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1999 DEC -9 PM 3:20

December 6, 1999

VIA FAX AND MAIL

Mr. Thomas B. Slattery
Program Director
Intellectual Property & Licensing
IBM
North Castle Drive
Armonk, NY 10504

Re: IBM Licensing Proposal

File

Dear Mr. Slattery:

We have reviewed IBM's claim that RCN Corp. ("RCN") infringes five U.S. Patents owned by IBM – U.S. Patents 4,805,134, 5,319,542, 5,442,771, 5,758,072 and 5,796,967. For the reasons stated below, RCN does not believe that it is in need of a license from IBM.

In many cases, IBM's infringement analysis is based on assumptions regarding RCN's methods of operation which are inaccurate. This is not surprising in light of the fact that IBM's ability to study the internal workings of RCN's systems is limited to monitoring the Erols web site. We are confident that once you have a better understanding of how RCN's systems operate, that you will conclude RCN is not infringing the intellectual property of IBM.

In addition, during your presentation, IBM personnel made certain assumptions regarding how a court would construe the claims with which we do not agree. We cannot help but observe that IBM seems to be digging deeply into its patent portfolio to try to stake a claim

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EXHIBIT N

to having invented the World Wide Web. Nothing could be further from the truth. The patents you have identified, which largely involve the sharing of information in a traditional distributed network, are old art and do not cover the World Wide Web. Indeed, IBM's early antipathy to the Web is common knowledge in the computer industry. When seen in light of the prosecution histories, specifications and prior art, the patents at issue cannot reasonably be construed to have the breadth IBM asserts.

We are also puzzled by IBM's licensing approach and choice of RCN as a licensing candidate. RCN is an ISP and acts only as a conduit for its customers to reach the Web. You stressed e-commerce applications and web caching during our meeting, both of which are only small parts of RCN's business. RCN's revenues from its relationship with Tucows are several hundred dollars per month. Similarly, while RCN has used web caching from time to time, it is still experimenting with the technology, and would not be willing to pay a license fee to IBM for its use. Indeed, RCN has already paid a licensing fee to another company which would be forced to indemnify RCN in the case of litigation. If IBM is interested in producing licensing income in these areas, it would be well advised to approach e-commerce companies and the companies which sell web caching software and hardware.

With respect to the specific charges of infringement made by IBM, our response is attached as Exhibit A. For each patent, we have addressed the merits of the claim discussed in your presentation, as we assume that you believe these claims are the most favorable to IBM. We have identified the principal, but by no means only, deficiencies in your infringement analysis. With respect to validity, the analysis depends upon the scope of the claims as construed by a court and, of course, prior art. As you pointed out during our meeting, IBM has several pending patent applications and is obviously engaged in an attempt to craft new claims onto existing applications for the purpose of strengthening its litigation position. We decline to assist IBM in that task by identifying the most pertinent prior art to you.

Finally, there are several other reasons why we do not believe that an IBM-RCN license makes sense at this time. First, IBM has not demonstrated any success in licensing RCN's competitors, and RCN cannot put itself in a position where it is at a competitive disadvantage. While you referred vaguely to ongoing negotiations, we have not seen any public announcements reporting that an ISP has taken a license to the IBM patents at issue. Second, the IBM position has not been vindicated by a favorable claims interpretation ruling from a court, and we are not aware of any suits that IBM has brought in relation to these patents. It is difficult to justify paying money for patents we do not infringe and the interpretation and validity of which are in serious question. Third, much of the purported infringement involves actions performed by third parties, either in web browsers or in software provided by others. Accordingly, RCN would need to know quite a bit more about IBM's licenses with the third parties who sell such software, including Microsoft, Netscape (now AOL) and Inktomi. If, for

instance, IBM has already licensed Microsoft for its sales of Microsoft Internet Explorer, then it is difficult to see how IBM could also extract a royalty from RCN for its involvement in sending content to an Internet Explorer browser.

In summary, RCN does not believe it is need of a license from IBM. If you still believe otherwise or have information to provide which would assist RCN in its evaluation, please feel free to contact me.

Sincerely,

Martin J. Black

MJB/cpk

EXHIBIT A

U.S. Patent 5,319,542

The '542 patent describes a system for ordering items using an electronic catalog, and in particular automating the process through which companies issue requisitions, approve requisitions and then generate purchase orders for suppliers. As noted in the background information (col. 1, lines 26-30), the patent does not cover the purchasing of products through an electronic service, where the service then sends a purchase order to a supplier. The inventors specifically noted that PRODIGY® already had that technology in use.

Claim 8, on which IBM relies, refers to an "electronic catalog requisition system" that permits customers to download from a public computer system to a customer computer information relating to items in an electronic catalog and to electronically order those items directly from suppliers using an "electronic requisition" containing the retrieved information.

On its face, all steps of claim 8 are performed by the user's browser, not the host for the electronic catalog. Accordingly, it is unclear to us what activities by RCN IBM believes to be infringing. Since IBM's presentation focused on Tucows, we will address RCN's activities in connection with Tucows. As you will see, the relationship between RCN and Tucows is materially different from what IBM assumed in making its infringement analysis.

RCN provides a mirror site for Tucows – one of over 1000 mirror sites worldwide. Tucows controls the content on the site, provides the order forms and whatever IBM believes constitutes a "catalog" within the lexicon of the '542 patent. RCN's role is completely passive – it plays no role in developing content or processing orders, provides no purchase inducements or advertisements, does not compile the "catalogs" and does not even participate in profits from sales of software over the Tucows site. All RCN receives is a small monthly payment of a few hundred dollars. Accordingly, even if IBM were to prevail, the royalties due to IBM would be minimal.

As we understand Tucows, the company manages a network of Internet software sites and provides software listings of freeware, shareware, commercial demos, and other software available for free download. In some circumstances, Tucows allows a customer to purchase and receive software in real-time. When using this service, the customer selects software for purchase, puts the selection in his/her "shopping basket," and when the customer is ready to place the order, the customer is asked to provide purchase and delivery information that is forwarded by Tucows to the software supplier. The purchased software is then downloaded by the supplier directly to the customer's computer. RCN plays no part in this process. Rather, RCN simply links the customer to the Tucows mirror site. No matter what the interpretation of the claims of the '542 patent, we do not see how such passive activity could be found to infringe the '542 patent.

In addition, IBM's broad interpretation of the patent is foreclosed by the prosecution history. During your presentation, you glossed over the differences between an

"electronic requisition" and a "purchase order," treating them as identical. IBM's position in that regard is untenable in light of the prosecution history.

As I am sure you are aware, claim 8 of the '542 patent matured from claim 9 of the original application. Original claim 9 included the steps of "creating an electronic requisition," "creating a purchase order based on the electronic requisition," and "transmitting the purchase order to a supplier computer system." Thus, original claim 9 properly distinguished a "purchase order" from an "electronic requisition." The "electronic requisition" is defined in the specification as the part of an industrial customer's procurement system that "automates all manual transactions currently experienced in generating and processing hardcopy requisitions, including the approval process" (column 2, lines 50-53). As described from column 5, line 30 through column 6, line 30, the "electronic requisition" is used to initiate the procurement process for the agent authorized to make the purchase. The electronic requisition thus includes pertinent ordering information about the product to be purchased that has been downloaded from the electronic catalog so as to permit the approver to assess the product to be purchased. Once the electronic requisition is approved by the in-house purchasing agent, an electronic purchase order for the product is sent to the supplier, not the electronic requisition. The requistion is an internal document which replaces the intra-company requisition and approval process. It is not the same as a purchase order.

In contrast to claim 9, allowed claim 8 only refers to an "electronic requisition" which is created and then sent to a supplier. It is clear from the specification and file history of the '542 patent that the claimed "electronic requisition" is not the same as a "purchase order" and that the creation of an "electronic requisition," as opposed to a purchase order, is required to satisfy claim 8. It is equally clear to us that neither RCN nor Tucows generates an "electronic requisition" as opposed to a simple purchase order. Accordingly, there is no infringement.

On the other hand, if IBM is reading claim 8 as simply requiring a customer to create a purchase order (as opposed to an "electronic requisition") for an item in an electronic catalog, we note that such an interpretation is precluded by file wrapper estoppel and precluded by volumes of invalidating prior art, including the PRODIGY® prior art system acknowledged in the specification of the '542 patent in column 1, lines 25-32.

In addition, we note that claim 8 of the '542 patent was characterized in the file history as including the concept of a "private catalog" downloaded from the central database (e.g., page 4 of response to October 26, 1999 official action). Neither RCN nor Tucows causes the customer to download such a "private catalog."

For the foregoing reasons, we do not believe that IBM could maintain an infringement action against RCN for infringement of the '542 patent.

U.S. Patent 4,805,134

Claim 1 relates to a computer architecture for the implementation of an information service (utility) for accessing graphical and textual information and executing transactions on an interactive basis with remotely located network nodes. As described at column 13, lines 7-13, the architecture of each node is based on the concept of partitioning functions performed by each node and distributing those functions among multiple processors on multiple nodes. In claim 1, first and second "operational nodes" include "database means" containing "pages" of related data and customized "application program means for exchanging messages and executing transactions on behalf of said user." The application programs are described in column 9, lines 18-68 and are invoked as described at column 22, line 15 to column 23, line 9. The user terminal exchanges messages and executes transactions with the second operational node through the first operational node to perform tasks such as merging a page retrieved from one node with data derived from other sources.

We believe that IBM's interpretation of claim 1 of the '134 patent is overly broad and, in any case, inconsistent with the operational characteristics of nodes on the Internet. In particular, we understand that IBM is reading the first operational node on RCN's home page server ("www.erols.com") and its associated database and operating system. We further understand that IBM is reading the second operational node on other nodes controlled by RCN such as the server which serves as the Tucows mirror site ("tucows.erols.com") and its associated database and operating system. As we understand IBM's position, these nodes are separate servers that communicate with each other via operating system communication functions and thus operate as set forth in claim 1 of the '134 patent. Such is not the case.

The "Erols home page server" is an end point; it does not act as a conduit to other servers. It does not exchange messages with other servers on behalf of the customer. It may provide "links" (host names behind clickable icons) to the customer's browser such that when the customer clicks on the icon, the customer's computer connects directly to the indicated distant host. The "Erols home page server" is not in the communications pathway to the distant host.

To connect customers computer to the Internet, RCN has an Ascend network access server that has telephone lines on one side and Ethernet lines on the other. The network access server answers all the telephone calls when the customer dials in. It is responsible for authenticating the customer by consulting databases further back in the network using a conventional Radius protocol to determine if the caller is a valid customer. If the customer is a valid customer, the network access server extends a communications pathway via a modem rack to/from the customer's computer during his/her entire session. As a result, the network access server is in the communications pathway in the same sense that the telephone lines or routers are in the communications pathway. The network access server operates at a level of abstraction (layer in the protocol stack) far below those covered in the '134 patent. In particular, the network access server operates as a router once the customer has dialed in. It forwards IP

packets based on the destination address and is oblivious to content or activity occurring at the higher protocol layers.

Thus, the network access server extends the Internet to the customer's computer through a modem rack. The customer's browser accepts the IP address of the desired destination node on the Internet, such as the Erols home page site or the Tucows mirror site. In this fashion, the customer's computer becomes a node on the Internet. Thus, any messages and transactions are sent directly from the customer's computer to the destination node. Erol's home page node is just like any other node on the Internet and is not in the communications path and does not exchange messages and transactions with any other node.

Since RCN does not provide conduits for node to node communications, it provides no "enabling means." In particular, no graphics and text are passed through a "first node" operated by RCN to or from a second node separate from the customer's computer. For example, a communications path from the customer's computer is not provided to the Tucows site via the RCN site. Rather, the customer's browser communicates directly with the Tucows site using address information provided by the RCN site. Moreover, many of the functions IBM attributes to RCN, such as providing control information, are actually performed by the customer's browser, if at all.

We also cannot ascertain what IBM believes to be the "applications programs" set forth in the claims. The term "application programs" is described in the specification of the '134 patent as a mechanism for implementing transactional services such as program triggers, value-added page creation and transactions for conducting an extended dialog with a customer. RCN does not perform any of these functions and further does not distribute processing over the web or forward or relay information on behalf of the customer to a distant node. Moreover, if IBM is reading claim 1 of the '134 patent as simply requiring a customer computer to connect to a home page server node that is also connected so as to send messages of any type to another server, then we note that such an interpretation is not only precluded by file wrapper estoppel but is also precluded by volumes of invalidating prior art.

Finally, claim 1 is written in means plus function format, and IBM has not attempted to identify the corresponding structure in the specification to each means plus function limitation. When seen in light of the structure disclosed in the specification, we doubt seriously whether a court would construe IBM's alleged improvement on Videotext technology to include the modern World Wide Web. IBM is not the inventor of the World Wide Web.

For the foregoing reasons, we do not believe that IBM could maintain an infringement action against RCN for infringement of the '134 patent.

U.S. Patent 5,442,771

Claim 1 relates to a method for storing data in an interactive computer network. "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." As used in the application, the storage control parameters relate to the frequency of use of the data. For example, more frequently used data is kept closer to the end user. This is the "cache concentration" concept.

IBM has alleged that the '771 patent covers the Quick Web software used by RCN to cache web sites. At the outset, we note that the Quick Web software was used for a limited time and is no longer in use. However, RCN has recently purchased an Alteon Internet switch and Inktomi web caching software to implement a web caching function. We will thus discuss the '771 patent in the context of RCN's current web caching implementation.

As with the Quick Web software, the Inktomi copies "cacheable" web pages into its web cache so that when the same or another customer requests the same web page it may be retrieved without querying the actual web site. However, the Inktomi software does not associate "storage control parameters" with the web page data to be stored in the web cache. Rather, the content provider provides cache control headers indicating whether the data is "cacheable" and, if so, a copy of the data is stored in the web cache. To the extent that anything resembling the "storage control parameter" described in the patent is created, it is created by the content provider, not RCN.

In addition, the data is also updated based on the header information. On the customer side, when a customer enters a web site URL into his or her browser, the browser first checks its own cache to see if the requested web page data is locally stored. If not, the request for the web site is sent out over the Internet connection. The Alteon Internet switch intercepts such requests and diverts them to the Inktomi cache to check if the requested web page data is stored in the Inktomi software's web cache. If so, the web page data is returned to the customer. If not, the actual web site is queried.

Accordingly, the Inktomi software provides a data store from which web pages may be cached; however, the determination of what data will be cached and whether such data is to be supplied to a web cache is determined solely by the content provider. In other words, unlike the system in the '771 patent, in the Internet context RCN provides no data storage strategy and has no control over where and how the requested web site data is stored. Thus, the Inktomi software does not provide the storage control parameters or "cache concentration" features that are fundamental to the '771 patent. Rather, the Inktomi software merely copies web site data into web caches in the same way that browsers copy web site data into browser caches in customers' computers all over the Internet.

For the foregoing reasons, we do not believe that IBM could maintain an infringement action against RCN for infringement of the '771 patent.

U.S. Patent 5,758,072

Claim 16 relates to a distributed processing, interactive computer network that distributes data objects used to generate applications throughout a network. To launch an application, the necessary data objects throughout the network are collected and processed at the reception computer. The file history characterizes the system as allowing "on the fly composition of applications at run-time" and recites that "object databases are distributed through a hierarchical network and collected for execution at the reception system."

As noted above, RCN 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. RCN thus plays no part in distributing data or applications throughout the Internet. Once connected to the Internet, the customer's browser composes applications from the web site data downloaded from a particular web site. Hence, once connected to the Internet, the applications are accessed and processed by the customer's browser, not by any node maintained by RCN. Accordingly, RCN performs no infringing activity.

In its presentation, IBM pointed to the accessing and processing of graphics files as evidence of data distribution in a hierarchical fashion as called for by claim 16. This argument makes no sense to us. Typically, when downloading web site data, a customer's browser downloads a skeleton of the web page from the web site and then downloads the graphics files (such as "Mvetdgjm.gif" referenced in IBM's presentation) to complete the download. A customer may turn off the download of the graphics if so desired in order to speed up the web page downloads. These graphics files are typically stored with the other web site data on the same web server and are not distributed throughout separate nodes. Once the web site, including the graphics files, are downloaded to the customer's browser, the graphics may be readily presented to the display from the browser's cache or the web cache (if available) without requerying the web site. In short, these graphics files are not "distributed" objects which are gathered for use in applications as set forth in the '072 patent, and, in any case, all data distribution and collection is controlled by the customer's browser, not the hardware or software provided by RCN.

Moreover, as noted above, the customer's browser is not connected through RCN's home page node to other nodes, but is only connected to one or more vendor nodes in a point-to-point fashion (*i.e.*, not through the RCN home page node). Hence, collection of data from a plurality of web sites is handled completely by the customer's browser. Accordingly, no "host" computer coordinates distributed processing as contemplated in the '072 patent.

For the foregoing reasons, we do not believe that IBM could maintain an infringement action against RCN for infringement of the '072 patent.

U.S. Patent 5,796,967

Claim 1 relates 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. Some of the data objects are stored on the customer's computer, while other data objects are stored in a distributed fashion throughout the network. According to the file history, "high level primitives" are not data objects; data objects are used to partition screen displays and are used to transport data across the network and to facilitate storage and processing. The file history also states "resource identifiers have nothing to do with data objects."

In the context of presentation of web pages using a web browser, the partitions in the web browser are generated exclusively by the web browser from the vendor data and not by RCN. 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 page data provided by the vendor. Also, as noted above with respect to the '072 patent, the graphics files are not retrieved from the network in the sense contemplated in claim 1. Rather, the graphics files are part of the same web site data being downloaded by the web browser. In any case, since the actions performed by the web browser are not controlled or facilitated by RCN, there cannot be infringement of claim 1, directly or indirectly, by RCN.

For the foregoing reasons, we do not believe that IBM could maintain an infringement action against RCN for infringement of the '967 patent.