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Outed 'Troll Tracker' Blogger Draws Ire Of IP Lawyers

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Trolls pillaging our economy, a bounty placed on our supposed hero's head and his adversaries threatening to reveal his secret identity to the world — all the story is missing is a few explosions and Julia Roberts as the romantic lead, and it might have the makings of a summer blockbuster.

However, in reality, the recent outing of the "patent troll tracker" blogger as Rick Frenkel, **Cisco** Systems Inc.'s director of intellectual property, has raised concerns from lawyers representing "patent trolls" that Frenkel used his anonymity to make illegally disparaging remarks against his company's enemies.

John Ward Jr. and Eric M. Albritton, attorneys who have built their practices on representing patent-holding companies against multinational powerhouses in the U.S. District Court for the Eastern District of Texas, have fired back with libel suits against Frenkel and Cisco for comments he made on his blog about a lawsuit the attorneys filed against his employer.

Frenkel's blog, trolltracker.blogspot.com, garnered a readership that reached 100,000 hits in the six months ending on Jan. 30, according to the site.

On his blog, he describes himself as "just a lawyer, interested in patent cases, but not interested in publicity."

One of Frenkel's targets on the site was plaintiffs attorney Raymond P. Niro and his Chicago-based firm, **Niro Scavone** Haller & Niro, which has successfully represented several patent-holding companies.

Frustrated with the sourceless attacks, Niro offered a $5,000 reward for the patent troll tracker's identity in December. The bounty had reached $15,000 before Frenkel outed himself on his site on Feb. 23, citing an anonymous e-mail he received which threatened to unmask him "in a way I wouldn't be happy about," Frenkel said in his outing post.

Once Frenkel's identity was revealed, the legal tussle began in Texas's District Court of Gregg County against Frenkel and Cisco.

Ward's suit against Frenkel was actually first filed in November 2007 against John Doe because the blogger's identity remained secret at the time. Once Frenkel revealed himself, Ward filed an amended complaint to name Cisco and its IP head.

Albritton then followed with his own defamation suit this month.

Both cases involve comments made by Frenkel regarding a patent infringement suit filed against Cisco by ESN LLC, a company represented by Ward and Albritton.

In a Frenkel post on Oct.17, he noted the ESN suit in a post titled "Troll Jumps the Gun, Sues Cisco Too Early."

Citing Dennis Crouch's popular Patently-O blog, Frenkel said ESN sued Cisco for patent infringement in the Eastern District of Texas on Oct. 15 even though the patent was not issued until Oct. 16.

That would have meant the Texas court lacked jurisdiction over the suit because ESN did not own the property right when the suit was filed.

Cisco, meanwhile, filed a declaratory judgment suit on Oct. 16 in the less patent-friendly jurisdiction of the U.S. District Court for the District of Connecticut, which would have had the upper hand to hear the case had the Texas case been annulled.

Then in Frenkel's post on Oct. 18, he said he received anonymous e-mails that the docket in the ESN v. Cisco case in Texas "had been altered," with the docket showing Oct. 16 as the filing date for the complaint. He confirmed that "that's exactly what happened."

"Only the EDTX court clerk could have made such changes," the post said. "Of course, there are a couple of flaws in this conspiracy," noting that Albritton had signed a civil cover sheet stating that the complaint was filed on Oct. 15.

"You can't change history, and it's outrageous that the Eastern District of Texas is apparently, wittingly or unwittingly, conspiring with a nonpracticing entity to try to manufacture subject matter jurisdiction," Frenkel said. "This is yet another example of the abusive nature of litigating patent cases in the banana republic of East Texas."

James A. Holmes, an attorney for Albritton, said Frenkel's comments were off-base. He said in a quirk of the Eastern District's filing system, the civil cover sheet in the case was filed on the 15th, which was necessary to receive a cause number to file a complaint.

Then, for strategic reasons, the suit was filed "at the stroke of midnight" on the 16th. However, the court clerk originally indicated that the suit had been filed on the 15th.

Holmes said the court clerk simply made a correction in saying the suit was filed on the 16th.

"Frenkel falsely accused Eric of conspiring to commit a crime, and that's absolutely false," Holmes said.

Dave Maland, the clerk of the court, said the court's system showed the complaint was e-filed shortly before midnight on Oct. 15, which led to a frantic call the next day from Albritton's firm. The firm claimed the e-filing was made after midnight.

"We're indifferent. We are a customer-oriented environment and made a corrective entry that the case was filed on the 16th. We didn't do it with a judge's permission," Maland said. "There was no collusion, it's just what we did. We were trying to facilitate their intent, and it is something we would have done for any lawyer."

Ward's complaint alleged that he has endured "shame, embarrassment, humiliation, and mental pain and anguish" as a result of Frenkel's "false and defamatory statements."

"Additionally, the plaintiff has and will in the future be seriously injured in his business reputation, good name and standing in the community, and will be exposed to the hatred, contempt and ridicule of the public in general as well as of his business associates, clients, friends and relatives," Ward's lawsuit said.

Albritton's suit alleged similar damages from Frenkel's posts.

"Having anonymously attacked the integrity and reputation of Albritton and impugned the dignity of the United States District for the Eastern District of Texas, the time has come for Frenkel and Cisco to be called to account for their conduct," Albritton's complaint said.

The suits also claimed that Frenkel and Cisco used search engine optimization techniques to direct search engine users who sought information about Ward or Albritton to links to the defamatory statements.

Both suits sought exemplary damages from Frenkel as well as damages against Cisco, claiming that Frenkel postings were done within the scope of his employment or with the approval of the company.

"Who wants to be associated with a lawyer accused of cheating and lying, especially in a conspiracy with the court?" Holmes said.

Albritton is seeking an apology, for Cisco to acknowledge the truth of the situation and to pay for damages to his reputation and practice, Holmes said.

In his outing post, which was his final post before the site was closed to all except registered users last week, Frenkel said only his direct manager knew he was the site's author. He also said, "The content was entirely my own, and nobody at Cisco ever wrote any content for me or made any attempts to edit me."

Frenkel and Cisco said they have agreed not to comment on the lawsuits.

"That said, we would like to underscore that the comments in the employee's personal blog represented his own opinions and several of his comments are not consistent with Cisco's views," Cisco said. "We continue to have high regard for the judiciary of the Eastern District of Texas and confidence in the integrity of its judges."

Libel experts said many questions needed to be answered to determine liability in the cases.

Eric Robinson, a staff attorney with the Media Law Resource Center, said the first question was to determine whether the aggrieved attorneys were private or public figures.

Robinson believes that an attorney filing a suit in a public controversy would generally not lead to a public figure classification for an attorney.

If the attorneys are held to be public figures, Robinson said the court must determine if Frenkel acted with actual malice or reckless disregard that his statements were false.

He said the law was unclear regarding if an employer is liable for an employee's blogs.

If the past is any indicator, Albritton and Ward may have a difficult time winning their case. The center found that only seven of the more than 100 cases it tracks have resulted in damage awards, though many of the cases are still pending.

“It's hard to win a libel suit generally,” Robinson said.

Robinson said one aspect of the troll tracker case that sets it apart from other blogger libel cases was that the blogger “turned out to be a real expert in the field.”

Frenkel's expertise in the field could be used to prove that he could have known his statements were false.

Matt Zimmerman, a senior staff attorney with First Amendment rights group the Electronic Frontier Foundation, was pessimistic about the attorneys' chances of success in their suits.

“It's an odd strategy to add Cisco since it doesn't seem there is evidence the company had anything to do with the blog. It may be an aggressive litigation tactic, I'm not sure,” Zimmerman said. “Also, its unclear whether or not the libel case can be successful. The actual statement [in question] is a bit ambiguous. I'm not sure, looking at it, if the attorneys are able to win a libel suit.”

He believes the suit isn't just about the libel in the statements, but it's also about Frenkel's history of defamatory statements against attorneys and patent trolls.

“This case, there seems to be a pretty strong desire to discover who is saying these things,” Zimmerman said. “Perhaps the litigation isn't solely based on the statements but the history of talking about things. Courts should always be on guard against unmasking anonymous bloggers for extralegal reasons.”

Michael C. Smith, an attorney with **Siebman Reynolds** Burg Phillips & Smith LLP who blogs about the Eastern District of Texas court, believes that much of Frenkel's comments were “fair game,” but that the comments at the center of Albritton and Ward's defamation suits did cross the line.

“I don't like name-calling, but I think that's unavoidably part of it. But stating that a lawyer was altering court documents — a felony — is not,” Smith said. “It was also, of course, untrue.”

“There is no worse thing you can do to a lawyer, at least around here, than accuse them of being dishonest,” Smith said. “When Rick did that, he made it critically important to the lawyers whose integrity that he impugned to show publicly that he was wrong.”

Glenn Harlan Reynolds, a professor with the University of Tennessee College of Law, said suits such as those against Frenkel are rare.

He said despite the strong opinions on blogs, few suits are filed against bloggers, with even fewer being successful.

“One [reason] is companies and public figures learned that attacking a blogger is a mistake because if you act thuggish, other bloggers try to dig dirt on you,” Reynolds said. “It's like whacking a hornet's nest.”

He also cited difficulties in finding anonymous bloggers and the lack of money that bloggers own as reasons for the lack of suits.

Frenkel, a former attorney at **Irell & Manella** LLP, said he started the blog “mainly out of frustration.”

“I was shocked to learn that a huge portion of the tech industry's patent disputes were with companies that were shells, with little cash and assets other than patents and a desire to litigate and did not make and had never made any products,” Frenkel said in his final post. "Yet when I would search the Internet for information about these putative licensors, I could find nothing.”

He also said he blogged anonymously to avoid publicity and possible patent suits on blogging.

The patent troll blogger's incident has incited debate over anonymous blogging.

Dennis Crouch, the author and editor of the Patently-O blog, did not believe anonymous blogging was unethical, noting that the Federalist Papers which advocated the ratification of the U.S. Constitution were written under pseudonyms.

“There are many many reasons to blog anonymously,” Crouch said. “Most blog authors see their blog as a hobby rather than a career and do not want the blog to interfere with the rest of their life. This is perfectly understandable.”

However, he noted that readers need to take articles by anonymous bloggers, as well as comments left on blogs, with a grain of salt since the entries “tend to be much more reckless than those who use their own names.”

“For that reason, I usually put much less stock in an anonymous article than I would in an article published by a reputable author,” Crouch said. “After double-checking several posts by the anonymous troll tracker, I began to trust his research, even though I disagreed with some of his conclusions.”

Smith said he generally doesn't like anonymous blogging because a blogger's self-interest is an important facet of his posts.

“If I'm anonymous, [readers] can't really evaluate how much of what I say is just because it's in my or my employer's financial or business interest to say something,” said Smith, who represents many patent-holding companies. “What Rick Frenkel is discussing in his posts is very useful to patent practitioners, but it would be more useful if we could consider to what extent his opinions are influenced by where he works.”

The weeks before Frenkel unmasked himself, Smith said Frenkel's posts “became less caustic and more informative” as he realized he soon wouldn't be able to hide from attacks.

“Previously he often skipped the analysis and went straight to the personal attacks,” Smith said. “Lately he's been explaining why something is or is not a good idea, and I find that very useful.”

Peter Zura, an attorney at **Katten Muchin** Rosenman LLP who authors the 271 patent blog, said anonymous writers do prevent authentic discourse but may also allow an author to express their true opinions.

“It's the sine qua non of blogging, to a certain extent: authors use blogs to convey information and/or to express opinions about specific topics, and some legitimate opinions may not be the type that are expressed in 'polite company,' ” Zura said. “Lawyers, of all people, are keenly aware that 'anything you say can and will be used against you.' Taken too far, however, this approach will ultimately produce sterile discourse that generates zero public interest.”

One attorney who disagreed with Frenkel's methods was Scott C. Harris, an inventor and patent attorney who is being sued by his former firm, **Fish & Richardson** PC.

Frenkel had several posts on his site regarding whether Harris had owned patents that were being asserted against **Google** Inc., a Fish & Richardson client.

“He accused me of masterminding lawsuits against my own firms, which is absolutely untrue,” said Harris, who had run a Web site called “I'm a Patent Troll.”

Harris said Frenkel's posts accelerated the firm's process in making the rest of his tenure at Fish & Richardson “unpleasant” and also cost him a teaching post with the Patent Resources Group, which teaches patent courses.

Harris said he may consider a libel suit against Frenkel when he has the time or resources, but is currently too busy with the start of his own practice.

Another attorney who is not shedding tears over Frenkel's unmasking is Niro, who said no one has yet come to him to collect the $15,000 reward. He said he offered the reward to expose the blogger's “hidden agenda,” which generated hate against patent attorneys like himself.

“I'm not trying to stop anonymous blogging, but it's evil when done in a calculated way to target people when you have an agenda,” Niro said.

He alluded to anonymous bloggers spreading rumors about presidential candidate Sen. Barack Obama as being an Arab.

“If somebody traced that to Hillary Clinton, there would be a different edge to it,” Niro said.

After Niro first offered a reward for Frenkel's identity, an anonymous commenter on the troll tracker blog wrote

"If you shoot and kill Ray Niro tonight, I would consider it a justifiable killing."

Niro also noted an anonymous posting at the site Slashdot.org that said "vigilantism is not only necessary, it is justified." The posting had included Niro's home addresses, phone numbers and his wife's name, prompting him to call the Federal Bureau of Investigation and Chicago police.

Despite such threats, Niro said he did not anticipate filing any libel or other suits against bloggers anytime soon. Also don't expect Niro to offer another award for the identity of other anonymous bloggers.

"I view it as a one-time thing," Niro said. "I don't want to be labeled as the guy who puts up an award for every anonymous blogger."

Such awards may not even be necessary if bloggers follow the lead of **Howrey LLP**, which openly announced a firm policy in which it refuses to represent "patent trolls."

The firm has published flyers, with a crossed-out troll, regarding the policy to current clients.

"We have made a firm decision that we are not going to represent companies whose only purpose is to acquire patents and sue other companies," said Henry Bunsow, managing partner of the firm's Northern California offices.

He claimed patent-holding shell companies were taxing successful companies that develop products and were inhibiting the production of new technology.

He said the policy has already been positively received by current and prospective clients, while helping to distinguish the firm from competitors who are "trying to play on both sides of the street."

Niro countered that most inventors have limited resources and cannot afford to enforce their patents against large corporations, which is where patent-holding companies come in.

"Companies that provide that support are not evil, not bad. They are helping people get their day in court," Niro said.

Niro also noted a study by Intellectual Ventures LLC which claimed large companies own roughly 40% of all technology patents and get 99% of patent revenues, while smaller companies and inventors who own the rest of the patents only receive 1% of total revenues.

While the debate rages on about whether patent-holding companies inhibit or promote innovation, most bloggers believe the libel suits against Frenkel and Cisco will affect how such companies are covered.

Smith believes the patent troll tracker case will lead to a decline in anonymous bloggers, who now know they may face some liability.

"The lesson to be learned is that if you go far enough — here accusing people publicly of criminal activity — you give them an enormous incentive to unmask you."

Zura believes the patent troll incident will make bloggers "skittish" about the content and will have a "chilling effect" going forward.

"Regardless of the merits of the case, a lawsuit of this nature will act like a lightning strike in the blogging world: while the chances of being struck are statistically miniscule, most people will know enough to run for cover when they see thunder clouds rolling in," Zura said.

Crouch, who is a patent attorney and professor at the University of Missouri School of Law, said attorneys have a strong desire to write and publish, but ethical considerations to keep secrets usually keep them from such pursuits.

"I think that it is no surprise that there are very few law bloggers at major law firms and corporations," Crouch said. "I expect that trend to continue."

Ward is represented by **Patton Tidwell** & Schroeder LLP.

Albritton is represented by the Law Office of James A. Holmes PC.

The cases are John Ward Jr. v. Cisco Systems Inc. and Richard Frenkel, case number 2007-2502-A; and Eric M. Albritton v. Cisco Systems Inc. and Richard Frenkel, case number 2008-481, both in the District Court of Gregg County, Texas.

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