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Diving into the patent pool

Google's strategy can provide some important lessons on whether to participate in a patent pool, according to Maier & Maier's **Timothy J Maier**

On 15 August 2011, Google announced that it would be spending $12.5 billion to purchase Motorola Mobility, a company that designs and manufactures smartphones, tablets and other communication devices for its parent company, Motorola.

Although the research and manufacturing capacity of Motorola Mobility is by itself very valuable and no doubt was an appealing target for Google, a consensus has developed that this purchase was equally motivated by something that has recently become very important to the search giant: Motorola Mobility owns a suite of more than 17,000 issued patents relating to mobile devices and smartphone technology.

This purchase is simply the latest step in Google's scramble to defend itself in the increasingly hostile smartphone marketplace. Unlike most of its competitors, before the Motorola Mobility acquisition Google's patent holdings were relatively sparse. This was not much of a problem for Google until the last few years, when the huge increase in the value of the smartphone market has led to a corresponding explosion in the number of lawsuits related to the technology.

This extensive litigation has led to a growing list of seeming absurdities. For instance, for every Android-enabled phone that it sells in the US, HTC, a large smartphone manufacturer, must pay a licensing fee not to Google, but to its competitor Microsoft, due to a patent-licensing agreement. It is beginning to become clear that the current strategies being employed in this technology space are inefficient almost to the point of unsustainability.

A kinder, gentler alternative

One possible approach that could have deflated this budding IP war at an early stage is a cooperative strategy called patent pooling. In a patent pool, two or more companies in a technological field come together and agree to cross-license their IP holdings in order to cooperate for the benefit of all involved. Patent pools are useful because they are efficient. They give users and manufacturers of a technology a one-stop-shopping experience, and guarantee access to an entire technology space through the door of one relatively simple licensing arrangement.

One common example of patent pooling involves developing a patent pool around an already established technological standard in order to safeguard its boundaries and streamline compensation for the companies that created and continue to use the standard. Generally, in cases like this members of the committee overseeing the standard begin by hiring an independent evaluator. The independent evaluator examines potential pool submissions and determines whether these patents are essential to the pool. Essentiality can be determined under a number of different criteria, for instance whether a patent is technically necessary for the standard, whether it is commercially necessary for the standard, or whether a patent is necessarily infringed 100% of the time by a device that is compliant with the standard. Once the essential patents are determined, the holders of these patents form a group, which meets to determine the rules governing licensing agreements and other administrative matters. At this point, especially in modern patent pools, government regulators such as the Department of Justice may become involved. Once approval is obtained, a pool administrator is hired, and then goes about signing up licensees, distributing royalties, and monitoring infringement.

Unfortunately, not for everyone

Although patent pools may sound like a straightforward and collegial strategy for efficiently managing the growth of an entire industry, they are not ideal for every situation. For example, a pool may simply fail to get off the ground. If a critical mass of licensors contributing patents to the pool is not present, the pool can simply fail for lack of momentum.

Once a pool does get started, it may flounder because joining the pool does not present an attractive economic proposition. This may be, for instance, because administrative and royalty fees are set too high. Pools may also set terms for early adopters, who receive more favourable rates than those signing up later. This can also discourage acceptance by an industry. In other situations, such as unbalanced technology spaces in which a handful of large corporations do the majority of the manufacturing, those large manufacturers may pay more money by joining a pool than they would save by striking out on their own. Having a large number of products covered means large royalties paid into the pool, often placing money in the hands of competitors, which can be an unappealing circumstance for some participants. One of these large manufacturers can avoid the large royalty payments by taking advantage of the fact that in a patent pool, infringement suits are filed by the individual patent owners, not the pool itself. If one of these large manufacturers has its own independent patent position that is relatively strong, it can chip away at the pool by taking on the other manufacturers one-on-one.

While all of these problems are evident in the current smartphone patent standoff, there is also another major barrier to the development of a patent pool for managing the smartphone market: a fundamental incompatibility in the business strategies of the major industry players. In essence, Google takes in the vast majority of its revenue from advertising sales, not hardware or software sales, unlike its competitors. Google's main goal is to get people online and viewing ads, as often as possible and for as long as possible. As a result, Google is not interested in charging royalties, and in fact provides its Android operating system free of charge to smartphone manufacturers, with the goal of keeping those smartphones relatively inexpensive so that more people use them more often. This is directly at odds with, for instance, Apple's business model, which relies primarily on hardware sales, or Microsoft's, which relies on licensing fees from software. Because of these diverging goals, it is difficult to imagine how these three companies would ever be able to reach a patent pooling or other cross-licensing scheme that is mutually advantageous.

A looming patent war

As a result, what has developed is exactly the scenario that patent pools are often used to avoid. The smartphone industry is now locked in an uneasy détente, a patent Cold War that could conceivably go hot with massive, industry-crippling lawsuits at any instant. For a time, Google appeared to be falling behind in the arms race, as the apparent "patent gap" loomed between the Android operating system and its competitors at Microsoft, Apple, and Research in Motion. This worry came to a head after a recent auction for a suite of patents owned by now-defunct Nortel, when a consortium including these three companies appeared to have succeeded in blocking Google from what some considered its last real chance of catching up. In one fell swoop, Google's acquisition of Motorola Mobility and its portfolio of more than 17,000 issued patents has gone quite a long way toward closing the gap and bringing the industry to an equilibrium that is

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relatively stable, if somewhat tense. Essentially, Google has secured the IP equivalent of mutually assured destruction – the military theory of nuclear deterrence holding that neither side will attack the other if both sides are guaranteed to be totally destroyed in the conflict.

Just as in the real Cold War, it is likely that what we see on the surface represents only a fraction of the manoeuvring that continues just outside the public eye. One interesting line of conjecture holds that the purchase of Motorola Mobility was Google's long-term objective all along. According to this line of reasoning, Google has been interested in buying Motorola Mobility ever since it was spun off from its parent corporation of Motorola in January of this year. The somewhat unusual collection of technologies comprising Motorola Mobility – including smartphones and internet television, two areas into which Google has recently expanded – lends credence to the idea that Motorola packaged the company intentionally and specifically to appeal to Google. According to this theory, Google shied away from the purchase after government regulators, including the Federal Trade Commission, began to make noise this summer about antitrust investigations into the software giant. Google then proceeded to pursue other portfolios, including the Nortel patent suite, in part to goad its competitors into taking action. When they banded together to defeat Google in that auction, Google took the opportunity to cry foul, and to spin its long-planned acquisition of Motorola Mobility as a purely defensive move designed to protect itself from what it called anticompetitive practices. Whether or not this version of events is accurate, it exemplifies the type of wheels-within-wheels strategic maneuvering that occurs under the type of patent détente in which these companies are engaged.

Practical Lessons

A number of lessons can be learned by companies who want to avoid Google's apparent missteps. First and foremost, the most obvious lesson is that you should join or start a patent pool or other cooperative arrangement if you can. If the situation permits, patent pools are really excellent tools for creating and increasing efficiency in a technological area. They allow potential competitors to collaborate, and therefore mitigate the waste of resources that is often the result when large technology companies engage in extensive patent litigation. In essence, patent pools allow companies to avoid the courtroom and focus their energy on simply doing business.

Second, if you decide to go it alone, understand the dangers you face. There are many reasons why cooperative strategies such as patent pools don't work out. If that happens, it is important to anticipate the type of standoff that will result if you are successful within a technological space. Google was almost left out in the cold. For a long time, their business strategy lacked an emphasis on IP, and this very likely could have resulted in the death of the Android operating system. Although it appears that the Motorola Mobility purchase has salvaged the situation in relatively dramatic fashion, Google could have saved itself a major headache and a significant amount of money if it had incorporated a robust programme of patent acquisition into its overall strategy from the outset.

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