

Microsoft's Open-Source Move To Pay Dividends In The Cloud

By Ryan Davis

Law360 (October 18, 2018, 8:51 PM EDT) -- Microsoft astonished some in the tech community by joining the Open Innovation Network, a group of companies that provide each other free licenses to patents covering the Linux operating system, but attorneys say it's a smart move to bolster Microsoft's cloud computing business.

Microsoft Corp. announced on Oct. 10 that it was committing its entire portfolio of 60,000 patents to OIN, which serves as a patent nonaggression group designed to shield Linux, the open-source system that competes with Windows, from infringement suits. The group has over 2,700 members, including fellow titans like Google LLC and Sony Corp.

The move came as a surprise given the hostility Microsoft has shown to open-source software like Linux under previous leaders, including filing patent suits against companies that use Linux. Former CEO Steve Ballmer said in a 2001 interview that "Linux is a cancer that attaches itself in an intellectual property sense to everything it touches." He also once likened the free operating system to communism.

Tech reporters therefore met Microsoft's embrace of open source by joining OIN with dropped jaws last week. "It suddenly feels like we're living in an alternate timeline," according to a Forbes article. "After triple-checking and slapping myself across the face a few times, I can confirm that this is reality."

"Microsoft has signed up to the Open Invention Network. We repeat. Microsoft has signed up to the OIN," the U.K. website The Register headlined its article, which said that the move "would have made Microsoft bosses of yesteryear choke on their penguin burgers," referring to Linux's penguin mascot.

Microsoft acknowledged its history in its announcement. Corporate vice president and Deputy General Counsel Erich Andersen said in the statement that the move "may be viewed as surprising to some; it is no secret that there has been friction in the past between Microsoft and the open-source community over the issue of patents.

"For others who have followed our evolution, we hope this announcement will be viewed as the next logical step for a company that is listening to customers and developers and is firmly committed to Linux and other open source programs," he said.

Microsoft has warmed to open-source software more in recent years and made other moves aimed at reducing patent litigation, including this month joining the LOT Network, a group of companies that pledge to give other members licenses to their patents if they are acquired by patent assertion entities.

So joining the OIN wasn't a total surprise, and while the decision will generate goodwill among among open-source software proponents, it also has the potential to make its Microsoft Azure cloud computing service, which is partly powered by Linux, more appealing for developers, attorneys say.

Joining OIN will "improve their reputation among the open-source community. They don't want to be seen as someone who is enforcing their patents recklessly," said Joe Mutschelknaus of Sterne Kessler Goldstein & Fox PLLC. "About 10 years ago, Microsoft was seen as a relatively aggressive enforcer of patents. There seems to have been a shift in strategy since the Steve Ballmer days."

Times have changed since Microsoft enthusiastically denigrated Linux and open-source software. The free form of software has been widely adopted to the point that "there's almost no business that has absolutely zero open-source software," said Hogene Choi of Baker Botts LLP.

"It's become so ubiquitous that companies have to recognize reality and go with the flow," she said. "When Microsoft was king of the hill, open source was not a big threat to them and it made sense for them not to participate. But it's good to see that they are recognizing the shift in the economy."

The decision is also "a very smart business move," Choi said, that has strategic implications in the competition for cloud computing services, which often use Linux, between Microsoft Azure and market leader Amazon Web Services.

Microsoft is already dominant in the Windows operating system, and is trying to compete with Amazon in the cloud space by providing infrastructure and encouraging developers to create apps that run on top of the Azure platform. With Microsoft's patents part of OIN, developers that are part of the network don't have to worry about infringement suits from the tech giant.

"It's a huge gesture for Microsoft to encourage developers to go to Azure," Choi said. "They're saying, 'We'll make it easy for you.'"

Without the patent risk hanging over developers, they may be more likely to create apps for Microsoft's service, which in turn could make the service more attractive to users and help it compete with Amazon.

"They're foreclosing some monetization and enforcement options down the road," Mutschelknaus said, but at the same time, "making it open-source may encourage adoption of cloud services" on Microsoft's platform.

Many of Microsoft's tens of thousands of patents may not have a great deal of value to the company, since they likely cover technology it has no plans to develop or market, but they have a lot of value to other people who now have access to royalty-free licenses to them through OIN.

Smartphone makers and others that are part of the network may already have significant licensing agreements for Microsoft's patents, and while those agreements remain in place, licensees could start approaching Microsoft about renegotiating those deals.

Since Microsoft is retaining ownership of the patents, rather than selling them, there's no risk someone else could acquire them and use them against Microsoft. It also has the ability to assert the patents against those that are not part of OIN.

"They're really sharing the wealth in a way that doesn't hurt them very much, if at all," Choi said.

Adding another big name to OIN could also set a precedent that could help it keep expanding, since "the more patents that are part of the network, the more appealing it is for others to join," Mutschelknaus said.

Putting nearly all of their patents in an open-source network is significantly different patent strategy for Microsoft than the one it used in 2011, when joined forces with Apple, Sony and others to buy 4,000 former Nortel Corp. patents for \$4.5 billion, then assert them against Google and others before selling them off. But Microsoft's latest move isn't a complete act of altruism.

"The major takeaway is that people shouldn't think this isn't good for Microsoft. It's good for Microsoft, too," Choi said.

--Editing by Katherine Rautenberg.