Patent Litigation: Not for the Faint-of-Heart

I had two deadlines for submission of this article. One was to make this September 7 edition of "South Carolina Lawyers Weekly." The other was from the United States District Court for the Eastern District of Texas, which has found that the word processing software I am using to type this article, Microsoft Corporation's "Word" product, infringes a patent and has issued a permanent injunction that takes effect on October 10. Examination of that case is a study of the often-profound consequences inherent in patent litigation.

The case i4i Limited Partnership v. Microsoft Corp. was filed in March, 2007. When I first heard of this litigation and that the Plaintiff was named "i4i," I knew I had to learn more. It turns out that the name was perhaps not inspired by ancient concepts of revenge, but instead by the company's former name, Infrastructures for Information, Inc.

In 1998, Infrastructures received a U. S. patent for what it said were "a method and a system for manipulating the architecture and the content of a document separately from each other." As described by the inventors, the invention removed dependency on document encoding technology.

In its suit, i4i alleged that the "Word 2003" and "Word 2207" word processing software, along with the "Vista" operating system, infringed its patent. It also alleged willful infringement. It sought money damages, a trebling of those damages, and an injunction.

In its responsive pleadings, Microsoft alleged that there was no infringement, that the patent was invalid, and that the patent was invalid for inequitable conduct of the patentees in prosecuting the patent application.

Those are high stakes for both parties and those are the usual stakes for parties involved in patent litigation. i4i stood to lose its patent – if Microsoft proved the patent to be invalid, the patent would be invalid not only as to Microsoft's products but as to the world. If Microsoft proved unenforceability, *collateral estoppel* would have made the patent unenforceable as to the world. Microsoft stood to lose not only substantial money in a judgment, but also several of its more popular software offerings if an injunction issued. As suggested by the title of this article, those stakes aren't for the faint-of-heart.

The case evidently was hard fought. The court's ECF docket contains over three hundred entries before trial began (and now over four hundred total), with lots of motions and a fair number of hearings.

Ultimately, the case was tried to a jury in May of this year. After a seven-day trial, the jury returned its verdict: infringement of the patent, willful infringement, no invalidity of the patent claims, and $200 million in money damages.

What followed was a flurry (twelve in all) of post-trial motions from both parties. i4i sought enhanced damages and a permanent injunction; Microsoft sought rulings as a matter of law of noninfringement, that the patent was unenforceable and invalid, and to reduce the verdict.

Interestingly, on June 8 the presiding judge ordered the parties back to mediation. In a ruling that underscores the title of this article, the judge observed, "both parties face great risks on how the court could rule on these [post-trial] motions." The court "strongly encourage[d] the parties to find a business resolution to their disputes."

They didn't.

Four weeks ago, the risks inherent in patent litigation materialized for Microsoft. In an August 11 order, the judge denied Microsoft's post-trial motions and granted i4i's motion for enhanced damages. More importantly, the judge granted i4i's motion for a permanent injunction. Doing so, he forbade Microsoft from selling, using, instructing anyone about, providing support or assistance to anyone about, or testing, demonstrating, or marketing products that have the patented technology. Both "Word 2003" and "Word 2007" were found to have the patented technology and are specifically identified as such in the injunction. (By its terms, the injunction does not apply to products licensed or sold before August 11, so the second deadline I mentioned above does not actually apply to my software).

Though substantial, Microsoft can surely pay the money damages portion of the judgment. But the injunction is a problem of a larger dimension.

Faced with what Microsoft has on its hands right now, a patentee can pursue at least the following three options. First, it can settle with the patent owner by paying for a license to practice the patent. Second, it can try to "design around" the patent – modify its product so that there is no infringement. Our patent system was created to encourage "designing around," so as to promote the development of technology. The public record does not reflect whether Microsoft is pursuing either of these two options. But we know that Microsoft is pursuing the third option: appealing the judgment. Recognizing that there is no right to stay injunctive relief pending appeal, Microsoft is appealing in a hurry. In an order issued August 21, the Court of Appeals for the Federal Circuit granted Microsoft's motion for an expedited appeal. Oral arguments are scheduled for September 23, seventeen days before the injunction takes effect.

i4i Limited Partnership v. Microsoft Corp. is not over. But already, it proves again the point that patent litigation is not for the faint-of-heart.