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Request for Comments on Discretion to Institute Trials Before the Patent Trial and Appeal Board

Comment On: PTO-C-2020-0055-0001

Discretion to Institute Trials Before the Patent Trial and Appeal Board

Document: PTO-C-2020-0055-0409

Comment from Cory Trese

Submitter Information

Name: Cory Trese

Address:

3549 N HACKBERRY ST
BLOOMINGTON, IN, 47404

Email: CORY.TRESE@GMAIL.COM

Phone: 9376099644

Submitter's Representative: Cory J Trese

Organization: Trese Brothers LLC

General Comment

I oppose the U.S. Patent and Trademark Offices proposed regulations changing the nature of PTAB trials., Docket No. PTO-C-2020-0055.

As an independent developer I know first hand the economic damage that bad patents cause. These are not "monster stories" nor are they exaggerations by a small number of individuals. I have been threatened, harassed and intimidated by patent holders in attempts to force licensing agreements for patents that were later invalidated by the IPR process.

Wrongly granted patents are a major burden on the economy and drain on innovation. Every week, they're used to threaten small businesses with extortionate licensing demands especially people who make and use technology. To promote innovation, the Patent Office needs to improve the quality of granted patents, and to do that, we need the robust IPR system Congress designed.

The rights of technology developers and users are no less important than the rights of patent owners. When patents are evaluated in federal court, nearly half of them are found to be invalid.

As a result of patent trolling I have been forced to close one business and another barely survived the legal costs. I have attached several news articles about the LodSys situation that illustrate how real this threat is to small businesses in the US.

In 2011 when LodSys LLC began trolling small indie developers with their bogus patent, I was in the process of hiring two American workers. Instead, those plans were scrapped and that employee budget was wasted on legal services for a court case that LodSys ultimately never filed.

If the regulations are adopted, people and companies wont be able to challenge patents through the IPR process when they need to.

Please, do the right thing. Protect the robust IPR system Congress approved.

Attachments

Google Steps Up to Defend Android Developers

FOSS Patents_ Lodsyst

Lodsyst Patent Trolling Continues

FOSS PATENTS

THIS BLOG COVERS SOFTWARE PATENT NEWS AND ISSUES WITH A PARTICULAR FOCUS ON WIRELESS, MOBILE DEVICES (SMARTPHONES, TABLET COMPUTERS, CONNECTED CARS) AS WELL AS SELECT ANTITRUST MATTERS SURROUNDING THOSE DEVICES.

WEDNESDAY, JUNE 22, 2011

Lodsys asks for two more months to answer Apple's motion to intervene and keeps sending letters to Android developers

[Update] Lodsys now claims that the motion discussed in this blog post was "FILED IN ERROR" and has replaced it with a new one asking for only one more month, not two. I have published the corrected motion and the "FILED IN ERROR" notice in this new blog post.

[/Update]

Timing is key in legal processes. I just blogged about a court order denying Samsung early access to the iPhone 5 and the iPad 3, and the implications it may have on the timing of Apple's possible motion for a preliminary injunction.

The week before last, Apple filed a motion to intervene in Lodsys's lawsuit against seven app developers. I was hoping for Apple's intervention to be allowed very soon, but we may all have to wait. Lodsys would have had to respond to Apple's motion by June 27, 2011 (Monday) but just asked the court for additional time -- for two months, in fact. Lodsys would like to have time until including August 27, 2011.

I have published Lodsys's motion on Scribd.

In that motion, Lodsys claims that "[t]his extension is not for purposes of delay" (though it will undoubtedly have that effect) and claims to have Apple's blessings:

Counsel for Lodsys conferred with counsel for Apple and Apple does not oppose the relief [i.e., the extension] requested herein.

Formally, this still has to be approved by the court. Two months appears excessively long to me, but since Apple doesn't object, the judge may rubberstamp this motion. However, it's also possible that the judge grants less time, such as only one additional month rather than two. And no matter how much time the judge grants, Lodsys may not wait until the very end.

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- ▶ 2013 (493)
- ▶ 2012 (628)
- ▼ 2011 (335)
 - ▶ December (37)
 - ▶ November (36)
 - ▶ October (30)
 - ▶ September (42)
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At any rate, it will take time before Apple is (hopefully) admitted as an intervenor. The problem is that the seven app developers who have been sued and, meanwhile, formally summoned will now have to react to Lodsys's complaint. Based on Lodsys's request for such a long extension, it may be possible for the sued app developers to also get two more months to reply. But that's not certain.

The biggest problem is that app developers need to know from Apple and Google how they should handle Lodsys's missives. Lodsys continues to send out letters demanding royalties. Whoever gets contacted by them needs to know whether the platform makers will provide blanket coverage to app developers. Otherwise, app developers may be well-advised to sign a reasonable license agreement as a smarter alternative to the enormous costs of U.S. patent litigation.

It's possible that part of the reason for Lodsys requesting this additional time is that they're secretly negotiating with Apple and Google. I said before (more than once, in fact) that Lodsys has a pretty good chance of getting paid either by the platform makers or by many little app developers.

Lodsys continues to attack Android developers

In May it already became known that Lodsys also sent out letters to Android app developers, and one of the accused products in Lodsys's lawsuit against app developers is Labyrinth for Android.

Yesterday, Cory Trese, a developer of Android games, reported on Twitter that he just received a FedEx transmittal from Lodsys. Here are some of his tweets -- Cory describes his views and feelings quite vividly:

#1: Just got a big package of legal BS from LodSys LLC about Star Traders RPG for #Android. I guess using @GoogleMobile SDK = Infringing ?

#2: @AndroidPolice Did all #Android devs wake up to FedEx man w/ legal threats and a big package of patent print outs? I up late doing updates!

#3: @AndroidPolice LodSys LLC claims Star Traders RPG is infringing on U.S. Pat. No. 7,222,078 they sent me screenshots of my naughty #Android

#4: @DroidGamers I think my house is the FedEx man's first stop. I saw the Marshall, TX Lodsys LLC return and thought "oh here we go again!"

[Update] Lodsys is in an administrative disarray. Not only did it replace its motion (now asking for one more month, not two) but it also contacted Cory and asked him to send the original letter back -- he will get a new one, so the threat is still there, and as Cory noted on Twitter, they didn't do that analysis of his game by coincidence. For the latest in this context, please see this new blog post, which quotes four new tweets from Cory. **[/Update]**

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Lodsys corrects its motion for extension of time: ...

Lodsys asks for two more months to answer Apple's ...

Samsung has to wait for iPad 3 and iPhone 5, but A...

Novell challenges Lodsys's two core patents as Lod...

Oracle expert says Google owes between 1.4 and 6.1...

Apple amends complaint against Samsung, asserts mo...

Oracle is open about wanting billions of dollars f...

Apple and Google may be contractually precluded fr...

No more doubt: Oracle wants billion-dollar amount ...

Apple feels "harassed" by "copyist" Samsung's dema...

Apple and Nokia settle patent dispute -- see I tol...

Two more lawsuits against Lodsys: by The New York ...

All four Lodsys patents now also challenged in Sou...

Lodsys sues another ten companies including Adidas...

Apple enters the fray against Lodsys, files motion...

So far, nothing is known about Google's position on the Lodsys issue. Apple didn't do as much as I'd have liked them to do, but at least they wrote a letter to Lodsys and shared it with many app developers, and they filed that motion to intervene in the lawsuit. But Google hasn't said or done anything to the best of my knowledge. That's very disappointing.

Android app developers need to know how to respond to Lodsys's letters. Let me again quote Cory Trese, the developer of Star Traders:

With this tweet he asked Google's outspoken iPhone hater Tim Bray for guidance:

@timbray Advice for concerned #Android devs? You told me "Google will support Android developers" at #io2011 boot camp. Was it real? Lodsys!

And this point is also very well-taken:

For me I suppose this Lodsys LLC event will be a major determiner in how I feel about Google and Apple regarding developer relations/support

I support Cory and everyone else who feels that way. Apple and Google: it's long overdue that you tell your developer communities how to deal with Lodsys's letters and the risk of ruinous U.S. patent litigation. Please speak out. They can't wait until the court in Texas maybe grants Apple's motion for an intervention in late August or September. They need guidance right here and now.

If Apple and Google continue to remain silent, I may soon have to recommend to app developers to take a license from Lodsys on reasonable terms. I'd hate to do that. Far be it from me to support a troll. It's just about what the responsible choice is for each developer under the circumstances. None of them should be sued into bankruptcy. That's my concern. It should also be Apple's and Google's concern, even though their hands may be tied in some ways due to the agreement under which they licensed Lodsys's patents (almost certainly from Intellectual Ventures while it owned those patents, not from Lodsys itself).

I hope Android app developers who got contacted by Lodsys will make contact with each other the way many iOS devs have already connected.

If you'd like to be updated on the smartphone patent disputes and other intellectual property matters I cover, please subscribe to my RSS feed (in the right-hand column) and/or follow me on Twitter @FOSSpatents.

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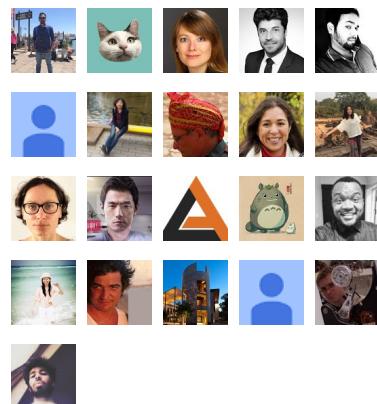
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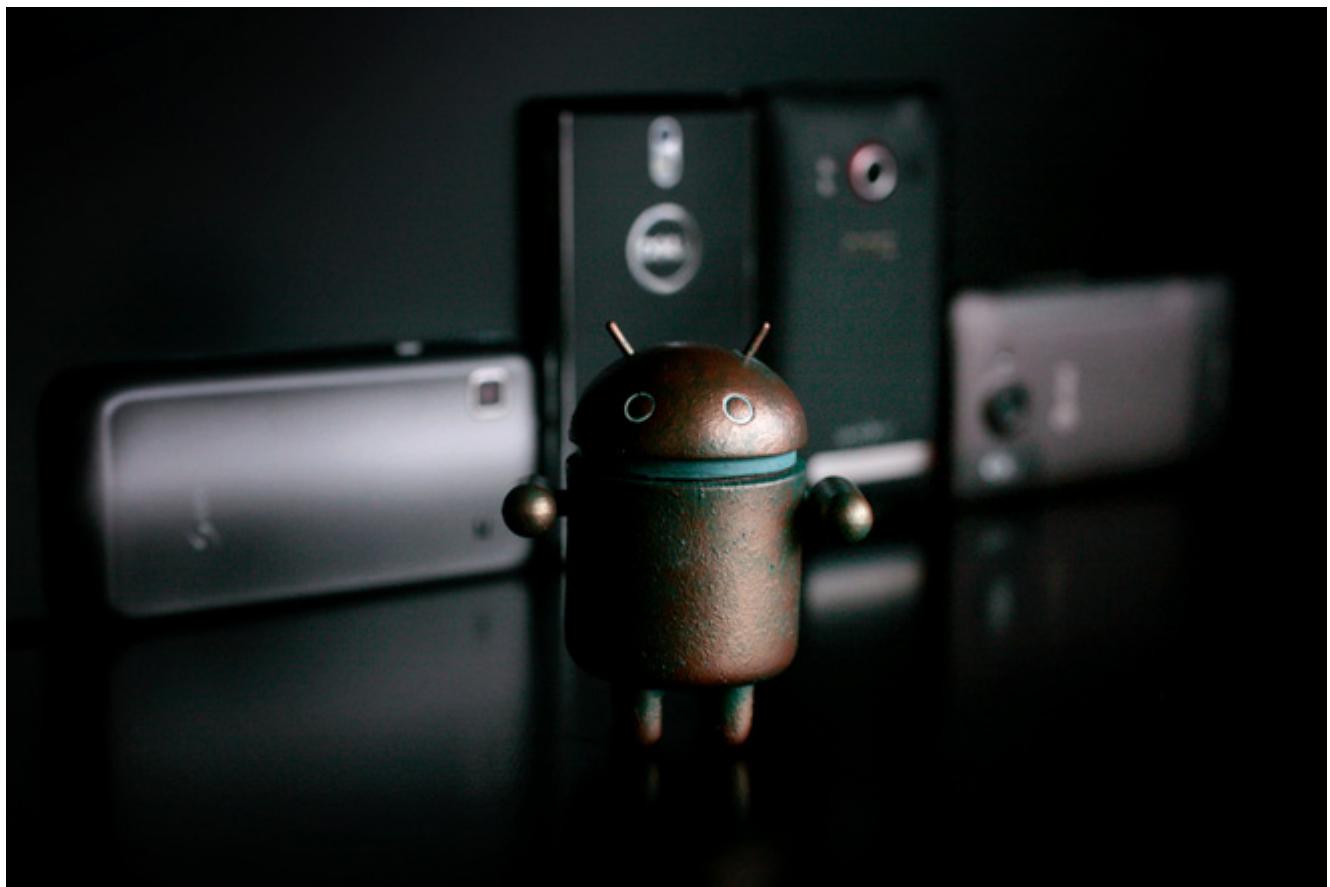
Florian Mueller is an app developer who used to be an award-winning intellectual property activist. His 30 years of software industry expertise span different market segments (games, education, productivity and infrastructure software), diverse business models, and technical and commercial areas of responsibility. In recent years, Florian advised a diversity of clients on the patent wars surrounding mobile devices, and on their economic and technical implications. (In order to avoid conflicts of interest, Florian does not hold or initiate transactions in any technology stocks or derivatives thereof.) He is now developing games for smartphones and tablet computers.

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MIKE ISAAC GEAR 08.13.2011 02:20 AM

Google Steps Up to Defend Android Developers From Patent Lawsuit

Google has intervened in an ongoing intellectual property dispute between smartphone application developers and a patent-holding firm, Wired.com has learned, marking the Mountain View company's first public move to defend Android coders from a patent troll lawsuit that's cast a pall on the community. The company says it filed a request with the United States [...]



Google has intervened in an ongoing intellectual property dispute between smartphone application developers and a patent-holding firm, Wired.com has learned, marking the

Mountain View company's first public move to defend Android coders from a patent troll lawsuit that's cast a pall on the community.

The company says it filed a request with the United States Patent and Trademark office Friday for reexamination of two patents asserted by East Texas-based patent firm Lodsyst. Google's request calls for the USPTO to assess whether or not the patents' claims are valid.

"We've asked the US Patent Office to reexamine two Lodsyst patents that we believe should never have been issued," Google senior vice president and general counsel Kent Walker told Wired.com in a statement. "Developers play a critical part in the Android ecosystem and Google will continue to support them."

Lodsyst is currently suing 11 smartphone app developers for allegedly infringing the two patents, U.S. [7,222,078](#) and [7,620,565](#). Lodsyst claims its patents cover the use of in-app payments technology, which allows users to carry out transactions within the context of an app itself. Countless app developers use in-app payments technology in their applications.

Lodsyst CEO Mark Small did not respond to an e-mail, and the company did not immediately respond to a telephone inquiry from Wired.com on Friday evening, after Google filed its request.

If Google's request for reexamination is granted, it could end up saving the developers and development studios -- many of whom are composed of a handful of staffers -- from large litigation fees.

"Reexaminations are often times a tool used to stay ongoing litigation," said Julie Samuels, staff attorney for the [Electronic Frontier Foundation](#), a non-profit digital rights advocacy group. "It's much, much cheaper than federal litigation, which on average costs between two and five million dollars."

Since Lodsyst first began targeting application developers months ago, the patent saga has been long and messy. The firm originally dispatched a series of [cease and desist letters](#) to iOS and Android app developers in May. The letters threatened legal action within a 21 day period if developers did not negotiate to pay Lodsyst a licensing fee for the use of the technology. The

company is now suing 11 defendants, ranging from small app development studios to major game companies like Atari, Square Enix and Electronic Arts.

Dan Abelow, the former owner of the patents who sold them in 2004, told Wired.com he was unable to comment on the matter.

Lodsys' actions are what many intellectual property experts refer to as "patent trolling" -- the practice of using patents for little else outside of suing other companies for damages or coaxing them into licensing agreements.

Both Google and Apple have licenses for Lodsys' patents, so Lodsys has been going after third-party developers instead. But the potential impact on Apple and Google is clear enough. Whether or not Lodsys wins its lawsuit, the threat of potential litigation for iOS and Android developers may cause them to think twice before creating apps for the two mobile platforms.

"In this case, the strategic interest of Apple and Google is to make app developers happy, or at least comfortable," said Florian Mueller, an intellectual property analyst who has covered the lawsuit exhaustively in his blog. (Defendants Rovio and Illusion Labs declined comment.)

But despite the fact that two Android developers were named as defendants -- Rovio, the Finnish development studio behind Angry Birds, and Illusion Labs, a Swedish company that produces the game *Labyrinth* -- Google has remained conspicuously quiet on the issue until now, rankling many in the development community.

Apple, in contrast, has attempted to insert itself into the Lodsys lawsuit on behalf of developers. On Monday, Apple filed a brief claiming it has the right to intervene in the case because Apple provides the in-app billing technology to its developers and retains its own license for the patents in question. Therefore, Apple argues, its license extends to coders who use Apple's technologies as well.

Google's request for reexamination is the company's first major public action backing up its developer community. If a reexamination is granted, the patents in question could be amended to the extent that they won't affect developers.

"It's rare that an entire patent is invalidated through the USPTO," said Samuels. "More likely is that the claim of the patent will be narrowed."

Google confirmed they filed this request "inter partes," which essentially means Google will be involved in the proceedings throughout the entire process.

"Inter partes requests are usually more thorough," said Samuels. Ninety-five percent of "inter partes" reexamination requests filed since 1999 have been granted by the USPTO.

Of course, even if the USPTO grants the reexamination request, there's no guarantee that the court will grant a stay.

"Courts have inconsistent track records of granting stays of litigation," Samuels said.

Especially in the eastern district of Texas -- home to a federal court that is often favorable to patent litigation plaintiffs -- where the lawsuit was filed. Eastern district courts grant motions to stay litigation pending reexamination around 20 percent of the time, according to a 2009 study conducted by Matthew Smith, senior counsel at Foley and Lardner LLP.

That could complicate things for the developer defendants, and potentially continue to cost them money for ongoing litigation expenses.

Still, Google's request marks an entirely different strategy than Apple's, and could potentially pay off for all parties involved.

Except, of course, for Lodsys.

See Also:- [Patent Firm Targets Lawsuit at Angry Birds](#)

- [Patent Firm Fires Lawsuit at Android, iPhone Programmers](#)
- [Apple Defends App Programmers in Patent Dispute](#)
- [Patent Firm Explains Why It Targets Developers, Not Apple](#)
- [Patent Firm Shakes Down iPhone App Programmers](#)



Mike is a Wired.com staff writer covering Google and the mobile beat. He's written on a number of different tech topics, ranging from startups to social media.

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Lodsys Patent Trolling Continues - What Should Android Developers Do, Google?

15



David Ruddock

Jun 22, 2011

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Update: Cory Trese's infringement notice was apparently sent to him [by mistake](#) - whatever that means. He received a call from Lodsys stating they'd like all the materials they sent returned. What's happened? Who knows, but as someone in our team chat room sarcastically stated - maybe they forgot a zero somewhere.



@corytrese

Cory Trese

@AndroidPolice LodSys LLC just called and said that they sent me the package by mistake and that they would like it back. They said "sorry"

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We received this tweet from Cory Trese yesterday, developer of a game called Star Traders 2, in regard to a settlement offer he received from [Lodsys LLC](#) (a [patent troll shell corporation](#)):



@corytrese

Cory Trese

@AndroidPolice LodSys LLC claims Star Traders RPG is infringing on U.S. Pat. No. 7,222,078 they sent me screenshots of my naughty #Android

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This isn't a friendly letter. In fact, it's probably downright terrifying as a prospect to most developers, and understandably so. Lodsys has essentially been sending extortion letters to developers claiming they infringe on a patent [that probably isn't even related to smartphones](#). The claim, at its core, asserts that Lodsys's patent (No. 7,222,078) encompasses most forms of in-app purchasing on any smartphone platform.

The patent itself clearly has nothing to do with in-app purchases on smartphones. But, there is an argument it could be applied that way (what that argument is, I don't know).

When you receive a settlement offer, you're basically given two choices: accept the offer, or get sued. The offer usually has a limited acceptance window (2 weeks, a month - whatever), so as to light a virtual fire under scared developers' rear-ends. The offer being given to developers that we've seen so far

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requires a lump sum payment (think thousands of dollars) - though royalty offers could be made as well, in the case of more profitable apps.

Without assistance (or at least, reassurance) from Google, individual developers are in a jam - one they should never have been in to start with. Developers are, as [Mr. Trese insightfully put it](#), being sued for little more than using the Android SDK. That's not right. Google knows it's not right - and it needs to make a statement. This isn't just a legal issue, it's people's livelihoods being blindsided by one of the truly abominable blights upon the American patent system.

So, Google, let's make sure no one has to pay up or lawyer up without a damn good reason - do what's right and protect the developer community Android would be nothing without.

TAGS IN-APP PURCHASES | LAW | LODSYS | PATENT INFRINGEMENT | TROLL

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