IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

- - -

FINJAN SOFTWARE LTD., : Civil Action
: No. 06-369(GMS)
Plaintiff, :
:
v. :
:
SECURE COMPUTING CORPORATION, :
CYBERGUARD CORPORATION, :
WEBWASHER AG and DOES 1 :
THROUGH 100, :
:
Defendants. :

- - -

Wilmington, Delaware
Monday, March 10, 2008
8:30 a.m.
Day Six of Trial

- - -

BEFORE: HONORABLE GREGORY M. SLEET, Chief Judge,
and a Jury

APPEARANCES:

PHILIP A. ROVNER, ESQ.
Potter Anderson & Corroon LLP
-and-
PAUL J. ANDRE, ESQ.,
LISA KOBIALKA, ESQ.,
JAMES HANNAH, ESQ.,
MEGHAN WARTON, ESQ.,
KRIS HASTENS, ESQ., and
HANNAH LEE, ESQ.
King & Spalding
(Silicon Valley, California)

Counsel for Plaintiff

APPEARANCES (Continued):

FREDERICK R. COTTRELL, III, ESQ., and
KELLY J. FARNAN, ESQ.
Richards, Layton & Finger
-and-
RONALD J. SCHUTZ, ESQ.,
CHRISTOPHER A. SEIDL, ESQ.,
TREVOR J. FOSTER, ESQ., and
JAKE M. HOLDREITH, ESQ.
Robins, Kaplan, Miller & Ciresi, L.L.P.
(Minneapolis, MN)

Counsel for Defendants

THE COURT: Good morning, counsel.

(Counsel: Good morning, Your Honor.)

THE COURT: I understand there is an evidentiary issue we need to talk about. I think we might still be waiting for a juror, too.

MR. SCHUTZ: Your Honor, after some further discussions with Mr. Rovner, there is a potential evidentiary issue we may be able to defer. It has to do with an exhibit that they have identified for possible use with Mr. Parr. Mr. Rovner tells me that depending on Mr. Degen's testimony this morning, he may not use it. If Your Honor wishes -- it's a three-minute issue, and if it does come up, we can defer it if you wish.

THE COURT: We can do that.

MR. ANDRE: Your Honor, may I discuss a housekeeping matter.

THE COURT: Sure.

MR. ANDRE: Mr. Degen will be the Defendants' last witness. So we will be moving for our Rule 50 motions thereafter. I was talking to counsel about how we want to proceed these last two days.

We think we might be able to get our rebuttal case in today, we aren't sure. It depends on how long the cross goes. We have the charge conference. We filed another set of jury instructions this morning. We have

about, substantive, about four or five issues on those jury instructions. There is a couple, three or four of them that we don't think they should be there, they don't think they should be there, that type of thing.

THE COURT: You mean the jury instructions, there doesn't need to be an instruction on a particular topic?

MR. ANDRE: Exactly. The substantive disputes, there is a dispute on obviousness, as Your Honor may figure, with KSR.

THE COURT: I guess it's the case that the parties are going to benefit from some guidance from the various groups that weigh in on model jury instructions at some point. I think most of them have not.

MR. ANDRE: Not yet. That's correct.

We didn't know if you wanted to try to have the charge conference on the jury instructions late this afternoon, even if we do not finish today and we can carry on tomorrow morning. Or if you want to do it tomorrow morning.

THE COURT: We should do it today. Because what I would like to do is to have the instructions collated and in shape so that there is no delay with regard to getting them to the jury.

MR. ANDRE: If we have our last witness on the

identified a mobile production code packaging engine.
Q. So would you disagree with Dr. Wallach's opinion regarding a package engine as well, that element?
A. Once again, he didn't provide me enough evidence to agree with him. So I am going to have to disagree with him.
Q. Claim 13 is dependent upon Claim 12. Would that -- what would be your basis of disagreeing with Dr. Wallach on that one?
A. Once again, because it's dependent on a claim that's already valid, it would be valid as well.
Q. Mr. Heberlein, just so we can wrap this up on this issue of the claims, is it your opinion that the claims, the asserted claims of the '194 and the '780 and '822 are valid in light of the prior art?
A. It is my opinion that they are all valid.
Q. Now, have you heard of a, something called secondary or considerations of nonobviousness?
A. Yes, I have.
Q. What is your understanding of secondary considerations of nonobviousness?
A. Secondary considerations of nonobviousness --
THE COURT: Mr. Andre, we are going to take our afternoon break.
(Jury leaves courtroom at 3:15 p.m.)
(Recess taken.)

THE COURT: We are going to go straight through until 4:30.
MR. ANDRE: Your Honor, may the witness take the stand.
(Jury enters courtroom at 3:32.)
THE COURT: Ladies and gentlemen, please take your seats and we will continue.
MR. ANDRE: Thank you, Your Honor.
BY MR. ANDRE:
Q. Mr. Heberlein, before we broke, I asked you if you have ever heard of something called secondary considerations of nonobviousness?
A. Yes, I have.
Q. What is your understanding of those?
A. In a broad sense, it's measures of success that the patented technology has had. Success is determined in a number of ways. One, does it address a long-felt need. Is it financially successful? Is it copied by competitors? Those are some examples.
Q. Let me ask you a question about that. On your opinion, has the patented inventions of Finjan's patents we are talking about here today, have they met a long-felt but unresolved need in the marketplace?
A. Yes, it has. May I explain?
Q. Please do so.

A. One of the major concerns in security, once again, that large corporations that spend a lot of money to protect their information, is the so-called zero-day attack. The zero-day attack is an attack that either wasn't previously known and exploits vulnerability that you didn't know about or at least a vulnerability that you can't patch in your system.
You have these vulnerabilities within your computer systems, and a new attack comes and you have never seen the attack. So you want some mechanism to stop that attack before it gets through.
That is particularly an important aspect. That is what a lot of these -- the major focus of these patents are, is being able to stop the suspicious activities that you didn't know about before, any attack that you didn't know about before.
Also, there is a number of benefits to their architecture that they describe in the patent. Once again, remember, we talked about two different types of security systems. One is the filtering firewall. And one is the gateway. The filtering firewall can be really fast. Packets come in, packets go out. It is a relatively simple system that you can implement fairly fast.
The gateway, which is the approach that these technologies are talking about, a much more complex system.

A much richer system. So, for example, if someone is downloading a large file, a gigabyte file or something like that, it might be a huge file that has to be analyzed. All that information has to go to the gateway. And the gateway constructs this information.
If a packet is lost somewhere across the network, the gateway has to say, Hey, I didn't see that packet. I need to go back and ask the remote machine for that packet.
Filtering firewall, you don't have to worry about that. The application of gateway also has to reconstruct all of this information. All these packets come in and now it has to take all the data and reconstruct the data it is going to analyze. Then it does the analysis.
The gateway we are talking about here has to do a whole bunch of extra work that the filtering firewall doesn't.
To address that, you need to look at optimization techniques. That is what these patents are talking about. Remember before, you would see this new downloadable code, the first time you have seen it, for example, you have to do some analysis. That analysis is costly. We are going to do the analysis, extract the security profile, we are going to go ahead and keep it. That is sort of the focus of the '194 patents and the

additional patents.

The next time that same downloadable comes by, I don't have to go through all that additional work to decompose and analyze that program because I have already done it once and we have kept that information to use it a second time.

We have got this optimization that says, I have kept this information around, I don't need to do it a second time.

So we talked about quickly the zero-day attack, then the optimization for extracting the security profile and keeping that security profile, so that, subsequently, I don't have to do further analysis.

A third aspect is especially important for a lot of worms and viruses, the self-propagating code. In the security field, we talk about a security code being hard and crunchy on the outside and soft and chewy on the inside. What that means is that a site will protect the perimeter, it will put a lot of protection, it will investment money, they will put the firewall to stop the attack from coming in.

Once an attack has gotten into the system, it can spread pretty easily. Once again, if you have a zero-day attack, and, once again, the worm gets in initially, once it gets in, it can spread throughout your

organization relatively quickly.

So the classical signature-based detection system, a classical signature-based virus detection system can't stop those worms.

It is a classical system that they can't build a signature until they see the attack. Once the attack gets inside your network, it can route your network and you are kind of screwed up.

The technology they are talking about here addresses all those issues and addresses the zero-day attack, it addresses workload that you are going to have to address on your server.

Once again, you are going to put this gateway there. It is going to intercept all this traffic between your organization and the outside world. So you want it to be fast or else users are going to complain.

It is also especially important in the case of self-automated worms that are new, because you want to stop them before they get in. You want to stop them at that gateway the very first time you ever seen them.

Q. Has the evolution of the Internet had any effect on this long-felt need in this space?

A. Yes. If you look back when the web first came out, most pages were the static HTML page. So I would get on my browser. I would go off to a site. It would pull down a

page and display ^ read SDMRAND this system. It would have some text and a picture. And every time you went, you got the exact same stuff back. It was always displayed exactly the same.

Over time, there has been this evolution to what is now called Web 2.0 or Web Application. So if you look in the newspaper or see stories, they will, that will talk about Web 2.0 or Web Applications, which create a much more dynamic environment on your system, so when I go out to a site, if you go to Google maps, for example, you will pull down something. Now I can actually drag around that map like I was using in the application.

Maybe you will have a stock ticker on your system that constantly goes out and updates the stock quotes. On your web page, you constantly have this updated ^ stuff going on. There is entire games that are web-based games.

As you move to this new technology, this Web 2.0, the system is much more dynamic. The mechanisms to provide that dynamic environment is these downloadable codes, so pulling down this downloadable code. It is this increasing trend that the market has to address.

Q. Did you find any evidence of copying of the invention of the Finjan patents in the marketplace?

A. Yes, that's another example of, sign of secondary

considerations. Did someone else like your stuff, especially a competitor? Yes, there is a number of examples.

Q. Would you please give one of them.

A. Certainly, the WebWasher approach copies this, and they talk about it, specifically wanting to address the same capabilities. They talk about the Finjan killer. We want to address, have the capability just like Finjan does.

Q. Did you rely upon any documents to make your determination that the WebWasher copied the patented technology of Finjan's?

A. There were several e-mails. I believe they may have already been presented; if not, we can present them here. There were several documents that they presented, generated a White Paper internally that they would use to describe their systems.

Q. Did you look at -- can we see PTX-10.

Did you look at this White Paper here?

A. Yes, I did.

Q. Did you look at this step-by-step guide as well?

A. Yes, I did.

Q. Based on your review of these e-mails and these guides and White Papers, did you make -- is that how you made the determination that WebWasher copied Finjan's patented technology?

A. Yes, sir. Once again, based on these documents, it certainly appears that WebWasher was trying to duplicate Finjan's technology.
Q. Did you see any evidence of commercial success of the patented technology?
A. Yes, there is a number of them. Finjan is making millions of dollars selling their products. Obviously, there is some success there.

In addition, Microsoft licensed their patents.

So Microsoft is the largest software corporation in the world. It's got -- I don't know about millions of developers, but large numbers of developers. So instead of just developing it on their own, they went off to Finjan and said, Let's just license their technology.
Q. We are calling these "secondary considerations," the considerations that you just discussed today. Do they further support your opinion that the asserted claims are valid and not obvious?
A. Yes, they do.
Q. Just one final question: Do you find that the Finjan technology and patents are valid?
A. I believe that the patents are valid.
Q. Thank you very much, Mr. Heberlein.

MR. ANDRE: I haven no further questions, Your Honor.

THE COURT: Mr. Holdreith.

MR. HOLDREITH: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. HOLDREITH:
Q. Mr. Heberlein, good afternoon.
A. Good afternoon.
Q. Now, you are Mr. Heberlein, not Dr. Heberlein. Right?
A. That's correct.
Q. You just gave an opinion that WebWasher is a copy of Finjan. Right?
A. That is correct, based on the -- WebWasher has technologies that Finjan has based on the descriptions in the documents that I looked at.
Q. What you said is that WebWasher is copied from Finjan. Right?
A. Based on my opinion from what I saw, yes.
Q. But you did not look at source code for any Secure Computing product, did you?
A. I did not. Someone else was doing that.
Q. You didn't rely on somebody else here, did you? This is your opinion?
A. This is my opinion, correct.
Q. You didn't look at source code?
A. I did not look at their source code.
Q. You did not look at any Secure Computing product in

operation?
A. I did not look at any Secure Computing product in operation regarding these particular patents.
Q. And you haven't, in fact, looked at WebWasher in detail, have you?
A. I have not looked at WebWasher in detail at the code level. I have looked at the White Papers.
Q. You don't know how WebWasher particularly operates, do you?
A. I do not know the specifics of how the code operates, that is correct.
Q. And you have not done a limitation-by-limitation analysis, where you compared WebWasher to Finjan's patent?
A. That is correct. I did not do a limitation to show that WebWasher infringed specifically on specific claims.
Q. So you don't even know if WebWasher does what Finjan's patent says?
A. Based on the documentation that I have seen, it certainly appears to be the same. But I have not done a detailed source code analysis with a claim-by-claim analysis. That is correct.
Q. I would like to show you Exhibit 1056. This is one of the e-mails that you just mentioned that you relied on when you were studying whether WebWasher was copied. Right?
A. I believe so.

Q. This is an e-mail called, Product Meeting Minutes, dated June 1 of 2004?
A. According to the print there, yes.
Q. And here are some participants. Do you know who any of these people are?
A. Not based on those names, no.
Q. The paragraph that you relied on is this Paragraph 3 of Exhibit 1056. Right?

(Pause.)

A. Yes. I believe there was additional e-mails which reference the term "Finjan killer."
Q. And this e-mail says, "For WebWasher 5.1 planning, two solutions were elaborated." Right?
A. I see the text there.
Q. And the text says, "First, we could copy Finjan's features." That's what it says?
A. I see that.
Q. That's what you relied on?
A. I don't know if I relied specifically on this one and solely this one.
Q. Well, you pointed this out in your report, didn't you?
A. I believe so. But I don't know if I cited additional ones.
Q. And the next sentence after that says, "This idea was dropped because the gain in security is questionable."