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Wireless Network Patent Owner Accusing Electricity Coops of Infringement

Recently many members of the coop community have received patent licensing letters from a business called Innovatio IP Ventures, LLC. Innovatio is a patent licensing business – sometimes referred to as a non-practicing patent entity, or NPE. It makes money by obtaining patents and licensing them to businesses that believe they need a license to cover their operations.

Innovatio has demanded license fees from a wide variety of businesses and has filed four lawsuits this year accusing hotels, restaurants and other public facilities of patent infringement because they offer Wi-Fi access at their facilities. Innovatio can make these allegations because U.S. law defines a patent infringer as any person who “without authority makes, uses, offers to sell or sells any patented invention,” or imports it into the U.S. The law does not require proof that the accused infringer is making money from the alleged infringing activity.

Innovatio contends that its 31 patents are “controlling patents in the area of WLAN (e.g., Wi-Fi) and mesh networking technologies.” The letters notify the recipients of their “likely infringement” of those patents, based on Innovatio’s belief that virtually any wireless local area network (WLAN), or any Wi-Fi network/ “wireless hotspot” offering Internet access, infringes these patents, particularly because the patents cover certain aspects of the IEEE 802.11 communication protocols, a widespread standard for wireless communication.

There is some good news, however. Two major suppliers of wireless networking technology – Cisco and Motorola – have filed their own suit against Innovatio, seeking a declaratory judgment defeating Innovatio’s infringement claims. That suit was prompted by demands for indemnification made by customers of Cisco and Motorola who were sued by Innovatio earlier this year. As that suit indicates, several other leading suppliers of wireless networking equipment have taken licenses from Innovatio, including Broadcom, Agere Systems, STMicroelectronics, Qualcomm, and Intermec. Those licenses should mean that anyone who buys equipment from those suppliers is protected by the license to that supplier.

If your coop receives one of these letters, you will need legal advice from a competent intellectual property lawyer, who can address your individual situation, such as whether a formal non-infringement or invalidity opinion is needed. There are some general best practices to consider after receiving this letter from Innovatio:

- **Don't ignore the letter.** Acknowledge it promptly, and say you are investigating. Ignoring the letter could expose you to a possible willful infringement finding, which allows the court to award increased damages up to three times the patent owner’s actual damages.
- **Are you operating a WLAN or Wi-Fi hotspot?** Chances are good that you are, even if it’s just inside your office. But if you are not, then your response to the letter is a simple one.
- **If you are operating a WLAN or Wi-Fi hotspot, you may have an indemnification claim.** Depending on any contract terms and the other specifics of your situation, your equipment vendor may have a duty to indemnify you, including providing a defense. Even without an express duty, some vendors will indemnify their customers as a goodwill gesture.
- **You might be better off paying for a license.** It is not unusual for the NPE to seek a license fee that is close to the legal costs of determining whether you infringe. Depending on the facts of your situation, you and your legal counsel could determine it would be more cost-effective to pay

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the license fee. Innovatio is offering a discount to those who take a license within 30 days of the date of the letter.

- **Notify your liability insurer.** Few businesses have coverage for patent infringement claims, but you won't know until you ask. Failing to notify the insurer promptly could waive any coverage you have.
- **Consider a follow-up response.** With the assistance of counsel, it is usually a good idea to send a further response to the licensing letter tailored to the other particulars of your situation. The defenses raised in the declaratory judgment suit might be worth mentioning.
- **You may need to preserve documents.** Innovatio's letter puts you on notice that Innovatio could sue you. Under most circumstances, it would be prudent to preserve all paper and electronic documents related to your Wi-Fi hotspot or wireless LAN, and to your response to this letter. Any destruction of relevant documents after the date of this letter could harm your case if Innovatio does sue you.



If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

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