

Microsoft and Ma Bell in Supreme Court duel

The nation's top court will have to decide whether Microsoft is liable for violating one of AT&T's domestic patents overseas.

By [Shaheen Pasha](#), CNNMoney.com staff writer

February 16 2007: 1:50 PM EST

NEW YORK (CNNMoney.com) -- Call it a battle of the titans.

Corporate giants [Microsoft \(Charts\)](#) and [AT&T \(Charts\)](#) are getting set to duke it out before the U.S. Supreme Court next Wednesday (Feb. 21) in a case that will decide whether a company can be liable for infringement on a domestic patent abroad. Legal experts say the outcome could have widespread implications on both the software industry and the manner in which patent holders can protect their intellectual property.

The financial fall-out of a decision against Microsoft could cost the software industry billions of dollars, making *Microsoft v. AT&T* one of the major business cases on the high court's docket this term.

"The case is clearly of huge importance in terms of monetary value," said Richard Samp, chief counsel at [Washington Legal Foundation](#).

The issue at hand is whether Microsoft violated AT&T's domestic patent on sophisticated speech decoding technology by sending the software overseas to be replicated and installed in its Windows operating system.

Microsoft v. AT&T revolves around the interpretation of a section of the Patent Act which involves the export of components of patented inventions from the U.S. Under section 271 (f) of this act, a person that supplies a component of a patented invention overseas is liable for infringement.

Sounds cut and dry. But here's where it gets tricky: Microsoft and a vast number of its supporters, including [Intel \(Charts\)](#), [Yahoo! \(Charts\)](#) and [Amazon.com \(Charts\)](#), contend that software is not a physical component, but intangible information.

Going a step further, Microsoft argues that the software wasn't technically supplied from the United States because overseas manufacturers of its computers made copies of the software from a master disk and installed those copies into the operating system.

Since the copies, and not the original software, were in the computers built abroad, Microsoft says it can't be

considered a supplier.

But AT&T argues that Microsoft's logic is simply a way to circumvent patent law and infringe upon the company's patent. The company successfully convinced the trial courts and the federal circuit that software is an important component of its speech decoding technology because the invention wouldn't work without it.

Now the issue lies with the U.S. Supreme Court justices, with the exception of Chief Justice John Roberts, who recused himself because he owns shares of Microsoft. Experts are divided about who will prevail in the case since they say both sides have strong arguments.

"In general, many in the legal community feel that it's not a good idea to extend American law to foreign countries," said Washington Legal Foundation's Samp. "Whether you're talking about a patent issue or anti-trust laws, many people feel that our courts shouldn't get into the business of trying to regulate activity taking place in foreign countries."

But Steven Lieberman, a patent attorney at Washington, D.C.- based law firm Rothwell, Figg, said in some countries outside of the United States, particularly India and China, companies have had a tough time obtaining and enforcing patents for their inventions. And under the 271 (f) statute, AT&T has already successfully convinced lower courts that software is a component that is protected under current patent laws.

That might make Microsoft's job tougher before the Supreme Court.

"Microsoft is going to have to argue that the statute should be read differently from what it says," Lieberman said. "They're going to have to make a more policy-based argument and that is much harder."

To that end, Microsoft is arguing that if a company creates software in the United States and then is held liable for copies that are made and installed into operating systems in foreign countries, software companies are going to be more inclined to relocate their research and development overseas.

"They're going to argue that people in Silicon Valley may start losing their jobs to people in Mumbai," Lieberman said.

But looking at AT&T's actual patent, there is no specific mention of software, said Michael Fein, an attorney at Cozen O'Connor. He said the patent discusses the process of decoding speech and some of the hardware attached to the technology but software is more of a blueprint or list of steps used to code the technology.

"Something that embodies the software, like a disk, could be considered a component but it's a big jump to say that software is an article," he said.

And that's the stance Microsoft and the software industry is hoping the Supreme Court takes on the issue. Already, there are raised eyebrows over the high court's decision to review the case, especially after all lower courts were in agreement in favor of AT&T.

Legal experts said the Supreme Court has been actively reversing a number of rulings by the Federal Circuit in recent months, raising hopes within the software industry that it might rule in favor of Microsoft.

For patent holders like AT&T, that could mean a loss of licensing revenues.

But with many companies involved in the practice of sending software overseas, the case could cost the software industry billions of dollars for past infringement if AT&T wins, said Rothwell, Figg's Lieberman.

As for Microsoft, legal experts estimate a ruling in favor of AT&T could cost the company around \$1 billion.

"It wouldn't be terribly material to Microsoft," Lieberman said. "But it could impact the software industry's development activities later."
