Big Firms Caught With Their Patents Down

By Steven Pearlstein

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Although Donald Stout has never met Tom Woolston, the two men have a lot in common. Both live in Northern Virginia. Both are trained as engineers and lawyers, with law degrees from George Washington University. And both now find themselves in David-and-Goliath legal battles against two of the most successful and celebrated firms in high tech.

Stout is a founding partner of one of Washington's top patent law firms. In 1991, he formed a company, NTP Inc., with engineer Thomas Campana Jr., for the sole purpose of patenting and renting out (“licensing”) technology developed by Campana at a defunct telecom firm for which both men had done some work.

One of those patents involved technical methods for getting short text messages to paging devices that people used to carry with them. But as luck would have it, variations on the same technology would later be used by a Canadian company, Research in Motion Ltd., to route e-mails from office computer servers to those BlackBerry devices that so many people cannot live without.

RIM came up with its technology all on its own -- there’s no dispute about that. But when Stout wrote to the company to suggest that RIM’s BlackBerry technology had been anticipated by NTP’s patent, he didn’t even get the courtesy of a response. So in late 2001, he sued. After a lengthy trial, a jury found that NTP’s patent was valid and that RIM had willfully violated it.

Transcript

Business: Corporate Computing
Washington Post business columnist Steven Pearlstein was online to discuss author Nicholas Carr’s argument that companies are shifting to a model in which they purchase computers, software and components as a service from utility providers.

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RIM had willfully violated it, awarding damages that have grown to $240 million. Now, as a result of RIM's refusal to accept the lower-court judgment and strike a licensing agreement with NTP, a federal judge in Richmond on Wednesday moved a step closer to silencing every BlackBerry in America not used by government officials.

It didn't have to come to this. By pursuing a scorched-earth legal strategy, RIM has spent more in legal fees -- Stout estimates them at between $25 and $50 million -- than it would have cost to license NTP's technology in the first place. The price of settlement has now grown to at least $500 million, which Stout would split with his lawyers and Campana's widow.

Tom Woolston's patent saga began in the mid-1990s, when a friend's desire to find customers for his old baseball cards led Woolston to develop a method for matching buyers and sellers over the Internet. Eight months later, he applied for patents for a system that could identify the parties involved, display the object to be sold and arrange for payment by credit card.

Woolston's technical training began in the Air Force, where he was an electronics warfare technician flying spy missions over North Korea and China. After leaving the military, he signed on as an undercover communications specialist for the CIA, spending nights and weekends earning his engineering and law degrees.

With patents in hand, and the Internet boom in full swing, Woolston raised $10 million in venture capital, hired 40 employees and laid the groundwork for a new Internet marketplace, to be known as MercExchange. Then, suddenly, in the spring of 2000, the call came from a lawyer at eBay inquiring after Woolston's patents.

Meetings were held, documents exchanged, and outlines of a deal began to take shape. But by the time the talks broke down several months later, MercExchange was floundering and Woolston's investors were getting cold feet. Woolston laid off the staff and began shopping his technology to other companies. He also sued eBay for patent violations.

In May 2003, a federal jury in Norfolk ruled that one of Woolston's patents was valid and eBay had willfully infringed on it. Damages of $29.5 million were awarded, but the trial judge refused to issue an injunction against eBay ordering it to stop violating the patent -- a standard remedy in such cases. Although an appeals court in Washington reduced the award to $25 million, it also found that the trial judge should have issued a permanent injunction. eBay appealed the injunction order to the Supreme Court, which on Monday said it would hear the case.

Despite the propaganda emanating from the high-tech lobby, which has rallied to the defense of eBay and RIM, these cases have nothing to do with "patent trolls," those unsavory characters who buy up obscure patents to extort money from innovative and law-abiding companies. Campana and Woolston were trained engineers who came up with genuine innovations for which
companies like Yahoo and AutoTrader are currently paying good money.

Moreover, the patents held by Stout and Woolston are entitled to the same legal protection whether they aim to build operating businesses around the patents or merely license them to others. The high-tech industry is full of companies that boast entire business units dedicated to licensing their patent portfolios. It is pure hypocrisy for the industry to argue that this is somehow illegitimate when done by small inventors.

What these cases are about is legal thuggery -- big companies, with their endless motions and discovery and appeals, abusing the legal system no less than the plaintiffs' attorneys they always complain about. The only way to end these wars of legal attrition is for courts to issue business-threatening injunctions that force the parties to the settlement table.

Although their legal circumstances are similar, there are marked differences in attitudes between the two locals at the center of these cases. The Don Stout I met with yesterday in Rosslyn is a seasoned patent attorney with enough patience to wait for the vindication he is confident will come. Tom Woolston, by contrast, appears consumed by his battle and frustrated by what he views as the absurdity of the process. By his own account, he's gone from being a forgiving "New Testament guy" to an Old Testament crusader seeking eye-for-an-eye justice.

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