two-year-old injunction in favor of patent-holding firm NTP Inc. will go into effect and stamp out service to the wireless e-mail devices for three million U.S. users.

The clash has captured the world's attention over the past five years and has become the equivalent of an IP soap opera. Patent attorneys have followed every move: infringement confirmed, injunction issued, injunction stayed, appeal failed, appeal denied, claims rejected, etc.

"Most probably the court will grant the injunction. There are no legal reasons why the judge shouldn't," said Richard Kelly, an attorney with Oblon Spivak McClelland Maier & Neustadt PC.

Others agree, pointing out that all the basics of IP law suggest an injunction against Blackberry maker Research In Motion Ltd. should be put in place.

The possibility of the injunction going into effect is likely since the essence of the patent right is to exclude, according to Douglas A. Miro, patent attorney at Ostrolenk, Faber, Gerb & Soffen in New York.

At this point, RIM's options are limited and none are too favorable for the embattled Canadian company. A much-touted software workaround may be technically impossible and has thus far failed to ease concerns.

"If its software design-around was really a satisfactory option and plainly does not infringe, I believe they would have distributed it months ago," said George Wheeler, patent attorney at McAndrews Held & Malloy Ltd. in Chicago.

Even if the workaround does go into effect, RIM will still find itself locked up in court since the parties would likely have to litigate the question of whether RIM's workaround also infringed NTP's patents, according to Adam Kessel, an associate in Wolf Greenfield & Sacks litigation group in Boston.

Of course there is still the chance RIM's executives are correct and the workaround will work. If RIM is successful in applying the workaround, NTP will lose royalties going forward, which are likely significantly larger than damages for past infringement, according to Miro.

If the software update is an option, most agree it needs to be executed soon in order to help RIM's case.

"One option is for RIM to immediately put its workaround into effect and then try to get the pending reexaminations decided as quickly as possible through the appeal stage," Kelly said.

Complicating that option, the U.S. Patent and Trademark Office this week issued a final office action rejecting one of the patents in suit, and all of NTP's patents are struggling upon reexamination. But even that may prove insufficient for making RIM's case in court.

"The judge has no doubt been advised, as I have found in my practice, that a final rejection in reexamination is far from the end of the process. The reexaminations likely will require years to be completed, including the appeal process," Wheeler said.

NTP has the option to appeal any adverse decision at the USPTO to the agency's Board of Patent Appeals and Interferences (BPAI). If the BPAI also rules against NTP, it would almost certainly appeal to the Federal Circuit and ultimately to the Supreme Court.

"This process could take several more years, and the district court has already found the patents-in-suit to be not invalid in that proceeding," Kessel said.

Others believe the judge will enter an injunction, starting from a fixed date in the near future, to allow users to make alternative arrangements, according to Richard Turner, patent attorney at Sughrue Mion PLLC in Washington, D.C.

"In my opinion, that would be the legally safe course. Assuming this happens, RIM will ask for a stay of the injunction while they appeal. They will likely be required to post a very large bond," Turner said.

The appeals process, according to Turner, could last long enough for the Supreme Court to rule on the applicability of injunctions in patent cases, which it is currently considering in the *MercExchange v. eBay* case.

Others look to Judge Spencer himself, who has openly admitted he is tired of the case and may wish to put it to rest as quickly as possible. That could be to the detriment of RIM, which has so far benefited from various delays, according to Miro.

"The judge does not appear phased by the Patent Office's reexamination of the patents, and is not giving in to the government's efforts to slow down the process on hardship grounds," Miro said.

The case is *NTP Inc. v. Research In Motion*, case number 3:01-cv-00767, in the U.S. District Court for the Eastern District of Virginia in Richmond.

--By Erik Larson, erik.larson@portfoliomedia.com