# Microsoft at the ITC

Ben Klemens

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You may have seen the news that Microsoft is suing Tom Tom over details of the FAT32 filesystem. This is surprising in some ways, but in other ways not.

First, despite a huge amount of sabre-rattling, Microsoft has never been exceptionally aggressive about its patent portfolio, so it is surprising to see a direct lawsuit.

Tom Tom's devices (primarily GPS devices) run on a set of free and open source systems, and there exist patent pools regarding such software. However, although some people talk about using those patents to countersue Microsoft, we're a long way off from that happening—and you won't find anything on the OIN site stating that such a "nuclear option" is really an option. Remember, IBM, Sony, and others in the Network already have a slew of legal agreements with Microsoft regarding patent licensing, and any suit will have to conform to all of them.

As you may have heard, the tide is turning in the US domestic courts with regard to patents on intangibles like software. Since the *In re Bilski* decision, there have been a series of decisions from the Patent and Trademark Office (PTO) to deny the granting of patents that are about as tangible and "tied to a particular machine" as the FAT32 naming scheme that's under dispute here. [I wrote about in entry #009 a few blogs ago, if you'd like a refresher.] A typical court trial on a patent triggers an automatic re-examination by the PTO, and I sincerely don't think that these patents would stand up to re-examination in the current climate. That's my own judgment call, and there are no doubt others who believe that the winds are still blowing in a favorable direction for this patent, and it would sail through.

[There are other patents in the suit, including more physical elements like a computer controlling parts of the car, that would fare better. The FAT32 patent may thus just be the sort of piling-on of complaints that lawyers so love to do. If you think that's the case (and that determination is one of those tea-leaf–reading exercises), then you can ignore the *Bilski* discussion here, and focus on the many other issues of ITC procedure below.]

But it's a non-issue, because Microsoft is suing at the International Trade Commission (ITC). The ITC is not a part of the Department of Commerce (like the PTO), and it's not a part of the Judiciary, like the patent specialists on the Federal Circuit. It is its own little boutique, whose Chairman reports directly to the President, and that gives them a lot of latitude in deciding how they are going to set the rules for their administrative court.

And indeed, many of the rules are different from the norm. The most notable is speed: the ITC prides itself on finishing cases in months rather than years, and even in less time than it typically takes the PTO to do a serious re-examination. Also, the

punishment for infringement is harsher: in all cases at the ITC, the dispute is over an item being imported—like TomTom's GPS devices—that is allegedly violating U.S. patents, and the result of a ruling of infringement is that the infringing item can not cross U.S. borders. That is the real nuclear option, being that domestic courts typically impose a hefty cash fine rather than entirely shutting down a business.

The ITC digresses in many matters of law as well; see my ~~blog~~ op-ed column about the ITC's exceptionalism[1] at the Washington Post, primarily in the context of pharmaceuticals. From a policy perspective, I think it's a no-brainer that we want a law that produces consistent rulings regardless of whether the court hearing the case is at Commerce, the ITC, or the Federal Circuit. We'll never achieve perfect harmonization, but there's much reason to believe that the ITC's methods are much further from the norm than they need to be.

[In 750 words, I wasn't able to give any detail about the caselaw, so I got a stern email from a practicing patent attorney that my Post article was all wrong, because any infringement defense brought forth in the usual courts is valid at the ITC, and continued about how non-specialists are all ignorant and should be banned from writing about patent law. I have more space here, so I can tell you that the article refers to the ruling in Kinik Co. v ITC[2], which found that "the defenses available under 35 U.S.C. §271(g) [i.e., actions in the domestic courts] do not apply to actions under 19 U.S.C. §1337(a)(1)(B)(ii) [actions at the ITC]." ]

But from Microsoft's perspective, the ITC is the place to be. Because the ITC's rulings are lightning-fast and a product's punishment for infringing is summary banishment from the country, an ITC case has force in licensing negotiations that a plodding domestic case won't have.

As for whether their patents will be found to be valid and infringed, there's some academic work, e.g., by Bob Hahn and Hal Singer[3], that says that the ITC is more likely to find infringement than other courts. This is a pro-American bias, by the way, because in the majority of cases (like MSFT v TomTom), it's an American company whose patent is said to be infringed by a foreigner. Rulings regarding U.S. companies suing other U.S. companies (who may be producing products in China) show less lopsided outcomes.

On top of that, we really don't know what the ITC judges think of the shift regarding intangible patents. *Bilski* left tons of room for ambiguity, and we've seen time and time again that the ITC is comfortable setting its own course in these situations. So much wiggle-room in the rulings means that much room for different standards to evolve in the normal domestic courts and the ITC. I'm sure there are people out there, probably a few at Microsoft's legal department, who can make a strong argument that the ITC would hold the FAT32 naming patent valid even though the PTO and Federal Circuit may not.

[Now, if the ITC's rulings are too far afield, then TomTom can appeal to the domestic Federal Circuit, which will ponder the issue for a year or two, but through the entire process TomTom is losing millions. So for the long-run harmonization of infringement standards, it's relevant that ITC rulings are appealed in much the same manner as rulings by the PTO's administrative court, but that doesn't provide much succor

[1] http://www.washingtonpost.com/wp-dyn/content/article/2006/08/24/AR2006082401326.html

[2] http://www.ll.georgetown.edu/federal/judicial/fed/opinions/02opinions/02-1550.html

[3] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=950583

for TomTom in its immediate predicament.]

So it all points to a strong move by Microsoft to get its patents licensed by TomTom—and quickly. Pundits have noted that other devices are also no doubt violating the same patent (e.g., Amazon's made-in-China Kindle) but it's only TomTom that's being served with legal papers. The simple explanation is that Amazon is a U.S. company and TomTom is a Netherlands company, and so TomTom can be favorably sued in a court that is something of a wildcard relative to the traditional Federal Circuit system. Microsoft can use the ITC as a tool to force a licensing agreement from TomTom, but can't use the traditional domestic courts to the same advantage against U.S. companies.