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Nokia and Microsoft Alliance Raises Significant Competition Concerns

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When competitors form a truce, consumers need to worry because often they find ways to make consumers pay more by cutting off competition. Nowhere is that a more big-ticket concern than an alliance between Nokia and Microsoft, waging a potential patent war on their smart phone rivals and potentially costing consumers millions of dollars in higher smart phone prices. Both companies recognize they have been losing the battle for smart phone dominance, as products like Apple's iPhone and open source operating systems like Google's Android continue to prevail.

With the knowledge they cannot succeed based on fair competition, Microsoft and Nokia have turned to patent enforcement as a means of driving up costs for other market participants. This two-phase attack includes unifying the companies' patent portfolios to amplify the reach of its patent aggression, and hiding these patents in shell corporations (a.k.a patent trolls), who do not use the patents for the production of any products but solely as a weapon to attack competitors. When it comes to Nokia's and Microsoft's latest double-team attack on open source technology, there isn't just one loser — there are millions of Android users, future customers, app developers and manufacturers who stand to lose.

In March 2011, Nokia and Microsoft formed what they called a “strategic partnership” after the Windows 7 developer paid \$1 billion to the world's largest handset maker. Aspects of the deal quickly revealed Nokia, once a strong open source advocate, was turning its back on its friends and unleashing its patents against open source technologies such as Android. The aging tech giants established a new business model for the handset maker — one of asserting Nokia's vast patent portfolio to demand higher licensing fees and garner a higher percentage of sales royalties.

Microsoft and Nokia understand the threat of a countersuit generally tempers the incentive for large technology companies to engage in aggressive and oppressive patent enforcement. Any stand-off is often resolved through pro-competitive cross-licensing arrangements between the technology companies. This is the optimal outcome for consumers, as it ensures more developers have access to the patents and technologies they need to continue developing new products. However, Microsoft and Nokia are not striving for the optimal outcome; they want to cripple their competitors, even at the cost of harming consumers. So, how to leverage a patent trove without the threat of countersuit? Get patent trolls to do your dirty work.

Just six months after the alliance formed, Microsoft and Nokia jointly armed a known patent troll called MOSAID with 2,000 of Nokia patents, 1,200 of which are standard essential patents or

SEPs. It was soon discovered that under the terms of the agreement the aging tech giants would share the royalties from these patents with MOSAID. The “strategic partnership” didn’t stop there. Nokia then turned around and armed another troll, Sisvel, with 450 patents. Recently, Nokia and its trolls started launching attacks against Android partners HTC and ViewSonic. Lawsuits by these trolls against Android original equipment manufacturers (OEMs) are expected soon.

This is nothing short of a frontal assault on the use of open source software which is the foundation for the explosive growth of smartphones. Open source means there is a technology highway with no toll booths. The Android code was released as open source, meaning the code is free for anyone to use or improve. Google provides Android for free to reduce costs so more people can afford a smart phone and to encourage innovation. With more than 550 Android devices on the market, there’s no question Android has accomplished these goals.

It is not entirely surprising that Microsoft and Nokia are desperate to disarm their competitors, and attempt to kill off open source. Nokia and Microsoft have struggled to adapt to a smart phone ecosystem underscored by rapid growth and collaborative innovation. What is surprising, though, is their decision to turn to patent trolls as the weapon of choice. Notwithstanding the cutthroat competition in the industry, none of the other prominent companies have ever resorted to such underhanded tactics as trolling. All of these companies have dealt with patent trolls before and know they are nothing but a tax on the industry, extracting money while producing nothing, and driving up costs for everyone else.

The Nokia/Microsoft patent transfer scheme harms competition and could impose a significant tax on all smartphones. As noted, trolls have no interest in cross-licenses and cannot be deterred by the possibility of countersuits, as they do not produce any products of their own. Thus, trolls impose higher costs (whether in more expensive licenses, higher royalties, litigation expenses, or settlements) on the operating companies they target, and in turn consumers. Second, an operating company that transfers patents to trolls will usually retain a license for its own use and its customers’ use. As such, the transfer to trolls further unbalance the competition balance beam, as only the original patentees’ rivals will face the cost increase.

Google has decided to fight back. Last week it filed a complaint with European and U.S. antitrust enforcers requesting an investigation into Nokia and Microsoft’s anticompetitive behavior. For Google the stakes are high — it has devoted over a decade and millions of dollars into its open source technology, and it is committed to the open source model as a means of encouraging collaboration and innovation. The stakes are even higher for consumers. If regulators do not stop Microsoft and Nokia from following this strategy, the immediate impact will likely be higher prices and reduced innovation in mobile platforms. The long-term consequences are also dire — if regulators sanction this type of predatory conduct, monopolists in all high-tech industries will have a blueprint for excluding competitors. The European Commission will hopefully open an investigation and the U.S. regulators will follow suit.

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