

Navigating Recent Mobile Patent Lawsuits

*An Immediate Look at the Impact of
Smartphone Technology on Patent Cases*



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Smartphone Patent Wars: It's the Operating System

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Overview

While patent suits are nothing new in technology-driven industries, the virulence in the smartphone industry stands out. In excess of twenty-five actions were filed in this sector in the past three years. What is the source of this litigiousness? A review of the multibillion-dollar smartphone market provides some clues.

A smartphone is essentially a personal computer with a mobile phone function. Spurred by the introduction of Apple's iPhone in 2007, smartphones now account for nearly 30 percent of all mobile phones sold. L. Barrett, *iPhone, BlackBerry Top Mobile OS Ratings* (12/1/2010), www.enterprisemobiletoday.com. This is a six-fold increase since 2006. D. Eran, *Smartphones: iPhone and the Big Fat Mobile Industry* (1/21/2007), www.roughlydrafted.com. Moreover, industry analysts predict smartphone share to increase to more than 50 percent by 2012. L. Barrett, *iPhone, BlackBerry Top Mobile OS Ratings* (12/1/1999), www.enterprisemobiletoday.com. Competition has been fierce as the players battle for market share. Many believe the ultimate battle is not between hardware products, but between operating systems.

The Emergence of Android

Currently, five mobile application operating systems dominate the US market (in descending market share order): Apple's iOS, RIM's Blackberry mobile operating system, Google's Android, Microsoft's Windows Mobile, and Nokia's Symbian. Nielsen reported in October 2010 that Apple and RIM each had roughly 27 percent of smartphone owners using devices running their respective mobile operating systems. The Android mobile OS claimed 22 percent of the market, while Microsoft's Windows Mobile and Nokia's Symbian operating systems came in at 14 percent and 3.4 percent of users, respectively. See, L. Barrett, *iPhone, BlackBerry Top Mobile OS Ratings* (12/1/2010), www.enterprisemobiletoday.com; Nielsen, *US Smartphone Battle Heats Up: Which is the "Most Desired" Operating System?*, Nielsen Wire (12/1/2010), <http://blog.nielsen.com/nielsenwire>.

The Apple operating system, iOS (known as iPhone OS prior to June 2010), was developed originally for the iPhone, but has since been used on the

iPod Touch, iPad, and Apple TV. Apple does not permit iOS to run on third-party hardware. According to a recent Apple press release, more than 250,000 applications are available for download. Android is based on a modified version of the Linux kernel. Google, and other members of the Open Handset Alliance, collaborated to develop and release Android to the world to encourage innovation. RIM's operating system App World (for BlackBerry) contains around 10,000 applications. With its new QNX operating system, BlackBerry can port applications from Google's Android system, giving RIM potential access to more than 160,000 applications. See Reuters, *RIM Shares Jump on Positive View of New Operating System, After Effects* (11/30/2010), <http://aftereffects.digitalmedinet.com>.

Although Blackberry is one of the market leaders, it is continuing to lose share to Android while Apple's share has flattened. *Id.*; and see B. Caulfield, "Android, iPhone Most Coveted Smart Phones," (12/1/2010), <http://blogs.forbes.com>; L. Barrett, *iPhone, BlackBerry Top Mobile OS Ratings* (12/1/2010), www.enterprisemobiletoday.com.

Many believe that the marketplace is shaping up as a battle between the market leader, Apple, with its proprietary iOS operating system, and the fast-growing Android operating system. The rest are quickly falling to the side.

When Apple introduced its iPhone in 2007, it was the first mobile phone to offer a finger-activated screen and provide access to a large menu of applications, called apps. It impressed customers with its uniqueness. In 2009, several Android-based phones emerged from manufacturers such as HTC, Motorola, and Samsung, and the iPhone lost its uniqueness. The Android-based phones also use touch-activated screens and a growing menu of apps. Android differs from Apple in that it is open source software supported by Google and is used by multiple smartphone manufacturers. Companies willing to invest in Android, typically in the form of allocating significant engineering resources to improve it and bring Android devices to market, have full access to the operating system. See www.android.com for a more detailed explanation of the Android philosophy regarding its open source project. The creators of Android made its source code open "so that no industry player can restrict or control the innovations of any other." www.android.com. In contrast,

Apple iOS is closed source and proprietary, and prevents any unlicensed use by third parties.

Apple Fights Back and Android Device Manufacturers Counterpunch

With the emergence of the Android-based smartphones, Apple made good on its threat and filed several patent suits. However, Apple is not alone in possessing patents. All the smartphone players have significant patent portfolios and have shown a willingness to use them, to improve their competitive position. In 2007, Steve Jobs highlighted Apple's 200-strong patent portfolio as a veiled threat to those that would seek to introduce similar products. As competitors start to take market share, companies routinely comb through their portfolios to find patents to assert. Consequently, among competitors in the field, patent infringement lawsuit filings are on a steep rise. See e.g., N. Bilton, *An Explosion of Mobile Patent Lawsuits* (3/4/2010), www.NYTimes.com, reporting that nearly every large mobile phone player has been involved in recent litigation regarding mobile technologies.

At least one commentator has likened the spate of recent litigation activity in this area as "patent lawsuit Super Bowl party." Id. At present, most, if not all, of the major players in the mobile devices market have joined, or been pulled, into the fray. The major (and some minor) players have launched attacks in the federal courts and in the US International Trade Commission (ITC), many times in multiple forums. For example, Oracle has sued Google, Nokia has sued Apple, Apple has sued Nokia, Elan Microelectronics has sued Apple, Microsoft has sued Motorola, Vertical Computer Systems has sued Samsung and LG, Gemalto NV has sued Google, HTC, Motorola and Samsung, NTP has sued Apple, Google, HTC, LG, Microsoft and Motorola, to name but a few. Some of the battles appear motivated to drive licensing revenue, but others seek orders barring importation and sale. Among the most significant litigation battles are those pitting Apple against Android-based manufacturers HTC and Motorola, and vice-versa.

Apple v. HTC/HTC v. Apple

By early 2010, HTC had emerged as the market share leader of the Android-based smartphone manufacturers. Not surprisingly, Apple targeted them first. Apple fired the first shots in this war in March 2010, in two simultaneously filed cases in US District Court in Delaware, each alleging that HTC's Android OS-based mobile phones violated ten patents (twenty in total). *Apple Inc. v. High Tech Computer Corp., et al.*, No. 10-CV-00166 (D. Del. filed March 2, 2010) and *Apple Inc. v. High Tech Computer Corp., et al.*, No. 10-CV-00167 (D. Del. filed March 2, 2010). At the same time, Apple initiated an ITC investigation involving ten patents, nine of which generally relate to software architectures, frameworks, and implementations, including various aspects of software used to implement operating systems, and one of which relates to an interface for a processor, such as a digital signal processor. *In re Certain Personal Data and Mobile Communications Devices and Related Software*, Investigation No. 337-TA-710. This case was consolidated in part with ITC Investigation No. 337-TA-704, which Apple brought against Nokia. Five of the patents were consolidated with HTC investigation with the rest remaining in the 704 investigation.

Apple's ITC complaint identifies the accused HTC products as computing and mobile communication devices, including cellular phones and smartphones, together with software designed for use on, and intended to be loaded onto, the devices, including the Android OS, and products with digital signal processing functionality. In June 2010, Apple added four more patents to the fight when it filed yet another suit in the District of Delaware against HTC's Android OS-based products. *Apple Inc. v. High Tech Computer Corp., et al.*, No. 10-CV-00544 (D. Del. filed June 21, 2010). The district court cases are in their very early stages, and the ITC investigation is in the discovery phase with a target date of October 2011.

HTC retaliated in May 2010, with an ITC suit of its own against Apple raising five patents. *In re Certain Portable Electronic Devices and Related Software*, 337-TA-721. HTC's complaint identifies three of the patents as relating to hardware and software used to implement telephone directories within mobile telephone systems, and two as generally relating to power management methods implemented in portable electronic devices. The complaint specifically targets Apple's iPod, iPhone, and iPad product lines.

This investigation is currently in the discovery phase, with motions to compel, and other motions flying back and forth, and has a target date of January 2012.

The choice of the ITC by the parties raises the stakes. The ITC, a US trade panel that investigates patent infringement involving imported goods, can bar the importation of products that infringe patents. Although a patentee cannot recover damages before the ITC, it is an attractive forum because of the exclusionary order, liberal discovery, expert judges, and speed. Investigations are typically completed in fifteen months, which is far faster than most district courts. However, unlike district court lawsuits, damage awards are not available in ITC investigations, only injunctive relief. In addition, a number of other district court venues, known as “rocket docket,” are often selected for the speed at which cases move through the courts.

Motorola v. Apple/Apple v. Motorola

Because of its success with its Android-based smartphones, Motorola knew it was next in line. In what many viewed as a pre-emptive strike, in October 2010, Motorola initiated multi-front attacks on Apple—in the Northern District of Illinois, *Motorola Mobility Inc v. Apple Inc., et al.*, Nos. 10-CV-6381 and 6385 (N.D. Ill. filed October 6, 2010) and the Southern District of Florida, *Motorola Mobility Inc v. Apple Inc., et al.*, No. 10-CV-23580 (S. D. Fla. filed October 6, 2010). Motorola sued Apple for infringement of eighteen patents, alleging that a number of Apple’s products, including the iPhone, iPad, iMac, Mac Book, iPod Touch, Mac Pro, and Mac Mini, infringed one or more of Motorola’s patents. Motorola recently voluntarily dismissed the Illinois complaints. The two Florida cases are still pending. Motorola filed yet another lawsuit in Delaware asking the court to find twelve of Apple’s patents relating to features, such as its multi-touch features, not infringed by Motorola and/or invalid. *Motorola Mobility Inc. v. Apple Inc.*, No. 10-CV-00867 (D. Del., filed October 8, 2010).

Motorola also filed a complaint with the ITC on October 28, 2010, to stop Apple from importing various products into the United States, asserting that these products infringe six of Motorola’s patents. *In re Certain Wireless Communication Devices, Portable Music and Data Processing Devices, Computers and*

Components Thereof, No. 337-TA-745. Several weeks later, Apple filed two separate lawsuits against Motorola in the Western District of Wisconsin, each asserting that at least nine of Motorola's mobile devices infringe one or more of three asserted patents, respectively (six total). *Apple Inc. v. Motorola Inc., and Motorola Mobility Inc.*, No. 10-CV-661 (W.D. Wisc. filed October 29, 2010) and *Apple Inc. v. Motorola Inc. and Motorola Mobility Inc.*, Case No. 10-CV-662 (W.D. Wisc. filed October 29, 2010). Both complaints name Motorola's Android-based products, Droid, Droid 2, Droid X, Cliq, Cliq XT, BackFlip, Devour A555, Devoir i1, and Charm, as infringing devices. One day after Motorola filed its ITC case, Apple fired back with its own, asserting its three patents against Motorola. *In re Certain Mobile Devices and Related Software*, No. 337-TA-750. Both Apple's and Motorola's ITC cases are in the discovery phase with no target date yet set.

Conclusion

The battle for the dominant operating system continues. Ideally, customers will choose the winner based on such factors as value, ease of use, and depth of features. However, the various patent battles may choose for them. Success by a company in the ITC or a district court may result in products being pulled from the shelves, or dramatically increased in price to support licensing payments. Another possibility is that these battles shape up to be all smoke but no fire, with an exchange of cross-licenses between combatants and business as usual. Time will tell. Because of the number of fights proceeding in the rapid forum of the ITC, the effect of the patent wars will be determined very soon.

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