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"Make the trolls pay"

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What is a patent troll?

- Patent troll:

    – Does not practice or commercialise patented inventions

    – Acquires and/or holds patents solely for enforcing and licensing

Trolling in the US (1)

- In the US, 'trolling' is booming

    - 2007: 24.5 % of patent infringement lawsuits by trolls

    - 2011: 40%

    - 2012: 56% (R. Feldman, T. Ewing, S. Jeruss, 'The AIA 500 Expanded: The Effects of Patent Monetization Entities', UCLA Journal of Law & Technology 2013, Volume 17, Issue)

- Procedural environment:

    - Huge litigation cost: average cost of patent infringement lawsuit in 2009 was $5.5 million (2009 AIPLA Economic Survey)

    - Huge damage awards (jury, punitive damages)

    - Risk of Injunction

Trolling in the US (2)

- 75 % of the cases is settled:

    - Due to costs involved and risk of injunction, defendant companies often find it more cost effective to settle, even if they do not believe that infringement has occurred, rather than proceed through expensive and uncertain litigation

    - At too high a price ("hold-up")

- *"The folks that you're talking about [Patent Trolls] are a classic example; they don't actually produce anything themselves. They're just trying to essentially leverage and hijack somebody else's idea and see if they can extort some money out of them... [O]ur efforts at patent reform only went about halfway to where we need to go and what we need to do is pull together additional stakeholders and see if we can build some additional consensus on smarter patent laws."* (President Obama, 14 February 2013)

- Innovation Act passed Congress but stalled in Senate on 21 May 2014 (lobby of trial lawyers and pharma lobby)

Trolling in Europe?

- Trolls In Europe?

  - Less favorable environment than in US

    - Cost of litigation is much lower (less leverage)

    - Damage awards (no jury) are lower (less leverage)

  - But trolls are becoming more active in Europe too

  - Be prepared !

Do what ? (1)

- Check vendor agreements

  - Indemnification provision?

  - Procedure to be followed for indemnification

  - Indemnification is capped?

- Have IP counsel review the patents and the allegedly infringing product/process

  - Very often trolls patents are 'bad' patents

  - Design around possible?

  - Obtain an opinion of IP counsel (to avoid 'bad faith' scenario) on invalidity and/or non-infringement

Do what ? (2)

- Extent of potential damages/royalties

  - If cost of licensing offer exceeds cost of litigation and patents are bad patents indeed, it might be worth fighting

  - Fighting will also help in keeping other trolls at a distance

- Explore whether other companies are prepared to cooperate /joint defense arrangements

  - Cooperate in areas such as prior art searching, development of invalidity and non-infringement defenses

  - Divide work and share expenses

  - Usually leads to stronger invalidity defenses because of greater resources

Telenet / Rovi (1)

- Endless (vague) discussions:

  - *"Rovi's patent portfolio in Belgium includes more than 225 issued patents and pending applications, and we have provided you with a complete list of this portfolio previously. We have not attempted to analyze each and every patent or application in that portfolio as we believe that is up to Telenet to establish its eventual need to take a license under the entire portfolio."*

  - *"Given the breadth and depth of our portfolio, we do not believe it is necessary for Rovi to illustrate infringement for each and every relevant patent in our portfolio."*

- (in the meantime) analysis of patent portfolio:

  - Belgian portfolio less substantial than, e.g. Dutch, UK, German portfolio's

  - Only a few patents are relevant but good invalidity and/or non-infringement arguments

  - No license required

- Just before the summer Rovi starts patent infringement proceedings

(19)

Europäisches Patentamt
European Patent Office
Office européen des brevets

(11) **EP 1 327 209 B1**

(12) **EUROPEAN PATENT SPECIFICATION**

(45) Date of publication and mention
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27.08.2008 Bulletin 2008/35

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G06F 17/30 (2006.01)

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PCT/US2001/031518

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WO 2002/031701 (18.04.2002 Gazette 2002/16)

(54) **SYSTEMS AND METHODS FOR PROVIDING STORAGE OF DATA ON SERVERS IN AN ON-DEMAND MEDIA DELIVERY SYSTEM**

SYSTEME UND VERFAHREN ZUR BEREITSTELLUNG VON DATENSPEICHERN IN SERVERN IN EINEM MEDIEN-AUF-ANFRAGE LIEFERSYSTEM

SYSTEMES ET PROCEDES DE STOCKAGE DE DONNEES SUR LES SERVEURS D'UN SYSTEME DE TRANSMISSION DE MEDIA SUR DEMANDE

(84) Designated Contracting States:
AT BE CH CY DE DK ES FI FR GB GR IE IT LI LU MC NL PT SE TR

(30) Priority: **11.10.2000 US 239407 P**
20.11.2000 US 252171 P
21.02.2001 US 270351 P

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16.07.2003 Bulletin 2003/29

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EP-A- 0 605 115   EP-A- 0 944 257
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- S. GONDOW, T. NAGATA, T. IWAMOTO, N. NISHIO, H. TOKUDA: "The Architecture of Communication Migration and Media State Management for Distributed Applications on Wearable Network" 61ST NATIONAL CONFERENCE OF INFORMATION PROCESSING SOCIETY OF JAPAN, [Online] 3 October 2000 (2000-10-03), pages 1-2, TOKYO, JP Retrieved from the Internet: URL:http: //www.ht.sfc.keio.ac.jp/move/publ ications/ papers/gon-ipsj2000a.pdf> [retrieved on 2005-06-23]
- F. TERAOKA, M. TOKORO: "Host Migration Transparancy in IP networks: The VIP Approach" ACM SIGCOMM - COMPUTER COMMUNICATION REVIEW, January 1993 (1993-01), pages 45-65,

Claims

1. An interactive media-on-demand system, comprising:

    a plurality of user equipment devices that are each configured to present media-on-demand programming delivered from a remote media-on-demand server, configured to allow a user to request to freeze delivery of a media-on-demand program, and configured to allow the user to request to have the delivery resumed from the point at which the delivery was frozen; and the remote media-on-demand server being configured to deliver media-on-demand programming to each of the plurality of user equipment devices, configured to freeze said delivery of the media-on-demand program when the remote media-on-demand server receives a request to freeze said delivery from a first one of the plurality of user equipment devices, and **characterised in that** it is configured to resume said frozen delivery at the point at which said delivery was frozen to a second one of the plurality of user equipment devices when a request to resume delivery is received from the second user equipment device.

A.   There is a server and a plurality of set-top-boxes

B.   The server can freeze delivery of a media-on-demand program when it receives a request from a first set-top-box

C.   The server can resume delivery to a second set-top-box when a request is received from that device

D.   The delivery will be resumed at the point at which said delivery was frozen

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Telenet / Rovi (5)

- Defense:

  – Patent is not valid

  – Patent is not infringed

  – Seeking an injunction is an abuse

- Counterclaim:

  – sending warning letters without specifying which claims of which patents are infringed by which acts is an unfair trade practice
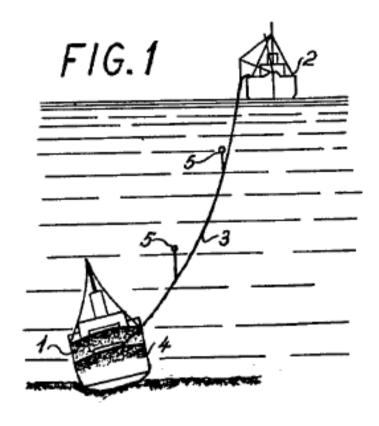
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- Novelty: « *An invention shall be considered to be new if it does not form part of the state of the art.* »

- « *The state of the art shall be held to comprise everything made available to the public by means of a written or oral description, by use, or in any other way, before the date of filing of the European patent application.* »

- Absolute condition:

    – Wherever in the world
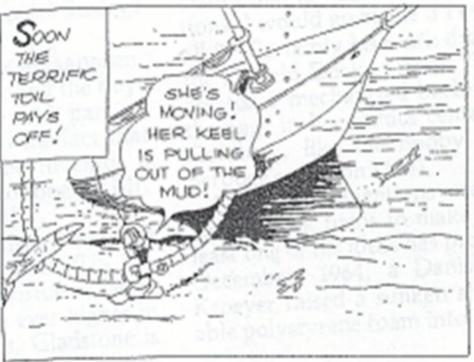
    – Whatever language

NL 6514306
"buoyant bodies 1 are inserted into a sunken
vessel 4 through a tube 3 from a salvage ship 2."

FIG.1

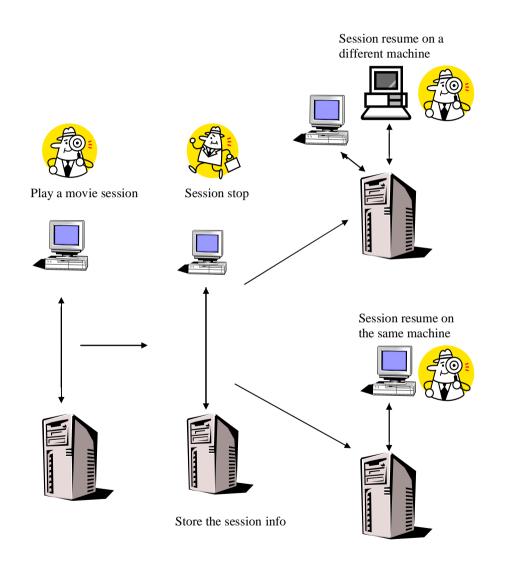'The Sunken Yacht', © 1949 Walt Disney

Telenet / Rovi (9)

Play a movie session

Session stop

Store the session info

Session resume on a different machine

Session resume on the same machine

Bo Zou, "Mobile ID Protocol: A badge-activated Application level Handoff of a multimedia streaming to support user mobility", August 2000, p. 10

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- President of Antwerp Commercial Court decided (3 April 2012) that:

  – patent is invalid

  – Rovi had comitted an unfair trade practice and issued an injunction prohibiting Rovi from (i) sending cease-and-desist letters in which it does not specify which claims of which patents it deems to be infringed by which acts and (ii) thereafter refusing to clarify when requested to do so by Telenet under a penalty of 250.000 EUR per violation of the order

  – seeking an injunction is not an abuse

- Rovi appeals but withdraws the appeal in August 2014

- Costs?

Art. 2. Met uitzondering van de aangelegenheden bedoeld in artikel 4 van dit besluit wordt de rechtsplegingsvergoeding voor geschillen die betrekking hebben op in geld waardeerbare vorderingen, vastgesteld als volgt:

	Basisbedrag	*Minimumbedrag*	*Maximumbedrag*
Tot 250,00 €	*150,00 €*	*75,00 €*	*300,00 €*
Van 250,01 € tot 750,00 €	*200,00 €*	*125,00 €*	*500,00 €*
Van 750,01 € tot 2500,00 €	*400,00 €*	*200,00 €*	*1.000,00 €*
Van 2.500,01 € tot 5.000,00 €	*650,00 €*	*375,00 €*	*1.500,00 €*
Van 5.000,01 € tot 10.000,00 €	*900,00 €*	*500,00 €*	*2.000,00 €*
Van 10.000,01 € tot 20.000,00 €	*1.100,00 €*	*625,00 €*	*2.500,00 €*
Van 20.000,01 € tot 40.000,00 €	*2.000,00 €*	*1.000,00 €*	*4.000,00 €*
Van 40.000,01 € tot 60.000,00 €	*2.500,00 €*	*1.000,00 €*	*5.000,00 €*
Van 60.000,01 € tot 100.000,00 €	*3.000,00 €*	*1.000,00 €*	*6.000,00 €*
Van 100.000,01 € tot 250.000,00 €	*5.000,00 €*	*1.000,00 €*	*10.000,00 €*
Van 250.000,01 € tot 500.000,00 €	*7.000,00 €*	*1.000,00 €*	*14.000,00 €*
Van 500.000,01 € tot 1.000.000,00 €	*10.000,00 €*	*1.000,00 €*	*20.000,00 €*
Boven 1.000.000,01 €	*15.000,00 €*	*1.000,00 €*	*30.000,00 €*

(...)

Art. 3. Voor geschillen die betrekking hebben op niet in geld waardeerbare vorderingen bedraagt het basisbedrag van de rechtsplegingsvergoeding 1.200 euro, het minimumbedrag 75 euro en het maximumbedrag 10.000 euro.

Telenet / Rovi (12)

- Article 14 Directive of 29 April 2004 on the enforcement of intellectual property rights Directive:

  "*Member States shall ensure that <u>reasonable and proportionate legal costs</u> and other expenses incurred by the succesful party shall, as a general rule, be <u>borne by the unsuccesful party</u>, unless equity does not allow this.*" (underling added)

- In a decision of <u>26 Janauary 2015</u>, the Antwerp Court of Appeal refers a preliminary question to the Court of Justice of the European Union:

  "*Do the terms 'reasonable and proportionate legal costs and other expenses' in Article 14 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights ('the Enforcement Directive') preclude the Belgian legislation which offers courts the possibility of taking into account certain well-defined features specific to the case and which provides for a system of varying flat rates in respect of costs for the assistance of a lawyer?*"
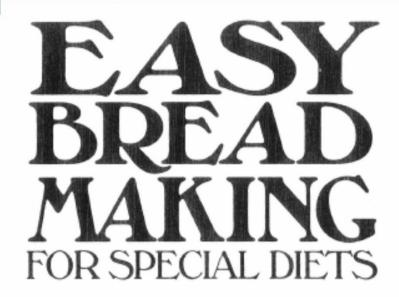
Conclusion – Weapons against trolls

- Trolls have to be specific in their claims

- Injunction an abuse?

  – Courts are getting more sensitive about abuse IP rights

  – ECJ, 16 July 2015, C-170/13, *Huawei Technologies*

  – Pres. Commercial Court Antwerp, 19 July 2013, Sabam / Tomorrowland

- Costs

- Validity

Claims

1. A method of manufacturing a doughnut, comprising two spraying steps in which a proven yeast dough mixture product is coated with cooking fat, and an intervening baking step.

EASY BREAD MAKING

FOR SPECIAL DIETS

Wheat-free, Milk- and Lactose-free,
Egg-free, Gluten-free, Yeast-free, Sugar-free,
Low Fat, High or Low Fiber, Low Sodium,
Diabetic, and Low Calorie

Use your bread machine,
food processor, or mixer to make the bread
YOU need quickly and easily

By
Nicolette M. Dumke

Uitsmijter (3)

Heart Healthy Doughnuts

Ingredients:

1 batch of any sweet roll dough, pages 217 to 221
Cooking oil spray
1 batch of any doughnut topping or frosting,
   pages 228 to 230 (optional)

Cycle: Dough cycle. When the cycle is finished, roll the dough out to about ½" thickness on a lightly oiled board with an oiled rolling pin. Cut into doughnuts with a floured doughnut cutter. Lightly oil a baking sheet or spray it with cooking oil spray. Transfer the doughnuts to the sheet with a spatula and spray them lightly with cooking oil spray. Let them rise in a warm place until double, about 30 to 40 minutes. Bake at 375°F for 10 to 15 minutes, or until the doughnuts are just beginning to brown. Spray both the top and bottom of each doughnut lightly with cooking oil spray and immediately shake them in one of the toppings below. Or, if you wish to frost them, allow them to cool before frosting them with one of the frostings below.

Nutritional Analysis: Essentially the same as for the dough used. Divide the whole batch values for the dough used by the number of doughnuts made to get the values for each doughnut.

Diabetic exchanges per doughnut: Divide the number of exchanges for a whole batch of the dough used by the number of doughnuts made to get the exchanges per serving.