

Vonage Goes To Work Redesigning Patents

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Notwithstanding the Federal Circuit's impressive history of reversing lower court decisions, Internet phone carrier Vonage Holdings Corp. can't put all its eggs in the appeals system basket, says a lawyer following the high-profile patent case.

An emergency stay on an injunction barring the troubled broadband telephone provider from soliciting new business will do little to reassure new or existing customers in the long run, said **Salt Lake City-based IP litigator Terry Welch**. Besides, the stay may expire in as little as a week.

The only viable option for Vonage now, said Welch, was to reinvent the technology in dispute.

"The only option for them is to design around the patent and find a non-infringement alternative to its technology," he said.

Vonage rode a rollercoaster last Friday when it won a reprieve in the U.S. Court of Appeals for the Federal Circuit in Washington D.C. just hours after a district judge in Virginia banned it from signing up new customers, pending an appeal of its patent dispute with rival Verizon Services Corp.

In a statement released Monday, the troubled company said it had high hopes of winning on appeal and assured its customers everything was business as usual.

It said it would continue to provide digital telephone service to existing customers indefinitely by paying a quarterly royalty of 5.5% and, following the terms of the district court order, posting a bond of \$66 million to secure Verizon's damages judgment.

"Vonage is pleased that existing customers will not experience any interruption in service," it said.

But the company did add, almost as an aside, that its team of technology buffs was busy working on redesigning its online phone system to get around the patents at issue, just in case.

On March 22 a jury found Vonage had infringed three of Verizon's patents for Internet phone technology and should pay \$58 million in damages.

Last Friday morning the district court ruled that in the interests of maintaining the status quo pending an appeal of the jury's verdict, a partial injunction allowing Vonage to service only its existing 2 million customers was warranted.

But in the fickle digital telephone market in which it operates, where customer loyalty is unheard of, Vonage argued, the status quo could be preserved only if the company continued to find new customers.

Welch, of Parr Waddoups Brown Gee & Loveless, said the Federal Circuit overturned district court decisions at a rate of 40%, the highest rate of any federal appeals court.

The immediate case before it now, whether to stay the injunction until the hearing of the appeal, will turn on which version of the status quo the circuit judges like best, said Welch.

"It does appear at first glance that existing customers is the status quo. Vonage's argument is credible, but Verizon's view of the status quo is that Vonage should not even be allowed to service existing customers, because that would result in more infringing," Welch said.

"If the injunction stays exactly as it is now Vonage will have to find a way to survive on its existing customer base, which looks pretty bad based on what Vonage has been saying," he added.

Vonage will argue in its appeal that the district court erred in its patent claim construction and that Verizon's case as an attempt to cripple Vonage, a trailblazer in the Internet phone market.

"This case is an attempt to do in the courtroom what Verizon could not succeed in doing in the marketplace—which is to put Vonage out of business," the company said in its statement.

But the company cannot rely on its confidence in the courtroom if it wants to survive in the face of increasing competition, said Welch.

"If the appellate court does not reverse the decision they're going to have to find a way to design around the patents. They'll have to find a better mouse-trap, essentially," he said.

"Maybe they will come up with a new and better product. The question is: Can they do it the same way and not infringe?"

The Federal Circuit has given Verizon a week to respond to the emergency stay.

Verizon is represented in the suit by McGuireWoods LLP and Winston & Strawn LLP. Vonage is represented by Steptoe & Johnson LLP.

That case is Verizon Services Corp. et al. v. Vonage Holdings Corp. et al., case number 06-cv-00682, in the U.S. District Court for the Eastern District of Virginia.

--Additional reporting by Marius Meland and Sara Stefanini

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