

October 30, 2007

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To provide a possible explanation for this posting having been withdrawn, the Desire2Learning October 26, 2007 posting is included and cited.

[Believed to be] October 24, 2007

In light of the important decision on October 15 by Judge Clark, affirming the invalidity of 35 of Blackboard's 44 patent claims, and in light of important phases of the Blackboard – Desire2Learn litigation coming to a close, we wanted to update you on the status of the litigation.

Discovery, except for damages discovery, ended on October 17, and cross motions for summary judgment have been filed. We're looking into how we can post the summary judgment motions, as some were filed under seal and contain other confidential information. Stay tuned – within the next week, we'll be posting at least a summary of the motions.

Please see our PatentInfo [<http://www.desire2learn.com/patentinfo/>] blog for the October 15 decision.

We would like to update you, though, on other developments, including some information we've learned about Blackboard as a result of the litigation:

- Blackboard is now disavowing the statements made by Matthew Small to various media outlets (Chronicle of Higher Education; Washington Business Journal) as well as what he said during his (recorded) debate with Software Freedom Law Center attorney Eben Moglen;
- Contrary to Michael Chasen's claim that "outside commentary about the patent misrepresents the scope . . . and appears to be creating confusion," and that he was "personally embarrassed" if people think Blackboard invented e-learning or course management systems [http://www.blackboard.com/patent/Patent_Client_Letter.htm], Blackboard is now claiming that there are no infringement-avoiding work-arounds for any e-learning system that uses either multiple roles, or perhaps even role-based access control;

- Contrary to repeated public statements that all Blackboard wants is a "reasonable royalty" (see, for example, the above link), we've learned that months before announcing the patent and filing suit, Blackboard and its external advisors and PR firms discussed the "public" purpose of the patent as to protect intellectual property, but the "real" purpose was to "contain and control" Desire2Learn;
- Blackboard has been obsessed for years about Desire2Learn as a competitor – see the following for just a couple examples:
 - Blackboard apparently has funded at least one person to attend at least one Desire2Learn User's Conference, and that same person was part of Desire2Learn's private member community until his presence was discovered this month;
 - Blackboard previously used one of its employees, representing herself as part of a university and using a spoofed university e-mail address, to attempt to obtain information about Desire2Learn;
- Blackboard and its expert are attempting to undermine the myriad of prior art filed both with the PTO and in Court. For one example, they question the release date of the v.5 IMS specification of April 29, 1998, although Blackboard's own press release of the same date [<http://www.blackboard.com/company/press/release.aspx?id=510709>] extols its involvement with IMS ("As the project's primary development contractor, Blackboard has been a significant source of expertise in designing the IMS standards");
- Blackboard is apparently desperate about the merits (or lack thereof) in its case – and as a result has decided to subpoena some Desire2Learn clients for unnecessary documents and depositions, while refusing to coordinate with Desire2Learn about what information was being sought, or basic scheduling issues;
- Blackboard has refused to provide court-filed documents that it filed under seal for posting on Desire2Learn's PatentInfo website, hiding behind the restrictive filing of non-confidential papers; it has thus far refused to discuss changing its position with us.
- Blackboard's litigation strategy appears to be to increase costs of litigation to Desire2Learn through unnecessary discovery and depositions, while deflecting attention from the real, fundamental issues of patent validity, infringement and inequitable conduct;

We at Desire2Learn are unquestionably pleased with how the litigation has gone thus far. 35 of the 44 claims have been invalidated by the Court in the Eastern District of Texas – twice – and our inter partes petition for reexamination filed with the Patent & Trademark Office (PTO) has resulted in an initial finding by the PTO that there is a substantial question of patentability of all 44 claims, based on 15 of the 16 pieces of prior art that we furnished to the PTO.

Perhaps our significant successes have led Blackboard to avoid the fundamental questions: Is the patent valid? Does Desire2Learn infringe? Was there inequitable conduct involved in securing the patent? Instead, Blackboard's litigation strategy seems to be to drive up unnecessary and wasteful costs and expenses, focus on side issues of little or no relevance to the substantive merits of the case.

We are truly disappointed with the conduct, actions, ethics and litigation strategy of our competitor. Conversely, we are truly pleased with our progress in the litigation, and continue to believe that our fight is not only to defend our own company, but is for the betterment of the entire educational community.

Lastly, we will remain eternally grateful to the many clients, educators and systems experts that have expressed their support and offered to help us in this cause. We will continue to remain focused on delivering outstanding services to our clients, and hitting our deadlines and client expectations on all product releases.

We look forward to the time when the energies of Blackboard might be focused on productive matters rather than incrimination, and all in our industry can again focus on what's best for education.

Entry

Litigation Update

Oct 26, 2007 9:19 PM

[Our Litigation Update post, originally posted here on October 24, has been temporarily removed, as late today we received a letter from Blackboard's lawyers.

Right now, our lawyers are quite busy preparing responses to various court filings by Blackboard – and those responses must be filed with the court soon. It's more important for our lawyers to address the substantive issues, and not be sidetracked by Blackboard's attempted distractions. So . . . it's down, but we promise it'll be back, in one form or another.

We continue our pledge to be as transparent as possible. And now perhaps our readers can begin to appreciate how difficult that can be.]