



Some of the big players in the patent wars have recently settled out of court, **Peter Adediran** asks is this the beginning of a shift toward more boardroom cooperation or merely a ploy to gain strategic advantage?

In the last few months, Google and Samsung reached a patent cross-licensing deal and Samsung and Ericsson agreed \$US650m to settle any further patent disputes between them in the so called "smartphone patent wars". Instead of being resolved in the court room, the patent disputes between Google, Samsung and Ericsson were resolved in the boardroom through patent cross-licensing deals. Is this a radical shift from the court to boardroom cooperation, or is the situation more pragmatic than that?

Battle lines

To consider whether the latest spate of patent cross-licensing deals are driven by a theoretical shift from patent litigation to cooperation, or whether they are temporary realistic solutions to gain a tactical end, it's necessary to explain the different stakeholders and the marketplace in which they operate.

First, there is the current size and make-up of the smartphone mobile market. The current smartphone mobile market is hugely profitable. The battle is taking place between the international corporations or original equipment manufacturers (OEMs) that manufacture mobile devices for dominance of the market. There is also the contest between the proprietors of the mobile operating systems (MOS) that run on those mobile devices. Finally, there is the fierce competition between the OEMs, and the proprietors that develop MOS'.

Table 1 (below) represents the three main mobile operating system (MOS) proprietors and the original equipment manufacturers (OEMs).

Undoubtedly, the real battle for the MOS is going on between Google Android and Apple iOS, with Microsoft Windows MOS merely clicking at their heels.

Figure 1 sets out the mobile device branding market share based on the number of visits to popular websites, rather than the number of

Table1: The three main mobile operating system (MOS) proprietors and the original equipment manufacturers (OEMs).

MOSs	Type of Ownership	OEMs
Google Android	Open Source	Samsung, Sony Ericsson, HTC, LG
Apple iOS	Proprietary	Apple
Windows	Proprietary	Microsoft phones, Nokia

devices shipped or sold. Apple dominates, with a staggering 63.63% (this includes Iphone, Ipad and Ipod touch). The runner up is Samsung with 6.75% and then Sony Ericsson with 4.03% (Sony and Ericsson merged their respective mobile businesses in 2001). There is about 12.83% unaccounted for. However, even if the majority of that was not allocated to Apple it would still dominate the market. It is also worth noting that Motorola (whose mobile arm was acquired by Google for \$12.5bn in 2011) is credited with only 1.78%.

Consider the above scenario then also consider that before acquiring Motorola, more than 90% of Google's revenues came from Ads.²

Further, consider the potential for Google, Samsung and Sony Ericsson to try to recover some of that market share from Apple.

Secondly, there is the growth potential of mobile. Recently, mobile devices and smartphones have taken over the web as the prime access to personal and business networks. According to Google co-founder Larry Page in an interview in July 2013, 1.5m Android devices are activated every day.³ In June 2012, Apple said its total iOS device sales was more than 400m. During the last quarter of 2012, Apple sold a total of 47.8m iPhones, which is approximately 4m units a day.⁴ According to a report by the WHO, there are about 371,000 babies born globally everyday.⁵ These are staggering statistics if you consider that these are just the figures for Android and Apple phones.

Although the two devices are different, when referring to mobile phones both mobile phones and smartphones are being referred to. A smartphone has all the functions of a mobile phone, such as SMS and email, but it can also connect to personal and business networks. A mobile phone only has SMS or email functionality. But the operating systems we are discussing are deployed on both types of device. Further, smartphones devices will very soon replace mobile phones use with the exception of a small specialist market.

It is therefore quite possible that most people in the world in the not too distant future will soon have mobile phones. Mobile will soon take over from web as the primary access for digital personal and business networks, if it has not done so already. Further, anyone starting a digital-based project in 2014 must first build a mobile version before a web version.

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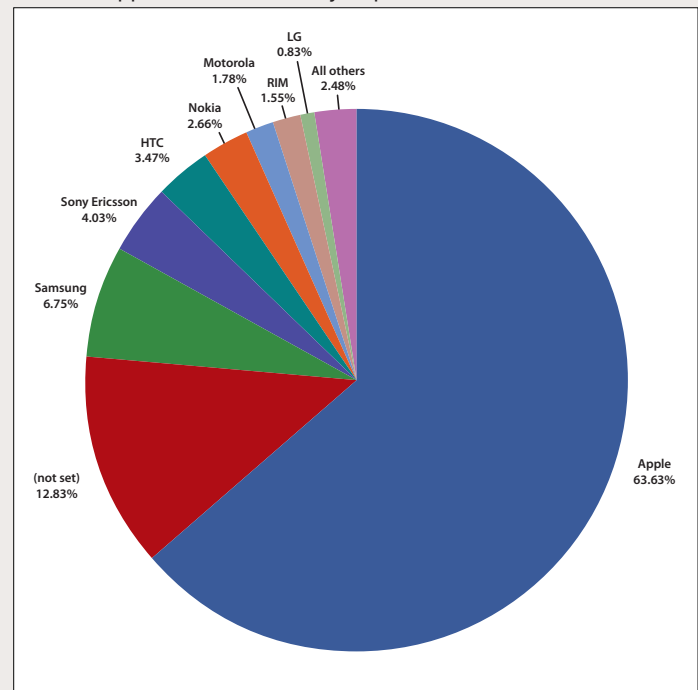
The power of patents

Patents are a negative right that means that it is a right to exclude anyone else from using the invention, it is not a right to use the invention.

So say hypothetically speaking, two entities Flute and Sax want to control the online music market. Flute recognises that Sax is a threat to its dominance of the market and patents the technology to record digital music files. Flute in its claim says “We claim digital music files comprising digital audio file format saved in 16-bit audio.” Sax recognises Flute as a threat and also applies for a patent but improves on Flute's application as follows: “We claim digital music files comprising digital audio file format saved in 24-bit audio.”

So Flute and Sax are both issued with patents. Say Sax copies Flute's very successful patented product and is immediately sued by Flute. The problem is that technology has moved on and platforms now support

Figure 1: The mobile device branding market share based on the number of visits to popular websites, rather than the number of devices shipped or sold. Courtesy of phonemarketshare.com¹



digital files saved in 16 and 24-bit audio. So Flute is forced to copy Sax and now they are both suing each other. In this scenario nobody wins except through negotiations allowing Flute to use 24-bit audio and Sax to use 16-bit audio through a patent licence or a patent cross-licensing agreement.

Patent cross-licensing

The story of Sax and Flute illustrates the power and difficulty of patents. You can use your patents to claim greater market share from your competitors but your competitors could also hold patents that could drive you out of business. This is the case for Flute and Sax since their business requires both 16- and 24-bit audio files.

So the typical stand-off between corporations that both hold patents to technology that the other needs can be resolved by patent cross-licensing. Flute will let Sax save in 16-bit audio and Sax will allow Flute to save in 24 bit-audio. Whoever has a bigger stack of patents than the other wins.

Google, Samsung and Ericsson are not unlike Flute and Sax in my hypothetical example above. They are all either competitors or potential competitors in the marketplace.

The Google and Samsung deal

Through its official blog, Samsung announced on the 26 January 2014 a new patent cross licensing deal with Google (Smart Company, 28 January 2014). The two corporations will have access to each other's existing patents over a broad range of technologies for the next 10 years. This deal was billed as a new cooperation approach to patent disputes. According to Dr Seungho Ahn, Head of Samsung, Intellectual Property Centre: “Samsung and Google are showing the rest of the industry that there is more to gain from cooperation than engaging in unnecessary patent disputes.”⁶

Google emphasised in its press releases that trying to take a conciliatory approach in the use of patents has always been its approach. Reference has been made to the Open Patent Non-Assertion Pledge by which Google in March 2013 allowed access to its pool of patents

provided companies do not sue Google for its patent use. Additionally, in August 2011 Google set up a "Prior Art Finder" as part of its patent search tool and enabled European patent search.

So Google are trying to solve the riddle of the patent wars? Well that is not quite so easy to discern. First, the full details of the Google Samsung deal have not been disclosed. So we do not know how much money changed hands or which patents are part of the cross licence deal. The deal is supposed to include existing patents and patent technologies to be filed in the next 10 years. This could be a concern for other Android OEMs who do not know what strategic advantage Samsung might have as a result of the deal that has not been made available to them.⁷

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It is also worth noting that Google announced their intention to enter into hardware in 2011 when they purchased Motorola for \$12.5bn. Three years later Google then sells its Motorola division to Lenovo for \$2.91bn. Before this, Google acquired Nest, a hardware start-up for \$3.2bn. It is not clear whether Google will use Nest to build smartphones. Almost certainly Nest will be used to build hardware, which is what they do already.

So why would Google buy Motorola and then sell it at a loss? Well Google is keeping most of the Motorola patents. Selling the OEM part of Motorola will ease any tension with its OEM partners like Samsung, but hanging on to the patents will provide Google with a vital defence if it plans a full scale assault into that mouth-watering market share presently dominated by Apple.

The sale of Motorola would appear like a loss of about \$7bn taking into account the Google's earlier sale of Motorola's set-top box division for \$2.35bn. It could also be seen as the cost of Motorola's patents, most of which Google is keeping while selling the rest of Motorola. Google, without patents of its own, could be easily driven out of the market through patent power by Apple and other OEMs.^{8,9}

Ericsson and Samsung

Ericsson filed a lawsuit in November 2012 at the US District Court for the Eastern District of Texas against Samsung for damages for patent infringement. On the 27 January 2014, Ericsson ended all on going patent-related legal disputes with Samsung. Samsung reportedly paid Ericsson \$US650m to settle any further patent disputes between them. Although the full terms of the deal were not publicly disclosed the information released was that the two international corporations

entered into a cross patent licensing deal on a range of different patents to prevent further litigation. As part of the deal, Samsung will pay royalty payments under the multi-year licence agreement that covers patents used in wireless and consumer electronic products, as well as a lump sum as damages for past infringements. According to the settlement, both companies were to drop complaints made against each other before the United States International Trade Commission (ITC),¹⁰ and the US District Court for the Eastern District of Texas. As a result of the settlement, Ericsson reported stable sales and improved profits in the fourth quarter. Revenues of SEK 67.0bn were unchanged year-on-year and included SEK 4.2bn from the Samsung deal.¹¹

Again this deal was billed as a theoretical shift towards cooperation in the so called "patent wars" by Samsung and Ericsson. After ongoing patent battles with Apple, in which Apple and Samsung are still suing and countering each other in more than 50 lawsuits in 10 different countries,¹² Samsung may be finally getting tired of litigation, and may want to settle down to innovation, instead of "engaging in unnecessary patent disputes" as Dr Seungho Ahn puts it. Patent peace might be the new buzz word.

Summary

In the corporate world idealism is very unlikely to be the prime motivator for any decision. The fact is that while the other players fight over token amounts of the total smartphone market, Apple dominates by a huge margin. The market may be maturing and the players may realise that it is far better to negotiate patent cross licences than to carry on with patent litigation, which is unlikely to improve their miniscule market share. Even the relationship of cooperation between Google and Samsung might fall short of a genuine deeper theory of cooperation and may just be a strategic move to join forces in order to take the fight to Apple. We shall see how it develops.

Footnotes

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