PATENT FILE

What's behind Microsoft's latest IP protection offer?

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Microsoft previously offered to protect customers using its Azure cloud service, but its newly announced Azure IP Advantage program extends the shield to companies using open-source products. **Richard S J Hung** and **Aaron P Rubin** explore the motivation behind the move

Microsoft Corp in February unveiled a new program that provides what it's touting as "best-in-industry" protection against threats of intellectual property lawsuits.

Under the Microsoft Azure IP Advantage program,[1] Microsoft advertises that qualified customers will receive "uncapped indemnification" for infringement claims resulting from their use of Azure, including claims arising from open source software products like Apache Hadoop that are incorporated by Microsoft into Azure and provided under Microsoft's terms.

The new program also will allow its customers to pick from among 10,000 Microsoft patents to help them fend off lawsuits.

The indemnification offer is not unlimited. Microsoft says its indemnity obligation[2] does not extend to "the customer's own data, non-Microsoft products, or any modifications a customer may make to Microsoft software or online services," among other things.

IP protection

Offering more IP protection to its customers is not unprecedented for Microsoft. In November 2004, for example, it announced an expansion[3] of IP protection to end users of its software, including Windows.

At that time, Microsoft was trying to stem the adoption of the burgeoning open-source equivalents of Microsoft's own offerings. Microsoft wanted to differentiate its products from open-source products.

Microsoft also was trumpeting its tech

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support for its products and touting them as more reliable than those of Linux.

Microsoft's goal in offering greater indemnification at that time was to stem the rise of open source software; it didn't want to cede more ground.

Non-practising entities

In any case, what's behind the newly added protections? Microsoft argues that the cloud is such an important innovation to the digital economy that it should not be bogged down by lawsuits – especially those brought by non-

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practising entities (sometimes referred to as "patent trolls"), which are too often baseless.

Litigation

In a blog post,[4] Microsoft president and chief legal officer, Brad Smith, said the company wants "software developers to be able to focus on coding, and businesses and enterprises to be able to respond to the changing needs of their customers with agility without worrying about lawsuits."

It's worth asking just how significant the patent-litigation threat is for companies migrating services and applications to the cloud. Smith cited statistics from Boston Consulting Group showing a 22% rise in cloud-based IP lawsuits over the last five years in the US.

But neither the Boston Consulting Group's findings nor its methodology is readily available.

A Docket Navigator search reveals that 276 patent lawsuits were filed in 2016 that refer to the term "cloud" and one of "computer", "server", and "network". Assuming all are on point, they represent a fraction of the 4,520 patent cases that were filed in the US last year. Figures from Lex Machina[5] further show an overall and continuing decline in patent litigation – with cases dropping 22% last year from 2015 and reaching the lowest level since 2011.

Whether the cloud will represent a significant new frontier of litigation therefore is uncertain at best. That's not to diminish the protections that Microsoft is offering. More protection is usually better than less.

Platform and pricing issues

Will these protections nudge prospective customers toward choosing Azure over competitors? In our experience, cloud customers – whether it's chief information officers, chief technology officers, or other decision makers – are most concerned about two factors: the platform itself, and price. Only after those are considered do issues like indemnification and IP protection come into play. And often, those issues are negotiated or traded for other terms, such as preferential pricing.

> ## "Microsoft hopes to gain goodwill among its clients by offering what it calls 'the industry's most comprehensive protection against intellectual property risks'."

PR move

So what is Microsoft getting with this announcement? First, the public relations benefit is obvious. Microsoft hopes to gain goodwill among its clients by offering what it calls "the industry's most comprehensive protection against intellectual property risks."

Secondly, the program may enhance the company's reputation for openness to technology contributed by outsiders. Due to Microsoft's historical emphasis on promoting its own proprietary technologies, it has not always been viewed as encouraging or fond of open source. As a result, customers interested in using open-source technologies instead of Microsoft's own proprietary offerings may have been attracted to Azure's competitors.

Summary

With Microsoft's offer to extend IP protection to its open-source products, it appears to be seeking to reshape how customers view the company, planting the idea that Azure – and Microsoft – aren't just about proprietary technologies.

Footnotes

1. https://azure.microsoft.com/en-us/overview/azure-ip-advantage/
2. https://www.microsoft.com/en-us/trustcenter/compliance/azureipadvantage
3. https://news.microsoft.com/2004/11/10/microsoft-extends-intellectual-property-protection-to-millions-of-end-users/#sm.000hy3dnb13wnd4jv921f2sonfczg
4. https://blogs.microsoft.com/blog/2017/02/08/protecting-innovation-cloud/#sm.000006exsdwbo8czjynb6zbw99g30
5. www.ipwatchdog.com/2017/01/17/lex-machina-litigation-report-drop-patent-infringement-suits-2016/id=77108/

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