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Packet Intelligence Wins $6M IP Verdict Against NetScout

By **RJ Vogt**

Law360, Los Angeles (October 16, 2017, 7:56 PM EDT) -- A Texas federal jury on Friday awarded Packet Intelligence LLC more than $5.75 million in its patent suit against computer networking company NetScout Systems Inc., finding that NetScout infringed on three of Packet's patents with its GeoProbe data network monitoring systems.

The Eastern District of Texas jury awarded $3.5 million to Packet as compensation for infringements that took place up until March 2016, when the suit was filed, and another $2.25 million to compensate Packet for infringement it has suffered since. The jury also awarded Packet an ongoing royalty for future GeoProbe profits.

Although NetScout argued that it was selling remote network monitoring probes for several years before the disputed patents were registered, the jury sided with Packet, which had alleged that NetScout's GeoProbe products infringed its patents over systems that examine data packets as they pass through a computer network connection point.

Packet counsel Paul J. Skiermont of Skiermont Derby LLP told Law360 on Monday that his client felt the jury's verdict had vindicated the position it took throughout the litigation.

"The NetScout product infringed something that the inventors invented, and NetScout's declaration that they were going to invalidate the patents didn't succeed," he said.

Friday's verdict for Packet left unresolved NetScout's bid to invalidate the patents based on claims of inequitable conduct, an issue that will be decided by U.S. District Judge Rodney Gilstrap.

Packet gained ownership of U.S. Patent Number 6,954,789 — a patent for a "method and apparatus for monitoring traffic in a network — in February 2013, at the same time it obtained two related patents. The company filed suit in March 2016, accusing NetScout and its subsidiaries Tektronix Communications and Tektronix Texas of infringing the patents by selling products that used the same method to monitor network traffic.

According to court filings, Russell S. Dietz, the first-listed inventor on the patents, had worked on the Internet and Engineering Task Force with NetScout CEO and founder Anil Singhal years before registering the patents. NetScout claimed the IETF, a volunteer internet-standards-setting organization, required Dietz to disclose any relevant patent applications before participating in the discussions, and said he violated his agreement with the IETF by keeping his patent plans private.

NetScout sought declaratory judgment of invalidity, noninfringement and unenforceability of the patents from the jury, claiming in its answer to Packet's complaint that Dietz, now serving as a technology consultant to Packet, withheld information from the U.S. Patent and Trademark Office about "inventive contributions" made by other IETF members when he registered the patents. NetScout also claimed the network monitoring technology it used in GeoProbe products had been in public use since as early as 1992.

But the jury on Friday rejected both claims and sided with Packet, ruling that the patents in question explicitly cover the methods NetScout used to inspect and classify packets of data as they move

through a network.

Although the jury refused to grant declaratory judgment of the patent's invalidity and unenforceability, NetScout also brought allegations that the patent should be invalidated for inequitable conduct before Judge Gilstrap at a bench trial held Friday. The judge has not yet issued a decision on the inequitable conduct claims.

Representatives and counsel for NetScout did not respond to requests for comment Monday.

The patents-in-suit are U.S. Patent Numbers 6,665,725; 6,839,751 and 6,954,789.

Packet Intelligence is represented by Paul J. Skiermont, Sadaf R. Abdullah, Sarah E. Spires, Alexander E. Gasser, Steven W. Hartsell and Steven J. Udick of Skiermont Derby LLP and William E. Davis of The Davis Firm PC.

NetScout Systems is represented by Eric Kraeutler, Michael J. Lyons, Ahren Hsu-Hoffman, Michael F. Carr and Adam A. Allgood of Morgan Lewis & Bockius LLP and Charles Edward Phipps, Paul D. Lein, Christopher Capelli and Scott D. Wofsy of Locke Lord LLP.

The case name is Packet Intelligence LLC v. NetScout Systems, Inc. et al., case number 2:16-cv-00230, in the U.S. District Court for the Eastern District of Texas.

--Editing by Catherine Sum.
