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TECHNOLOGY RIVALRIES 2012 Will it be Apple versus Android Patents Bickerings With Rivals May Hurt Apple

BLOOMBERG BUSINESSWEEK SAN FRANCISCO

Steve Jobs, the co-founder of Apple Inc., told his biographer that he'd rather wage a thermonuclear war with Google than make deals to share its technology with the maker of the Android operating system. That was no empty threat. In the 18 months before Jobs died on October 5, Apple sued HTC, Samsung Electronics and Motorola Mobility, the three largest Android users. It alleged that the phone makers stole Apple's technology and asked courts to make them stop. Now, as rulings start coming in, it might be time for a détente that helps Apple maximize the value of its patents, said Kevin Rivette, a managing partner at 3LP Advisors, a firm that advises on intellectual property. When courts side with Apple and impose bans on infringing products, competitors can often devise workarounds; in cases where Apple doesn't win import restrictions, it would be better off striking settlements that ensure access to a competitor's innovation, he said. A scorched-earth strategy is bad news because it doesn't optimize the value of their patents -- because people will get around them, said Rivette, whose clients include Android licensees. It's like a dam. Using their patents to keep rivals out of the market is like putting rocks in a stream. The stream is going to find a way around. Wouldn't it be better to direct where the water goes? Steve Dowling, a spokesman for Apple, declined to comment for this story.

EARLY VICTORIES

For a time, Apple's strategy looked sound. In October, an Australian court banned the sale of Samsung's Galaxy 10.1 tablet in that country, and the US International Trade Commission agreed to consider an import ban on sales of certain HTC devices. Then the tide began to turn. Apple suffered a setback on November 30 when a higher Australian court overturned the ruling against Samsung. On December 22, a German judge said he was unlikely to uphold an import ban on a version of the Galaxy, which Samsung had modified in response to a ban on the original design. The ITC gave Apple only a partial victory on December 19 by ruling that HTC had violated only one of four patents Apple said it infringed. The patent covered

so-called data detection, a feature that helps users make a call, send an e-mail or find an address on a map with a single keystroke.

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HTC decided to drop the feature. That's a significant loss for HTC, since the capability has come to be an expected part of using a smartphone. Still, the ruling reinforced predictions that Apple won't succeed forever in preventing Android rivals from selling gadgets with the now-familiar hallmarks of Apple's pioneering devices. These include touch screens and app stores. Legal history isn't on Apple's side, said Marshall Phelps, former head of intellectual property at International Business Machines (IBM) and Microsoft Corp. Nobody has ever kept competitors out of any market with patents, in part because software can usually be slightly changed to find a noninfringing alternative, he said. Exceptions, he said, include an IBM patent that characterised the basic architecture of a computer and Texas Instruments' original patent for the integrated circuit, or computer chip. IBM was ordered by the US Department of Justice to license its patent, while Texas Instruments decided to do the same, which has resulted in billions of dollars in royalties, Phelps said. Many of Apple's patents, by contrast, relate to the look and feel of devices or particular ways of using a machine, rather than a basic technology breakthrough.

SHIFT AHEAD

The question on the minds of many patent lawyers isn't whether Apple should adapt its legal stance, but when. For now, the company's approach is costing rivals millions of dollars in fees, distracting management and preventing them from emulating Apple's products more boldly, said Ron Epstein, a former attorney at Intel Corp. who now runs patent licensing firm Epicenter IP Group. Apple's patent portfolio remains strong compared with those of rivals, thanks both to the innovations that went into groundbreaking products such as the iPhone and iPad, and to the effectiveness of Apple's legal department in obtaining patents for those innovations, said Christopher Marlett, chairman and co-founder of MDB Capital Group, an investment bank that advises companies on buying and selling patents. Apple has the patents, the money and the expertise to go to war, Marlett said. I just don't see why Apple would seek détente, since they're the clear leader. Until they're hit with an injunction by Google or Samsung, they don't need to get serious about licensing.

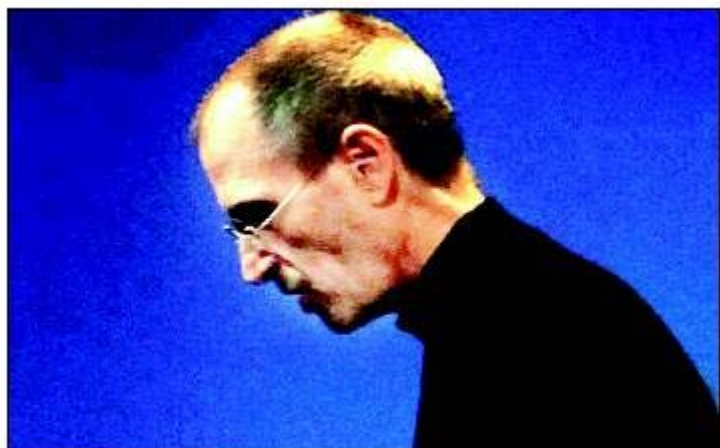
RIGHT BACK AT YOU

Still, as more companies pour resources into the booming mobile devices market, Apple should eventually cut deals to ensure access to rivals' innovations as well, Epstein said. How long can you beat everyone else over the head before they can do the same to me, he said. Tim Cook, who took over in August when Jobs announced he would be unable to come back as CEO, has many other ways to take advantage of the company's patent portfolio. The company could probably collect as much as \$10 in royalties for every device sold, more than the amount analysts speculate Microsoft receives from Samsung and HTC, which use its mobile technology, said Rivette at 3LP.

OTHER ARRANGEMENTS

With \$81 billion in cash and investments, Apple has little need for more. Instead, the company could pursue out-of-court settlements that would help it take on Android in other ways, Rivette said. The company could offer to drop its more than two dozen patent claims against Samsung in exchange for an agreement to hold off using Apple technology for six months or a year, he said. Cook could also try to get price breaks or guarantees that would give it greater access to Samsung parts, Rivette said.

Samsung parts, Rivelle said.



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