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Smartphones become hot player in the game of 'global patent wars'

In the current game of "global patent wars," the most prominent player these past few months may well be the smartphone you carry in your pocket. Keeping an accurate scorecard would be a full-time job. Multiple lawsuits based on different technologies, different versions of the ever-changing smartphone, different forums and different countries require special wikis to keep track of even the major developments. Among the current players are Nokia, Apple, Microsoft, Samsung, HTC, Motorola and Google. These patent wars are deadly serious. At least at present, they are also uncomfortably unpredictable.

The patent thickets that companies created to protect their ability to leverage smartphone technologies are now the weapons launched against rivals in an escalating global battle that is re-defining the communications marketplace. It will also shape the scope of patent protection afforded breakthrough technologies internationally. In this second battle, the losers may well be the patent owners themselves.

The present international patent system grants innovators a 20-year exclusive monopoly over their inventions in exchange for their public disclosure via the registration process. This disclosure gives rivals the ability to design around another's invention. It also gives them the opportunity to make the business decision to use another's patented invention and dispute the validity of the patent later. The increasing litigation directed to smartphone technology demonstrates the popularity of the second model, fueled by the inconsistent treatment of patents globally. Such inconsistencies can be economically devastating for the losing side.

Article 27 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) sets the international standards for patentability — newness (novelty), an "inventive step" (nonobviousness) and

"industrial application" (utility). These general standards, however, are interpreted under domestic law. Thus, technologies patented in one country are not guaranteed patent protection in other countries.

More problematic, infringement standards are also governed by domestic variations. One country's infringing conduct may well qualify as acceptable in another. Of the diverse lawsuits involving smartphone technology filed around the globe, the American, German and Australian courts have granted Apple's requests for injunctions barring the sale of certain Samsung smartphones. By contrast, a British court rejected the request. Although the technologies in these cases are not always identical, the economic impact of these decisions, by limiting the loser from further marketing its smartphone, is identical — and potentially ruinous. In August, a California jury awarded Apple \$1.3 billion damages in its patent suit against Samsung. Within a day, Samsung's stocks plummeted 7.5 percent. Other technology companies connected with Samsung's smartphones, including Google (Android) and HTC, saw similar declines. By contrast, Apple's stocks rose 1.9 percent (or just about \$13 billion).

Patent injunctions can also disrupt consumers' lives. Concerned about the "harm that an injunction might cause to consumers who can no longer buy preferred products because their sales have been enjoined," in June, Judge Richard A. Posner rejected Motorola's request for injunctive relief against Apple's infringement of its smartphone technology. He considered "harassment of a bitter rival" an unacceptable "danger."

By contrast, Judge Lucy H. Koh in the same month in the Apple/ Samsung case granted the injunction because "the public interest favors enforcement of patent rights here." Koh rejected Samsung's claims of consumer and business disrupt-

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tion caused by such relief: "[I]t does not have the right to compete unfairly, by flooding the market with infringing products."

One of the reasons these patent wars are so hard-fought is because the economic rewards promise to be so great. IHS iSupply said smartphones will constitute 50 percent of the global mobile phone market by 2013. As new generations of smartphone technology emerge, the owner of patent rights in what becomes the industry "standard" gains tremendous leverage in setting the price of future licenses. Internationally, holders of "essential" or "standards-related" patents (SEPs) generally provide licenses on "reasonable and nondiscriminatory" terms (RAND) to avoid antitrust liability. RANDS are designed to eliminate the "hold-up" value of essential technology. Yet in the constantly moving rules of the global patent wars, new weapons including injunctive relief and import bans are being used to pressure would-be users of SEPs to pay a premium for these licenses. SEPs are not limited to standards adopted by formal standard-making bodies such as the Universal Mobile Telecommunications System. Instead, as Posner recognized,

they include "patents that cellphone makers must use to communicate over specified telecommunications networks."

The growing scope of the smartphone wars has raised international concerns to such an extent that the International Telecommunications Union will be holding a special roundtable in Geneva on Oct. 10 to address the issue of RAND licensing commitments and SEP litigation. Even before this conference, the present international focus on licenses for infringing SEPs is already showing signs of expanding beyond "essential" technology.

Since the U.S. Supreme Court's decision in *eBay v. MercExchange* in 2006, American courts have increasingly denied injunctive relief in patent cases. Members of the European Union have begun to show a similar reluctance. Like pharmaceutical patents, smartphone and other breakthrough technologies may find that victory has a downside in this current global patent game — relegating such patents to compulsory licenses or, even worse, permitting uncontrolled importation of gray-market versions. The thrill of the present game may well cost patent owners their ability to deny rivals low-cost licenses for their innovative technologies.

The longer the smartphone global patent war game continues, the more likely breakthrough technologies will be added to the list of essential patents, like those for pharmaceuticals, for which open access is becoming an uncomfortable economic reality for patent owners.

Today, smartphones, tomorrow green technology? Maybe it is time for some hard-headed economic re-evaluation of the risks involved in the current global patent wars. Otherwise, the perception of patents as enablers to innovation will give way to the perception of them as stumbling blocks — entrenched in international standards that remove or at least minimize licensing choices in the future.