Kluwer Mediation Blog

Patent wars go nuclear. Might mediation help?

Rafal Morek (DWF LLP) · Friday, September 9th, 2011

Patent wars are a perennial hot topic with not only IP experts being familiar with stories of well-known patent disputes. A classic example is perhaps the story of the Wright brothers, who received a patent for their method of flight control in 1906 and fiercely defended it for years afterward, by suing other aviators and companies. Prolonged patent disputes related to sewing machines, lasers, microprocessors, and thousands of other commonly used (or unused!) devices, substances, methods or processes etc. have occurred. Readers interested in the history of patent disputes may find many vivid examples, e.g., in F. Warshofsky's "The Patent Wars: The Battle to Own the World's Technology" (1994) or M. Fisher's "Fundamentals of Patent Law" (2007). While "patent wars" are nothing new, their present scale is unprecedented. The new age of patent warfare has just begun. What role will mediation play in its regulation?

Last year alone, the U.S. Patent and Trademark Office (PTO) issued more than 100,000 patents. In the PTO's database one can find such "wonders" as: a finger puppet, a multi-dog log carriage, a toilet seat deodorizer apparatus, or Methodologies and Analytics Tools for Identifying White Space Opportunities in a Given Industry (named "a Patent on Absence of Patents"). While some patents may be worthless, many are precious. "*Patents are emerging as a new currency*", Alexander Poltorak, General Patent, told the New York Times. Many financial analysts and bankers are now curious as to how to value them.

The top five organizations that have had the most US patents approved are: IBM (5,866); Samsung (4,518); Microsoft (3,086); Canon (2,551); and Panasonic (2,443). IBM has been awarded the most patents in the past 17 years. However, the honor for the most valuable portfolio goes to Microsoft (see the info-graphic below).

If you cannot "invent patents" (which is not always easy or sufficiently quick) or you simply want to have more… and more patents, there is always the option to buy them. Just recently it made the news that Google Inc. is paying $12.5 billion for Motorola Mobility. Some experts immediately commented that while there are many things Google gets with the Motorola Mobility acquisition, like its own smartphone manufacturer, what Google is really acquiring is a portfolio of more than 17,000 patents. According to Bill Snyder, "*the major, if not the only, reason it's making that gargantuan purchase is to defend the Android platform from patent-related legal attacks from Apple and others. Some analysts have suggested that Motorola's big patent portfolio represents roughly half the value of the company*."

To get a full picture, it should be remembered that just two months ago, in the biggest patent

auction in history, both in terms of the number of patents sold and in relation to the price tag, a consortium of Apple Inc., Microsoft Corp., Research in Motion Ltd. (RIM), Sony Corp., Ericsson AB and EMC Corp. outbidded Google for a patent portfolio from Nortel Networks Corp., and agreed to pay $4.5 billion in cash. In addition, several smaller transactions have been taking place, such as the $450M acquisition of 882 of Novell's patents by Microsoft last year.

More patent buyouts are on the way. Everyone knows what an arms race is. Building up your patent arsenal now appears to be as important as the products you produce or services you provide. In fact, you do not have to produce or provide anything at all – just attempt to extract licensing fees from other firms that are allegedly infringing on your patents. By doing so you become a "patent troll".

Google is not defending itself from patent trolls, of course. It's fighting with other IT moguls like Apple, Microsoft, and Oracle, who are in turn fighting with the likes of Samsung and HTC and vice versa. A patent is "*a license to sue*" or "*a shield against being sued*". According to the old rule: "*In the light of the history of patent wars, there is no alternative but to fight patent with patent*" (cited by: O. Granstrand, "The economics and management of intellectual property: towards intellectual capitalism" (2000), p. 140). As observed by Brandon Bailey: "*a hefty patent portfolio can be a shield against accusations of infringement, because the accused company can threaten a countersuit based on its own holdings — a tactic some compare to the nuclear-era doctrine of 'mutually assured destruction'*."

It remains to be seen whether mediation will play a significant role in this new era of patent warfare. There is undoubtedly much room for mediation, and such a role can be played – even though resolving patent disputes by way of mediation may sometimes be difficult for various reasons (see e.g. "Eight Challenges to the Successful Mediation of Patent Cases" on the IP ADR Blog.com). There are excellent mediators and reputable mediation centers, such as the WIPO Mediation Center, which have plenty of relevant expertise. Specific problems related to patent disputes have attracted considerable attention and research, see e.g. CPR's Patent Mediation Task Force. Finally, there are successful stories of mediation and other ADR applied in very complex patent-related disputes in the past, such as the famous IBM-Fujitsu dispute (see e.g. Ch. Bühring-Uhle et al., Arbitration and mediation in international business, p. 255 et seq. (2006)).

Concerning the most recent high-profile patent disputes, we know that there have been some attempts at mediation. While most of these probably remain confidential, a few have already been disclosed. In the *Oracle v. Google* lawsuit over alleged Java patent violations in the Android mobile OS, mediation was ordered by a court just last Friday (September 2nd, 2011). The order issued by Judge William Alsup of the U.S. District Court for the Northern District of California ordered the "top executive officers" of both the companies to mediate the case before a United States Magistrate Judge. The mediation is yet to start. According to PC World, Oracle has taken issue with the executive Google proposed to represent itself, saying he is not senior enough and was also part of past failed attempts at a resolution. Google had put forward Android head Andrew Rubin and general counsel Kent Walker to take part in the mediation, while Oracle proposed sending co-president and CFO Safra Catz and Thomas Kurian, senior vice president of product development. Although it supposedly seems unlikely, we will see whether Oracle's CEO Larry Ellison and Google's CEO Larry Page agree to step into the mediation process…

An interesting infographic courtesy of businessinsurance.org:

Via: Business Insurance Site

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