

Patents emerge as significant tech strategy

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It seems not a week goes by these days without news of another patent battle or announcement: Microsoft reaching licensing agreements with various device manufacturers. Apple and various handset manufacturers filing suits and countersuits. Oracle suing Google over the use of Java in Android.

Not to mention barbed digs and jabs that [company executives](#) trade over blogs, Twitter and news releases.

One example:

After Microsoft and Samsung announced a patent-licensing agreement last month involving Google's Android operating system, Google issued a statement saying, in part: "This is the same tactic we've seen time and again from Microsoft. Failing to succeed in the smartphone market, they are resorting to legal measures to extort profit from others' achievements and hinder the pace of innovation."

Microsoft's PR chief Frank Shaw shot back via [Twitter](#): "Let me boil down the Google statement ... from 48 words to 1: Waaaah."

So what gives? What's up with the spate of patent petulance?

The answer is that they're visible signs that technology companies' patent practices have evolved from using them to defend their own inventions to deploying them as a significant part of competitive strategies in the fast-growing [mobile market](#).

And Microsoft serves as a key example of that.

At issue in Microsoft's current patent wrangling is its contention that Android - the mobile operating system developed and offered to manufacturers for free by Google - has certain features that infringe on Microsoft's [patents](#).

Whether Android does indeed infringe on those patents is up to the courts to decide, said a Google spokesman who questioned whether many of the software patents at issue are overbroad or vague.

One Google attorney has accused Microsoft, along with Apple, Oracle and other companies, of "a hostile, organized campaign against Android," when those companies formed a coalition to buy old patents from two tech companies. (Microsoft countered with tweets saying Google had voluntarily declined to jointly bid with Microsoft for some of the patents.)

In just the past two years, Microsoft has reached agreements with 10 smartphone and tablet manufacturers that use Android on devices they produce, most recently with Compal, a company that designs and makes computers branded by other companies. (It has sued Motorola, after the two sides couldn't come to an agreement, as well as Barnes & Noble over the Nook e-reader and Nook Color tablets, which run on Android software.)

Microsoft says it's trying to protect its investment in research and development - an investment resulting in some 32,000 current and 36,500 pending patents. It consistently ranks among the top three computer-software patent holders in the U.S.

One reason these patent issues are being negotiated now is because smartphones are computing devices with features that "are generally in

the sweet spot of the innovations investments Microsoft has made in the past 20 years," said Microsoft Deputy General Counsel Horacio Gutierrez.

Negotiating license fees or filing a lawsuit is about protecting the value of the company's patent portfolio and ensuring there's respect for them, just as Microsoft respects other companies' patents by paying licensing fees - about \$4.5 billion over the past 10 years - the company's attorneys say.

By some estimates, 1,000 to 2,000 of the company's patents are at issue in these disputes over smartphone and tablet technologies - a figure that Microsoft declined to either confirm or deny.

In its case against Motorola, the company alleges infringement of seven patents, including those covering context-sensitive menu systems and behavior and methods and systems for managing changes to a contact database.

In the Barnes & Noble case, Microsoft alleges infringement of five patents, including those that involve natural ways of interacting with devices by tabbing through various screens, surfing the Web more quickly, and interacting with documents and e-books.

Microsoft typically approaches companies it thinks infringe on its patents by first raising the issue in a general way, said Microsoft General Counsel Brad Smith.

"If someone wants to see specific patents, we're prepared to share specific patents with them," but the general understanding during negotiations is that there probably are even more patents involved.

Microsoft's preference, he said, is to reach licensing agreements rather

than battle it out in court. The company has negotiated such agreements with major manufacturers of Android devices, including Samsung, HTC and Acer, which together hold more than half of the U.S. Android smartphone market share by units. It's also reached similar agreements with major original design manufacturers that produce devices branded by other companies.

In many patent negotiations, bringing up the larger, vaguer threat of "we have thousands of patents, you infringe on some of them and we're willing to go the distance to sue you" is enough to start negotiations for a settlement, said Andrew Torrance, a visiting law professor at the University of Washington who specializes in intellectual property and patents.

About 1 in 1,000 such disputes reach a final court decision, with most having settled well before then, he said.

There's no arguing Microsoft is gaining a lot strategically from its patents: financially, legally and competitively.

Royalties from Android phones have become a fairly significant revenue stream.

Investment firm Goldman Sachs has estimated that, based on royalties of \$3 to \$6 per device, Microsoft will get about \$444 million in fiscal year 2012 from Android-based device makers with whom it has negotiated agreements.

Some think that estimate may be low.

Microsoft is not disclosing how much it gets in royalties, but Smith, the company's attorney, has said \$5 per device "seems like a fair price."

Various tech companies wield patents also to slow down competitors or to frustrate, and sometimes stop, a rival from entering a market.

Because the mobile market is still so new, companies are "fighting it out in any way they can," with products, marketing - and patent portfolios, said Torrance, the law professor.

The patent issue can also be another way for Microsoft to position itself vis-a-vis its competitors when trying to persuade phone makers to go with Microsoft.

Google offers Android for free, the argument goes, but it really isn't because the phone makers will end up paying royalties to Microsoft. Wouldn't it be better to just pay a licensing fee for Windows Phone?

While "Job 1 is to produce the best phone software in the world," Microsoft attorney Smith said, the company is also "able to offer our partners a strong IP and patent-value proposition for Windows Phone software."

Beyond all that, there may be still another layer at work, surmises David Martin, chairman of M-CAM Inc., a finance company.

What Microsoft is doing, he believes, is playing a long game, trying to isolate Google, both from the best patent lawyers and from manufacturers who could otherwise stand by Google's side should there eventually be a direct legal battle with Microsoft.

Martin sees it like this:

Microsoft has been negotiating with handset manufacturers such as HTC and Samsung in preparation for eventually taking on Google.

If or when it does, he says, lawyers who've been involved in negotiating patent settlements with Microsoft - i.e. some of the best patent lawyers in the country - would likely be unavailable to Google because they would almost certainly have conflicts of interest.

Licensing agreements that Microsoft crafts now could have another strategic legal benefit, Martin said.

"If Microsoft succeeds in getting cross-licensing settlements with a bunch of (manufacturers), it leaves Google with little opportunity to use a class defense," he said.

Under a class-defense scenario, Google would try to reach out to a Samsung or Motorola so that together they can say: "a number of us agree that Microsoft's patents are not that valuable or valid," Martin said. But most cross-licensing agreements stipulate that neither party will claim that the other's patents are invalid.

"The more companies and portfolios are impaired through Microsoft cross-licensing settlements, the fewer companies Google has to turn to," Martin said.

In response to Martin's theory about Microsoft trying to tie up all the best patent lawyers, Microsoft's Smith said: "That one doesn't come close to reality."

Of Martin's second theory, Smith said: "I don't think this is the legal field that's right for class defenses, class cases."

In addition, added Gutierrez, Microsoft generally doesn't include in its licensing agreements a provision that prohibits either party from proclaiming the other's patents invalid.

A Google spokesman said that even if Martin's theories are correct, that wouldn't prevent Google from asking for a re-examination of whether the patents in play are too broad.

And the simple fact is that Android still holds the largest share of the smartphone market and is continuing to grow, he said.

Several experts say they expect these patent battles to sort themselves out over the next few years.

Torrance, the law professor, draws a comparison to the early days of the PC when similar skirmishes over patents eventually settled down to "an uneasy peace" where rivals realized they had enough firepower to harm one another.

"I think we're in the early stages of a similar battle in mobile computing, which will eventually settle down like it did with PC computing," Torrance said. "But it will take a lot more cases."

PATENT ISSUES AT A GLANCE:

Here are some details of Microsoft patent actions

-Licensing deals: Microsoft says it has reached 1,133 licensing agreements covering a variety of technologies, including operating systems and networking technologies, not just features used in smartphones.

-Android deals: In its patent battles over Android features, Microsoft has reached [licensing agreements](#) with 10 manufacturing companies: Samsung, HTC, Acer, ViewSonic, General Dynamics Itronix, Onkyo,

Velocity Micro, Wistron, Quanta Computer and Compal.

-Android battles: Microsoft is in litigation with four companies over Android features: Motorola Mobility, Barnes & Noble, Foxconn and Inventec.

-Other battles: Other continuing patent battles related to devices running on [Android](#) include Oracle's lawsuit against [Google](#), and Apple's lawsuits against HTC, Samsung and Motorola. (Some handset manufacturers, including Samsung, Motorola and Nokia, have also sued Apple, claiming Apple violated their patents on some its mobile devices.)

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