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Innovation's Cold War

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As tech companies prepare for the holiday season retail wars, touting products with cutting-edge technologies, a costly war is unfolding in corporate America: a war for patents and, more importantly, an arms race to seek protection from frivolous patent-infringement lawsuits.

Because of weaknesses in our patent system, companies have started using patents strategically, threatening litigation to block competitors' sales and stall the development of new products. These lawsuits cost millions to fend off — increasing costs of devices to consumers and dampening innovation. And the only way to fend off these suits is to wield a significant patent portfolio of one's own, thereby creating the ability to threaten a return volley of infringement suits.

The result: a modern Cold War, in which only the threat of equally damaging retaliation can dissuade a patent aggressor from deploying its most destructive IP weapons. Winston Churchill's famous comment that "the only direct measure of defense upon a great scale is the certainty of being able to inflict simultaneously upon the enemy as great damage as he can inflict" is as applicable to the mobile patent wars as it was to global politics in the latter half of the 20th century.

Patent Arms Race

The patent arms race is quickly coming to a head. In 2010, Novell announced it was being acquired by IT management vendor called Attachment. Curiously, Attachment would not be purchasing Novell's vast patent portfolio. Rather, Novell's 882 patents, many of which relate to free and open-source software, were sold to an unknown entity called CPTN Holdings LLC, which turned out to be a consortium of technology companies comprising Microsoft, Apple, Oracle and EMC.

The U.S. Department of Justice reviewed this transaction and eventually added conditions to the deal, requiring CPTN Holdings LLC and its owners to change their original agreements to address the department's antitrust concerns. The department said that, as originally proposed, the deal would jeopardize open-source software innovation in a variety of areas, including mobile operating systems.

These conditions did not deter Microsoft and others from acquiring even more patents. For instance, in the battle to purchase the patent assets of Nortel, a Canadian technology company in bankruptcy, Google's initial $900 million bid was dwarfed by an unknown, dark horse bidder with a $4.5 billion dollar offer: Rockstar Bidco.

When the blinds were lifted, it turned out that Rockstar Bidco was made of up of all the largest

makers of smartphone operating systems, except Google: namely Apple, Microsoft and Research in Motion — plus a few others. Based on their history of patent aggression, it is no stretch to believe that these firms clearly intend to use the Nortel portfolio to handicap Google's Android operating system and tax Google's efforts to innovate in the mobile technology space.

In partial response to the acquisition of the Nortel portfolio by its already patent-rich competitors, Google announced plans in August to buy Motorola Mobility (MMI), which owns, among other things, some 17,000 patents. While the Department of Justice is currently reviewing the transaction, it's clear that this deal will provide a potential deterrent against frivolous patent infringement lawsuits, help create patent balance amongst major smartphone players, and therefore promote competition and innovation on the merits. The fact that other Android-device manufacturers publicly support this deal shows the importance to consumers of patent balance in the mobile space.

It seems the only solution to these IP battles is to embrace the Cold War mentality and permit the IP equivalent of mutually assured destruction. Importantly, Google's acquisition of MMI is very different from Rockstar Bidco's purchase of Nortel's patents because Google is a single firm fighting to establish its own defensive position, whereas Rockstar Bidco is a cadre of competitors aiming to prevent others from effectively competing with them. As such, regulators should allow Google to complete its acquisition of MMI immediately and they should continue to allow companies to engage in defensive patent acquisitions.

At the same time, to allow a cadre of companies to combine their efforts and target one standout competitor serves no procompetitive function. In fact, this can only accelerate the arms race, and distract the industry from competing on the merits. Regulators should remain vigilant for coordinated actions by companies — such as Rockstar Bidco's acquisition of Nortel's patents — aiming to damage another competitor.

We have to remember why we are having this debate. The companies involved are among the most creative and productive companies in America. We want them to continue innovating. We want them to continue competing with one another rather than engaging in patent aggression, which ultimately harms consumers by raising prices and reducing choice. We should not forget that it is innovation and competition which leads to the development of the very products we hope to receive as a gift this holiday season.

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