

Hearing Date: November 16, 2004 at 10:00 a.m. (Eastern)
Responses Due: October 28, 2004 at 4:00 p.m. (Eastern)

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re : Chapter 11
RCN CORPORATION, et al., : Case No. 04-13638 (RDD)
Debtors. : (Jointly Administered)
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DEBTORS' OBJECTION UNDER 11
U.S.C. §§ 105(a) AND 502 AND FED. R. BANKR. P. 3001 AND 3007 TO PROOFS
OF CLAIM FILED BY INTERNATIONAL BUSINESS MACHINES CORPORATION

RCN Corporation ("RCN") and certain of its direct and indirect subsidiaries, debtors and debtors-in-possession in the above-captioned cases (collectively, the "Debtors"), hereby file this objection (the "Objection") under 11 U.S.C. §§ 105 and 502 and Fed. R. Bankr P. 3001 and 3007 to proof of claim numbers 1420 through and including 1424 and 2041 through and including 2045 (collectively, the "IBM Proofs of Claim") filed by International Business

Machines Corporation (“IBM”). In support of this Objection, the Debtors respectfully represent as follows:

FACTUAL BACKGROUND

Introduction

1. On May 27, 2004, RCN Corporation, TEC Air, Inc., RLH Property Corporation, RCN Finance, LLC, and Hot Spots Productions, Inc. (collectively, the “Initial Debtors”), filed voluntary petitions in this Court for reorganization relief under chapter 11 of title 11 of the United States Code, as amended (the “Bankruptcy Code”).

2. RCN Cable TV of Chicago commenced its chapter 11 case on August 5, 2004. RCN Telecom Services of Virginia, Inc., RCN Entertainment, Inc., 21st Century Telecom Services, Inc., and ON TV, Inc. (collectively with RCN Cable TV of Chicago, the “Additional Debtors”), commenced their chapter 11 cases on August 20, 2004.

3. The Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to Bankruptcy Code sections 1107 and 1108.

4. No trustee or examiner has been appointed in these cases. On June 10, 2004, the Committee of Unsecured Creditors (the “Committee”) was appointed by the United States Trustee for the Southern District of New York (the “United States Trustee”). No other official committees have been appointed or designated in these cases.

5. On September 23, 2004, the Debtors filed a motion to retain Dechert LLP as special conflicts counsel under 11 U.S.C. § 327(e), including for the specific purpose of resolving IBM’s claims.

6. The Court has jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334. Venue is proper under 28 U.S.C. §§ 1408 and 1409. This is a core proceeding under 28 U.S.C. § 157(b)(2).

7. The statutory predicates for the relief requested herein are Bankruptcy Code sections 105 and 502 and Rules 3001 and 3007 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

The April 1999 Letter

8. On April 26, 1999, IBM sent a letter (the “April 1999 Letter”)¹ to David C. McCourt of RCN, asserting that IBM had completed an analysis of RCN’s Internet service offerings and that RCN required a license to several IBM patents. IBM specifically identified five of the six patents listed in the IBM Proofs of Claim.² During 1999 and 2000 the parties had some discussions regarding IBM’s claims, but they have had no substantive discussions since then.

The Bar Dates

9. On June 4, 2004, the Initial Debtors filed their Motion for Order Under 11 U.S.C. § 105 and Fed. R. Bankr. P. 2002(a)(7) and 3003(c)(3) (I) Setting Bar Dates for Filing Certain Proofs of Claim, (II) Approving Procedures for Filing Such Proofs of Claim, and (III) Approving Form, Manner, and Sufficiency of Notice Thereof (the “Bar Date Motion”). On June 23, 2004, the Court entered an order (the “Initial Bar Date Order”) approving the Bar Date Motion and the form of notice attached thereto and establishing August 11, 2004 (the “Initial Bar Date”) as the deadline for filing proofs of claim against the Initial Debtors.

10. On August 21, 2004, the Debtors filed their Motion for a Second Order Under 11 U.S.C. § 105 and Fed. R. Bankr. P. 2002(a)(7) and 3003(c)(3) (I) Setting Bar Dates for

¹ A copy of the April 1999 Letter is attached hereto as Exhibit A and is incorporated herein by reference.

² Copies of the IBM Proofs of Claim are attached hereto as Exhibit B and are incorporated herein by reference.

Filing Certain Proofs of Claim, (II) Approving Procedures for Filing Such Proofs of Claim, and (III) Approving Form, Manner, and Sufficiency of Notice Thereof (the “Second Bar Date Motion”). On August 27, 2004, the Court entered an order (the “Second Bar Date Order”) approving the Second Bar Date Motion and the form of notice attached thereto and establishing October 1, 2004 (the “Second Bar Date”) as the deadline for filing proofs of claim against the Additional Debtors.

11. Notices (the “Bar Date Notices”) of the Initial Bar Date and the Second Bar Date were published in the Wall Street Journal. The Bar Date Notices stated, among other things, that parties filing claims should “attach to your completed proof of claim any documents on which the claim is based (if voluminous, attach a summary) or an explanation as to why the documents are not available.”

The IBM Proofs of Claim

12. On or about August 11, 2004, IBM filed proof of claim numbers 1420 through and including 1424. On or about September 24, 2004, IBM filed proof of claim numbers 2041 through and including 2045. The IBM Proofs of Claim provide none of the documentation that is necessary to support a claim of patent infringement, such as a claim chart, identification of which claims of which patents have allegedly been infringed, or a calculation of damages, let alone the expert reports and other evidence required to support a claim of patent infringement.

13. Instead, the sum total of IBM’s “proofs of claim” is one vague sentence. As set forth in each of the IBM Proofs of Claim, IBM’s claims are based upon the alleged “infringement of many of IBM’s patents, including U.S. patent numbers 4,805,135, 5,319,542, 5,442,771, 5,758,072, 5,347,632, and 5,796,967” by Erols Internet, Inc. (“Erols”), the Debtors’ purported predecessor-in-interest.

14. IBM asserts a total claim of \$37,600,000 in the proof of claim filed against RCN (claim number 1424), although it does not attach to that proof of claim any schedule, table, or other documentation indicating how it calculated the amount of the claim, which vastly exceeds the amount of any demand made by IBM prior to the filing of these bankruptcy cases. Although IBM let its claim lie fallow for over four years, it now asserts that it has suddenly discovered a \$37.6 million claim.

15. In addition, IBM asserts unliquidated claims in the proofs of claim filed against the other Debtors (claim numbers 1420 through and including 1423 and 2041 through and including 2045), without any indication of why those claims are unliquidated or how it is that each of those Debtors engaged in infringing activity.

RELIEF REQUESTED

16. By this Objection, the Debtors seek entry of an order under Bankruptcy Code sections 105 and 502 and Bankruptcy Rules 3001 and 3007 disallowing and expunging the IBM Proofs of Claim because IBM's claims (i) are not supported by sufficient evidence, (ii) are without merit, as IBM's patents have not been infringed and/or are invalid, (iii) are barred by the laches, estoppel, or 35 U.S.C. § 286 (iv) are barred by IBM's patent misuse and other conduct in violation of the antitrust laws, (v) are barred by IBM's prior licenses, (vi) are barred by IBM's failure to comply with 35 U.S.C. § 287, and (vii) are duplicative.

BASIS FOR RELIEF REQUESTED

The IBM Claims Are Not Supported by Sufficient Evidence

17. IBM asserts in the IBM Proofs of Claim that the Debtors have infringed "many of IBM's patents," but offers no support for such contention, including no evidence of, among other things, (1) which claims were infringed, (2) the conduct that supposedly constituted infringement, or (3) how each of the Debtors supposedly infringed. It provides no interpretation

or analysis of its patent infringement claims, let alone a claim chart or other proof of infringement.

18. Moreover, IBM fails to provide any evidence of how it calculated the amount of its claim (\$37.6 million) against RCN or why its claims against the other Debtors are unliquidated.

19. Although Bankruptcy Rule 3001(f) provides that a proof of claim is “prima facie evidence of the validity and amount of the claim,” this presumption of validity does not apply to IBM’s Proofs of Claim because they are entirely unsubstantiated, despite the requirements of Bankruptcy Rule 3001(c), the specific directions in the proof of claim form, and the specific directions in the Bar Date Notices that IBM provide copies of any documents on which its claims are based. See, e.g., In re Hongisto, 293 B.R. 45, 50 (N.D. Cal. 2003) (properly filed proof of claim is not prima facie valid, unless claimant has alleged facts sufficient to support a legal liability); In re Jorzak, 2004 WL 2149005, at *5 (Bankr. D. Conn. Sept. 22, 2004) (“A proof of claim, however, does not qualify for that *prima facie* evidentiary effect if it is not executed and filed in accordance with the Bankruptcy Rules.”); In re Hughes, 313 B.R. 205, 208 (Bankr. E.D. Mich. 2004) (“Generally, courts have held that when a proof of claim fails to comply with the requirements of Rule 3001(c), the claim will not be considered *prima facie* valid as to the claim or amount.”). Because IBM has not provided even the most basic information in support of the IBM Proofs of Claim, including a claim chart for each Debtor, the amounts of its claims, and the circumstances under which its claims arose, the IBM Proofs of Claim do not meet the minimum requirements imposed by Bankruptcy Rule 3001 and should be disallowed and expunged in their entirety.

**IBM's Claims Are Without Merit Because
Its Patents Have Not Been Infringed and/or Are Invalid**

20. To the extent IBM's claims are based on the same allegations made in the April 1999 Letter, they are without merit.

21. IBM's vague proofs of claim sound in patent infringement. A patent has two broad sections, the specification and the claims. The specification describes the invention in prose form and diagrams, but the claims define the scope of the legal monopoly granted by the patent.

22. Only claims are infringed. In order to prove infringement, the patent holder must identify a specific claim in a specific patent and establish that each and every element of the claim is present in a product manufactured by the infringer. This is done by practitioners in the field through the use of expert testimony and a claim chart, which identifies the claim and infringing elements in the product.

23. Only the first inventor of a technology is entitled to a patent, and accordingly, the United States Patent and Trademark Office (the "PTO") will not grant a patent - which is a legal monopoly -- to an applicant when there is a prior invention. Thus, a patent claim will be rendered invalid if it claims something which was in the "prior art."

24. Damages in patent cases are calculated either by reference to the lost profits of the patentholder or a so-called "reasonable royalty." 35 U.S.C. § 284. Since IBM and the Debtors operate entirely different businesses, IBM cannot plausibly claim that it would have sold products or rendered services to the Debtors' customers, and accordingly, could at best claim a reasonable royalty. In calculating the reasonable royalty, courts look to factors such as whether the technology at issue has been licensed to others and the rates at which the technology

has been licensed. Expert economists are usually retained to opine on the outcome of a hypothetical negotiation between a willing licensor and willing licensee.

25. The Debtors did not infringe any of the claims of any of the six patents listed by IBM in the IBM Proofs of Claim. In fact, IBM is attempting to use its patents to try to stake a claim that it invented the World Wide Web. Nothing could be further from the truth. The six patents identified by IBM, which cover the sharing of information in a traditional distributed network and do not cover the World Wide Web. When viewed in light of the statements IBM made to the PTO in obtaining the patents, the patents listed by IBM cannot reasonably be construed to cover any activities of the Debtors.

26. In this case, IBM's patents are quite limited in scope, as the patents at issue cover a narrow range of technology, which the Debtors did not use. To the extent IBM asserts that the claims of the patents have a broad scope, however, the patents are invalid.

27. U.S. Patent No. 5,319,542 describes a system for ordering items using an electronic catalog, and in particular refers to an "electronic catalog requisition system." The specification and prosecution history of the patent (the back and forth between IBM and the PTO examiner) demonstrate that this "electronic requisition" does not cover the purchasing of products through an electronic service, where the service then sends a purchase order to a supplier. IBM asserted this patent against RCN in 1999 in relation to the "Tucows" service, which users could access at www.erols.com to buy others' products. Tucows controlled the content on the site and provided the order forms. The Erol's site, which is no longer even operating, was completely passive and played no role in developing content or processing orders and provided no purchase inducements or advertisements.

28. The passive role of simply linking customers to the Tucows mirror site does not infringe any of the claims of the '542 patent. Moreover, the Tucows site generates purchase orders that are then forwarded to software suppliers. As noted above, IBM specifically stated to the PTO during the prosecution of the '542 patent that its "electronic requisitions" are different from purchase orders. Indeed, if the claims covered purchase orders, they would be invalid in light of the prior art, including IBM's own PRODIGY® service.

29. U.S. Patent No. 4,805,134 relates to a computer architecture for the implementation of an information service for accessing graphical and textual information and executing transactions on an interactive basis with remotely located network nodes. In 1999, IBM asserted claim 1 against RCN, arguing that RCN's Internet Service Provider ("ISP") business was infringing. IBM's position lacks merit for several reasons. First, its claim, which relates to distributed processing in a conventional network, cannot be read onto the Internet -- that is, IBM's patent on a typical corporate network cannot be stretched to cover the entire World Wide Web. The Erol's home page, which is no longer in existence, is an end point; it does not act as a conduit to other servers and content on the Web. It does not exchange messages with other servers on behalf of the customer. Rather, it provides URLs (links) to a user's web browser, which are then used by that browser to connect directly to other web sites. Second, IBM's claim is written in a particular type of format, known as means-plus-function format, and thus can only be read on structure corresponding to that set forth in the specification of the patent. When viewed in light of the specification, a court would not construe IBM's alleged improvement over existing technology to include the modern World Wide Web. IBM did not invent the World Wide Web.

30. Similarly, U.S. Patent No. 5,758,072 relates to a distributed processing, interactive network that distributes data objects used to generate applications throughout a network. IBM asserted claim 16 in 1999 against RCN. An ISP merely extends the Internet to a customer's computer, such that the customer's computer becomes a node on the Internet. Once on the Internet, the customer's browser controls the customer's interaction with the destination web site. The ISP plays a limited or no role in distributing data or applications throughout the Internet. Accordingly, ISPs perform no infringing activity. Moreover, as noted above, the customer's browser is not connected through a home page node to other Internet nodes, but rather is connected directly to those other nodes in a point-to-point fashion. Hence, collection of data from a plurality of web sites is handled completely by the customer's browser. There is, therefore, no "host" computer coordinating distributed processing. Therefore, there is no infringement with respect to the '072 patent.

31. U.S. Patent 5,442,771 relates to a method of storing data in an interactive computer network in which "storage control parameters" are associated with the data to dictate storage strategy or the "predetermined eligibility of the data for storage at the data stores." IBM alleged in 1999 that claim 1 of the '771 patent was purportedly infringed by the third-party software allegedly used by RCN to cache web sites. The Debtors did not and do not use this feature, as their software does not provide the storage control parameters or "cache concentration" features that are fundamental to the '771 patent.

32. Claim 1 of U.S. Patent No. 5,796,967 (asserted by IBM against RCN in 1999) and U.S. Patent No. 5,347,632 (a division application of the '967 patent, which was not asserted by IBM in 1999) both relate to the generation of a partitioned screen display for presenting "applications" in a first partitioned area of the display and "command functions . . .

selectable to permit movement between applications” in a second partitioned area of the display. In the context of the presentation of web pages using a web browser, the partitions in the web browser are generated exclusively by the web browser from the vendor’s data and not by the Debtors. In fact, all of the actions called for in claim 1 are performed by the customer’s browser based on the data content from the web pages provided by the vendor. Thus, the Debtors do not, directly or indirectly, infringe claim 1 of the ‘967 patent or the claims of the ‘632 patent.

33. Finally, even assuming *arguendo* that IBM could prevail on its infringement claim, which it cannot, IBM’s assertion, without any factual support, that it is entitled to \$37.6 million enormously exaggerates the amount of money that IBM could ever hope to collect as reasonable royalty damages for patent infringement. It is impossible to evaluate IBM’s damage theory, however, because it has not provided any detail at all, let alone a delineation of its claims against any of the Debtors. IBM has provided no evidence in relation to its other licenses for this technology, or indeed, proof that it has such licenses. There is no conceivable basis for IBM’s claims, which exceed, by an order of magnitude, its opening offer in prior licensing negotiations.

IBM’s Claims Are Barred by Laches, Estoppel, or 35 U.S.C. § 286

34. IBM’s claims are also barred by laches, estoppel, or 35 U.S.C. § 286. As noted, in the April 1999 Letter, IBM asserted infringement of five of the six patents also identified in the IBM Proofs of Claim. Discussions between the Debtors and IBM, in which the Debtors made it abundantly clear that they did not agree with IBM’s allegations, lasted until 2000, after which point the Debtors had no further contact with IBM regarding the Debtors’ alleged infringement. The Debtors were justified in believing that IBM’s silence equated to an agreement with the Debtors’ analysis. IBM cannot now resurrect its purported infringement

claims, assert that it “forgot” to assert a \$38 million claim, and seek allowance of that claim by this Court.

IBM’s Claims Are Barred by the Doctrine of License

35. Any claim by IBM that the Debtors’ have infringed through the provision of ISP service to third parties is, upon information and belief, barred by the doctrine of license. The predominant supplier of software for browsing the Internet is Microsoft Corporation, and a license by IBM to Microsoft would bar any claims against the Debtors based in whole or in part upon use of Microsoft’s products.

IBM’s Claims Are Barred 35 U.S.C. § 287

36. Pursuant to 35 U.S.C. § 287, a patent holder is required to mark all infringing products sold by or licensed by the patent holder or, in the alternative, to provide notice to a potential infringer. IBM has failed to comply with Section 287 and is not entitled to any damages as against the Debtors.

IBM’s Claims Are Barred by Patent Misuse

37. Throughout IBM’s discussions with RCN, IBM personnel, including specifically Thomas M. Slattery, Ph.D., IBM’s Program Director of Intellectual Property & Licensing, made it clear that IBM had an agenda to use its massive patent portfolio as a weapon to coerce RCN into buying unpatented products. Dr. Slattery repeatedly tied the negotiations with RCN over a patent license agreement to the purchase of unpatented servers and products by IBM. Such conduct is an impermissible attempt to broaden the patent monopoly and to coerce RCN into purchasing unpatented products by wielding market power generated through the use of its patents. IBM’s attempt to extend the patent monopoly beyond its legal scope constitutes patent misuse and a violation of the antitrust laws, and in particular Section 2 of the Sherman Act, 15 U.S.C. § 2. IBM’s conduct renders the patents unenforceable.

IBM's Claims Are Duplicative

38. The IBM Proofs of Claim are based on identical allegations against each of the Debtors, and, as such, are duplicative. Accordingly, to the extent any IBM claim is allowed against one Debtor, the remaining claims should be disallowed in their entirety so that the Debtors are not required to satisfy the same obligation more than once.

RESPONSES TO OBJECTIONS

39. The Debtors request that any response from IBM to this Objection comply with the Notice of Objection attached hereto and, at a minimum, include the following:

- (a) a description of the basis for the amount (\$37.6 million) of the claim filed against RCN (claim number 1424);
- (b) a claim chart identifying each asserted claim and the basis for alleged infringement by each of the Debtors;
- (c) a concise statement setting forth the reasons why the relief requested in this Objection with respect to each of the IBM Proofs of Claim should not be granted, including, but not limited to, the specific factual and legal bases upon which IBM will rely in opposing the Objection;
- (d) all documentation or other evidence of the IBM Proofs of Claim upon which IBM will rely in opposing the Objection;
- (e) the address(es) to which a reply, if any, to the response should be sent, if different from that presented in the proof of claim (if a response contains an address for the creditor different from that stated on the objected to proof of claim, the address in the response shall control and shall constitute the service address for future service of papers upon that creditor); and
- (f) the name, address, and telephone number of the person (which may be the creditor or his/her/its legal representative) possessing ultimate authority to reconcile, settle, or otherwise resolve IBM's claims.

40. If a response is properly filed and served in accordance with the above procedures, the Debtors will endeavor to reach a consensual resolution with IBM. If no

consensual resolution is reached with IBM, the Debtors request that the Bankruptcy Court conduct a hearing with respect to the Objection and any responses thereto on **November 16, 2004 at 10:00 a.m. prevailing Eastern time.**

41. If no responses are filed and served in accordance with the above procedures, the Debtors will present to the Court the form of order attached hereto as Exhibit C with respect to the IBM Proofs of Claim **without further notice to IBM.**

NOTICE AND WAIVER OF MEMORANDUM REQUIREMENT

42. Notice of this Objection has been given to the United States Trustee, IBM and its counsel, counsel to the Committee, counsel to the agent for the Debtors' prepetition credit facility, the indenture trustee for the Debtors' outstanding debt securities, and those persons who filed a notice of appearance in this case. The Debtors respectfully submit that such notice is sufficient under the circumstances and request that the Court find that no further notice of the relief requested herein is required.

43. The Debtors submit that no new or novel issue of law is presented with respect to the matters contained herein, and respectfully request that, because the relevant statutory authorities are already cited in this Objection, the requirement of a separate memorandum of law under Local Bankruptcy Rule 9013-1(b) be waived.

RESERVATION OF RIGHTS

44. The Debtors reserve the right to object further to each of the IBM Proofs of Claim on any and all additional factual or legal grounds. Without limiting the generality of the foregoing, the Debtors specifically reserve the right to amend this Objection, file additional papers in support of this Objection or take other appropriate actions to (a) respond to any allegation or defense that may be raised in any response filed by or on behalf of IBM or other interested parties, (b) further object to any of the IBM Proofs of Claim for which IBM provides

(or attempts to provide) additional documentation or substantiation, or (c) further object to any of the IBM Proofs of Claim based on additional information that may be discovered upon further review by the Debtors or through discovery pursuant to the applicable provisions of Part VII of the Bankruptcy Rules.

45. The Debtors reserve the right to amend this Objection in connection with discovery they intend to take, including discovery in relation to (a) IBM's program for leveraging its patent portfolio to force others to buy IBM products, (b) IBM's licenses with Microsoft and others, and (c) IBM's licenses in relation to the technology at issue.

CONCLUSION

WHEREFORE, the Debtors respectfully request that the Bankruptcy Court enter an order (i) disallowing and expunging the IBM Proofs of Claim and (ii) granting the Debtors such other and further relief as is just and proper under the circumstances.

DATED: October 7, 2004
New York New York

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