

The Truth About Mobile Intellectual Property Protection: Debunking Common Misconceptions

By Gregory F. Wesner

Snapshot

Mobile is the platform of the smart future.

As mobile device and network capabilities expand and reach broader audiences, ubiquitous network connectivity and depth of mobile data penetration will solidify the position of “smart” devices and services as essential components of an increasingly mobile economy.

The evolving mobile marketplace is volatile, with intellectual property (IP) taking an increasingly prominent role. As a result, the field is riddled with potential pitfalls for the unwary. A comprehensive business strategy based on clear understanding of basic IP principles is essential to navigate this newly challenging and lucrative landscape.

The Buyer’s Perspective

As new and existing vendors expand into the mobile marketplace, prospective buyers are faced with an increasingly complex business environment. Buyers should accordingly be wary for potential pitfalls, and develop a proactive strategy to identify and avoid potential risk and distraction.

An essential element of any such strategy is basic familiarity with IP principles, which enables sophisticated buyers to engage prospective vendors and explore market strength IP portfolio claims. Vendors’ claims to exclusive rights in the market should be thoroughly vetted.

It is rare for patent holders to assert claims directly against end users, preferring to target vendors of the allegedly infringing products. Buyers’ risk of legal fallout can and should be eliminated through robust indemnification. In this context, measuring a vendor’s financial ability to fend off challenges and fulfill indemnification obligations is critical.

The Vendor’s Perspective

Perceptive buyers will demand the vendor bear both the risk and cost of potential IP conflicts. As a result, vendors can no longer rely exclusively on superior products or services to secure and maintain a healthy and happy customer base. Vendors must protect these superior offerings with robust IP portfolios, and demonstrate both the willingness and capacity to fend off potential challenges by competitors or non-practicing patent owners (sometimes called patent “trolls”).

The successful vendor will therefore engage buyers by demonstrating both a sophisticated IP strategy and portfolio, coupled by the willingness and ability to protect buyers from risk.

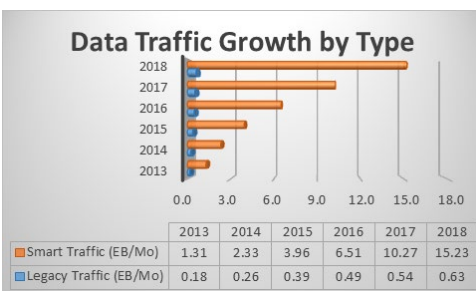
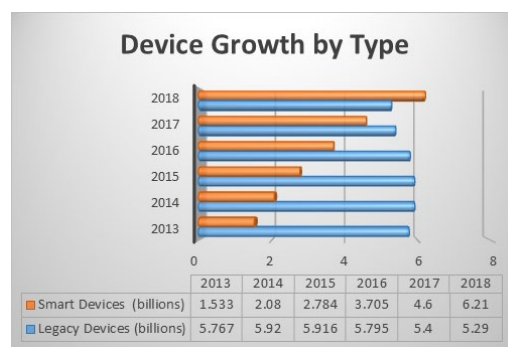


MOBILE MARKET EVOLUTION

The past decade has seen the advent of mobile technology as a dominant force in the consumer economy. As smart device manufacturers transition into more stable niches in the market, and device capabilities across various platforms approach equilibrium, the focus shifts from the device capabilities to service offerings. As the mobile market evolves over the next five years, this trend may accelerate, prompting a flurry of activity as service providers explore various strategies to seek competitive advantage. A brief overview of recent developments and expected trends regarding the mobile market and the role of IP in this emerging landscape appears below.

The Mobile Marketplace bustles — current estimates forecast over 10 billion network-connected mobile devices in place by 2018, the vast majority of which will be mobile phones (72.4%) and tablets (5.0%).¹ Among these, “smart” devices and connections² will grow into a dominant market share, overwhelmingly so in Western European (83%) and North American (93%) markets.

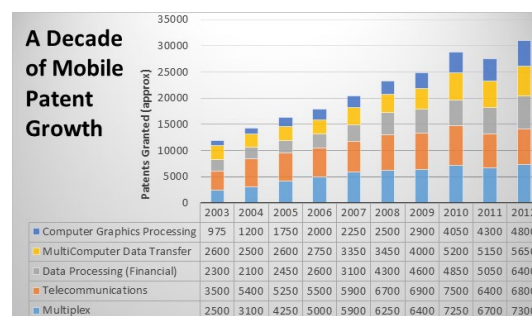
Mobile data traffic promises to grow more geometrically, due to increasing market share of smart devices and significantly greater data consumption observed in connection with smartphones and smart device connections.³ Extensive use and streaming of video data will fuel the consumption increase. By 2018, aggregate monthly smartphone traffic will increase eleven-fold, as will total mobile traffic — growing from 1.5 EB/month to 15.9 EB/month.



Major industry players have shifted business strategies accordingly. Indeed, more than a year ago Google CEO Eric Schmidt prophesied: “If you don’t have a mobile strategy, you don’t have a future strategy.”⁴ Recent studies of the mobile services industry highlight the importance of a strong commitment to innovation.⁵ As the device capabilities and market penetration expand, major players make more extensive and sophisticated use of intellectual property to ensure exclusive control over innovative technical solutions, secure competitive advantages and limit competitors’ flexibility to operate in similar arenas.

The Growing Role of IP in Market Competition

In recent trends, IP strategies play out most visibly through the acquisition and utilization of patents. The result is a veritable “mobile arms race,” in which participants assemble and leverage IP portfolios in a multi-faceted competitive approach. While the mobile service industry is relatively new to this arena, lessons may be learned from the now-familiar experiences of smartphone manufacturers. Similarly, while the majority of battles thus far take place in North America and Europe, similar trends may be expected as other markets, particularly Asia, bridge the gap and expand access to smart devices and connections. In 2014, some observers anticipate over one-quarter of issued U.S. patents will feature mobile technology.⁶



¹ “Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2013-2018.” Cisco Public, 2014.

² “Smart” devices are defined as those with, at minimum, 3G network connectivity, dual-core 800 MHz processor chipset and multimedia capabilities sufficient to stream video.

³ By 2018, the average smartphone will consume 2.7GB of data per month, up from 529MB per month in 2013.

⁴ “Key factors to consider in mobile strategy goals.” *Mobile Marketer*. Tarun Nimmagadda, Feb. 13, 2013

⁵ “The Innovation Commitment.” *Q2 2013 Mobile Financial Services Tracking Study*, AlixPartners. Feb. 2014.

⁶ “One-quarter of U.S. Patents issued this year will be in mobile, study says.” *ComputerWorld*. http://www.computerworld.com/s/article/9237950/One_quarter_of_U.S._patents_issued_this_year_will_be_in_mobile_study_says (last accessed March 19, 2014).

⁷ “Mobile Patents Landscape: An In-Depth Quantitative Analysis” (3rd Ed.). Chetan Sharma, Chetan Sharma Consulting, Inc. 2014.

STRATEGIC USE AND IMPACT OF IP

Intellectual property has taken center stage as a major vehicle upon which competitors in various market niches rely to achieve their business goals. The now-familiar battle between smartphone manufacturers over the “look and feel” of mobile operating system features is exemplary of the transition from emphasis on the device hardware to the user experience. This transition puts much greater emphasis on the services enabled by increasingly sophisticated software offerings via various “app” marketplaces.

In general, a vendor’s mobile IP strategy should secure protection over core aspects of the mobile products and/or services. The advent of software as a primary enabler of technical innovation and development yields an environment of uncertainty. For example, it is not yet clear to what extent software (e.g., for scanning technology) is separately patentable in the mobile context, merely because it migrates existing techniques to a mobile computing platform. Something more will likely be required. Nonetheless, patents play a major role as a primary tool in current mobile business strategy.



A vendor’s patent strategy can be broken down into two core aspects: (1) acquisition and management, and (2) enforcement. Unique considerations apply to each aspect, and will vary according to individual vendors’ goals and resources. While vendors should develop a comprehensive IP strategy and enact procedures and practices to implement that strategy, the onus falls on buyers to develop and implement effective strategies for evaluating the field and selecting appropriate business partners. Successful buyers will develop a basic comprehension of the general principles influencing interplay between IP and business practices.

Armed with a basic understanding, sophisticated buyers will minimize risk associated with a given vendor by reviewing IP coverage in the field. This overview enables buyers to engage vendors in a thorough discussion addressing existing or potential challenges relating to the product and/or service of interest. Buyers can, and should, dictate this conversation by making specific inquiries to all candidates in order to explore the relative advantages and disadvantages offered by each.

THE BUYER’S PERSPECTIVE

Today’s mobile technology consumer faces a unique set of challenges when considering whether and how to act on various opportunities presented in the evolving marketplace. With these challenges comes great opportunity. In order to minimize risk while extracting maximum value from these new opportunities, buyers can leverage IP to develop a robust business approach.

IP Comprehension

A basic understanding of IP is prerequisite to developing effective risk analysis and management strategies in the mobile market. In practice, the buyer’s ability to negotiate the terrain of a business transaction depends on the capacity to thoughtfully engage potential business partners with respect to the IP-related issues at stake. Professional counsel, both legal and technical, can vastly improve a buyer’s understanding of relevant issues and potential courses of action.

Buyers must be especially aware of discrepancies between the apparent and actual scope of IP protection, as well as the impact of IP on various stages of a business transaction. This is only possible when armed with sufficient understanding to critically consider the nuances presented in each scenario. The savvy buyer leverages this comprehension in two primary facets: (1) analyzing the existence of risk, and (2) ensuring appropriate measures are in place to eliminate or mitigate risk to the greatest extent possible.

Risk Analysis

Proactive buyers can leverage a basic understanding of IP principles and awareness of relevant IP possessed by vendors to analyze the risk associated with a potential vendor relationship. The analysis requires a candid, thorough discussion with potential vendors to evaluate the scope and strength of any IP they hold, and how those holdings place the vendor in relation to other market participants' IP portfolio. The discussion should also explore the vendor's awareness of, and willingness to absorb, any associated risk to the buyer.

Buyers must review vendor's representations critically, and ideally with insight from technical and/or legal professionals. The natural inclination is for vendors to exaggerate the scope of IP holdings owned while downplaying the existence and/or magnitude of any risk presented by competitors' IP. Resulting gaps between the perceived and actual scope of IP protection can materially impact the decision process throughout the course of a business transaction.

Buyers should carefully assess aggressive vendor claims and advertising that they have exclusive rights to exclude competitors from a particular market. Such broad claims are rarely accurate, instead often serving to reveal ignorance of IP principles, and market insecurity on the part of the vendor. Vendors engaging in such behavior can create risk of litigation and/or liability. Buyers therefore should approach any potential business engagement with boisterous vendors of this type using the utmost caution and with the benefit of legal counsel.

While many vendors may successfully obtain valid patent rights to exclusively use and sell their respective algorithm(s), this right does not permit that vendor to exclude others from performing any possible form or variant of the activity addressed by the patented algorithm. Rather, the exclusive patent right is limited to the very specific series of operations defined in the patent claims.

Inaccurate statements regarding patent rights are a potentially significant risk. Not only are assertions of a blanket right-to-exclude generally untrue, the Supreme Court has recently found that these types of untrue assertions may result in unfair competition liability.⁸ Ultimately, the wise buyer will be wary of conducting business with a vendor that makes broad patent claims at the negotiation table, especially where the vendor's patents have not been subjected to the test of litigation.

Risk Management

An effective strategy to eliminate, or at least mitigate, identified risks is key. Prudent buyers will evaluate each identified risk and determine where the burden of such risk rightfully belongs — with the buyer or the vendor. Buyers can, and should, shift the burden of liability risk to vendors wherever possible, especially concerning IP related to the purchased products/services.

Indemnification and Joint Defense

Buyers should leverage the fact that most vendors have existing strategies and resources in place to address potential challenges. In most cases, buyers may entirely eliminate (or at least significantly mitigate) such risks by requiring the vendor to shoulder any risk via a robust indemnification agreement and/or joint defense agreement.

Buyers may find that merely raising the question of an indemnification agreement, or specific terms of such an agreement, is an informative and valuable exercise. For example, if a vendor is hesitant about offering indemnification and resists attempts to discuss specific aspects of a potential indemnification, this hesitation may reveal underlying insecurity regarding the product or the vendor's position in the market. In these situations, it is absolutely worth the buyer's additional effort to inquire further into the source(s) of insecurity, including the vendor's capacity to uphold the terms of an indemnification agreement.

⁸ The Supreme Court recently endorsed the theory that a party who makes untrue statements regarding the existence or scope of patent protection in the course of a business negotiation may incur liability for unfair competition upon a plaintiff demonstrating the requisite intent to mislead and harmful impact.

Buyers should be particularly vigilant for new market entrants and/or small entities displaying resistance to indemnification. Such vendors are much less likely to be capable of providing sufficient financial resources and professional expertise to defend against challenges in the market or the legal system. These same vendors are even less likely to provide adequate protection to a consumer drawn in to undesirable competition or litigation by virtue of using the vendor's products and/or services. Under these and similar circumstances, the timeless adage "caveat emptor" applies in force.

Freedom to Operate Opinions

Another tool available to the buyer and vendor alike is a legal opinion commonly referred to in the industry as a "freedom to operate" or "clearance" opinion. These opinions are valuable tools providing insight into the issues likely to be raised in a hypothetical legal action surrounding IP.

For example, a freedom to operate opinion may explore the validity and infringement scenarios for a patent or group of patents assessed against existing or proposed technology. It can also point the way to technical designs or approaches not encompassed by the patent, etc. All these factors should be investigated, allowing buyers and vendors to react accordingly, e.g., by identifying distinctions between the patent claim and the product or service at issue, and either preserving or developing those distinctions in future offerings.

While a freedom to operate opinion does not eliminate risk, it can mitigate risk, and reveal a framework for avoiding or diffusing potential conflicts. In addition, should actual litigation arise, an accused party can significantly reduce liability for any damages ultimately assessed by relying on reasonable freedom to operate positions.⁹

THE VENDOR'S PERSPECTIVE

Acquisition and Management

The ideal patent portfolio exhaustively covers every innovative aspect of a mobile service provider's catalog. However, given the common reality of budgetary constraints, particularly in the startup phase where strong IP is critical to future viability (or acquisition), most firms simply cannot afford to implement such an exhaustive approach.

Accordingly, it is important to develop and maintain a sophisticated patent acquisition and management strategy. In order to ensure thorough understanding and consistent employment of the strategy at all levels of operation, a consistent vision should be formed at the executive level in cooperation with experts having insight into the various legal, technical and business aspects of the process.

Identify Innovative and Valuable Aspects of a Revenue Stream

The first aspect of an effective patent acquisition strategy is a forward-looking innovation commitment. AlixPartners recently highlighted in detail the benefits of a strong commitment to innovation in the mobile financial services industry. Similar principles apply to a significant degree to other service industries transitioning to the mobile arena.

A strong commitment to innovation, however, is only part of the picture. Without an equally strong commitment to protecting those innovations with appropriate form(s) of IP, the most successful innovation programs will invest significant resources in research and development (R&D), only to effectively donate the resulting innovative solution(s) to potential competitors. Accordingly, guaranteeing a revenue stream sufficient to recover investment costs, and leveraging innovative solutions into profitable offerings is dependent upon an effective ability to identify and protect the essential aspects of those solutions using appropriate vehicle(s).

⁹ A reasonable freedom to operate opinion (i.e., produced by competent counsel in good standing) may be used to preclude liability for willful infringement, and the treble damages and attorneys' fees associated therewith.

Effective identification of valuable, innovative opportunities requires close communication between management, researchers and/or engineers, and legal counsel. Frequent review of technical investigations at each stage of development provide the ability to evaluate value and strength of various products and core technical features.

One illustrative, but far from comprehensive, scenario includes encouraging management and executive officers to include patent procurement in their high-level goals, in addition to goals for product or service offerings, performance, market goals, etc. The company should encourage the identification of specific technical problems, challenges or obstacles presented by the current state of the art, and how the company solves those. This is where patentable innovations arise, and where securing exclusive rights to employ those solutions can protect superior product or service offerings. The highest-value opportunities secure exclusive rights to innovative solutions that ubiquitously apply to a host of products and/or services.

Patentability Determination

Upon identifying valuable opportunities for innovation based on business and engineering principles, it is often useful to perform a patentability determination regarding whether, and if so to what extent, an opportunity to secure exclusive rights exists. Even more informative, a comprehensive prior art search can provide a preview of achievable scope of those exclusive rights. Therefore, performing an effective search of published knowledge in the relevant sector(s) of the public domain can be an element of forming an intelligent strategy to achieving competitive advantages in the market via exclusive patent rights. Note, however, that there are consequences to evaluating competitor patents. Knowledge of a patent can make its infringement willful, and there are obligations associated with the identification of relevant prior art (including mandatory disclosures to the Patent Office when you file a related application). As such, patent review and prior art searching should always be done in close coordination with counsel.

Even where prior art extensively covers a technology, any advantageous innovation that provides superior performance is worth considering for patent protection.

Prosecution

Patent prosecution should be conducted by an experienced professional in the pertinent jurisdiction(s) where patent protection will be sought. The area of patent law is rapidly evolving in response to emerging market trends and social pressures, so navigating these waters is best performed with professional guidance to avoid various pitfalls awaiting the unwary applicant.

Perception Gap — Application Disclosure Versus Issued Claims

Professional guidance in patent prosecution can ensure the scope of issued claims includes the specific technical advantages and innovative features identified in the course of an effective acquisition strategy. Patent claim drafting is an art unto itself, requiring careful consideration of many factors both technical and legal in nature. Without such consideration and care, many patent holders may be surprised to find that the claims ultimately issuing from an application intended to broadly encompass a technical innovation may actually only cover specific aspects or implementations of the more general concept. This can lead to dangerous perception gaps, where it may be assumed that a patent application filed in connection with a particular technology or innovation necessarily covers the entire scope of that technology or innovation, while in reality the claim(s) ultimately secured in the granted patent encompass only a specific subset of the broad concepts disclosed and/or originally claimed.

This situation is particularly true in the mobile services industry, where patent claims are often drafted to cover a particular “method” or “process” of accomplishing a desired result. While the original patent application may describe and broadly claim all the various aspects of the underlying technical process, claims that ultimately issue from applications may be substantially narrowed in the course of prosecution. The typical result is a potentially significant difference in scope between the intended scope of the application as-filed and the granted scope of the claims as-issued.

The consequences of the gap can be enormous. For instance, the veracity of representations (e.g., to competitors, negotiation partners, etc.) that a particular technology, innovation or even field of use is subject to patent protection hinges on the scope of the claims. Making representations that a patent encompasses greater scope than reasonable in light of the claim terms can incur liability if those representations rise to the level of tortious interference with contract, or even simple misrepresentation under pertinent contract principles.

Even if such statements do not incur liability, discrepancies between the representation and the true scope of the claims are prone to cause disconnects between customers and vendors. Ultimately, these disconnects erode the essential consumer relationship and associated goodwill. Moreover, making incorrect or uninformed representations regarding the scope and impact of intellectual property reveals ignorance of practical realities.

For example, a blanket assertion that an entity has secured exclusive right to operate in an entire field of use merely reveals ignorance of the role and function of patents. In the first place, patents only confer a right to exclude others from practicing what is claimed in the patent. As elaborated in the enforcement section below, ownership of a patent in no way guarantees that the owner is itself free to practice the claimed invention — there may be other extant patents that cover other aspects of the technology. There is really no way to know for sure. Even a comprehensive search may miss a relevant patent.

On the other side of this equation, it is almost always incorrect to state that ownership of a patent guarantees the right to exclude others from practicing some broad generic activity, like mobile check deposit. As touched upon above, a patent covering “mobile check deposit” almost certainly only covers a very particular aspect of, or way of conducting, mobile check deposit. Statements that a patent confers exclusivity over a broad generic activity typically evidence a lack of patent expertise in the speaker. These types of statements fail to consider the gap between the true scope of the patent claims and the fact that alternative techniques for performing the same broad class of activity are fully permissible without violating any patent holder’s exclusive rights. Indeed, there is danger to a patent owner in persisting in making very broad statements about patent claim scope. It is a fundamental principle of patent law that “that which infringes, if later, anticipates, if earlier.” As such, it is much easier to invalidate a broad patent claims because that claim will encompass a greater universe of prior art. Obtaining the appropriate professional guidance can prevent embarrassing assertions of this nature.

Strategic Prosecution

Professional guidance throughout acquisition of patent protection also provides unique opportunities to secure competitive advantages and mitigate or defeat attempts by others to exclusively control a particular market space. For example, where multiple entities in a particular market space each pursue solutions to a common problem, those entities may anticipate future competition for a revenue stream. Each entity may therefore find significant value in securing claims that encompass not only the specific innovation involved in their solution, but also to secure claims encompassing some or all of the known (or even potential, if sufficiently limited) approach(es) employed by other players in the same space.

To avoid surprises regarding gaps between actual and perceived patent claim scope, and to provide the best possible position in which to anticipate and/or respond to claims raised by others operating in the same market space, professional guidance regarding patent prosecution is essential. Determining the meaning and scope of complex, and often jargon-laden language of patent claims is challenging. Many common difficulties may be avoided, mitigated or even turned to one’s advantage, however, with the assistance of appropriate professional guidance. For example, a patent portfolio that features strong representation of technology featured in competitors’ products grants the portfolio holder greater freedom to operate in the corresponding space without fear of litigation, since the portfolio provides significant disincentive to potential plaintiffs.

Moreover, professionals intimately familiar with the practical realities of patent prosecution may offer unique strategies capable of providing advantages in the acquisition process. With passage and implementation of the Smith-Leahy America Invents Act (AIA), the United States instituted a host of new procedures and programs available to more fully and effectively pursue protection over critical innovations. New procedures offer exciting opportunities to quickly secure protection despite the existence of a large backlog in the USPTO queue, ensure relevant prior art is considered in all public applications, and submit relevant prior art in applications that should, but have not yet, been considered in the course of evaluating an applicant's claims. Other new procedures include the institution of post-grant review and other similar opportunities to evaluate the strength and scope of a patent *before* incurring the significant expense of patent litigation.

Maintenance

Patent rights are limited in duration. The monopoly granted by the limited right is exclusive, but also expensive. Accordingly, it is prudent to evaluate the utility of maintaining the right to exclude others from practicing the process or producing the product claimed. This value should be compared against the growing cost of maintaining the patent. Some of these costs are clearly delineated and easy to anticipate. For example, the USPTO charges significant fees to maintain a viable patent over the course of its lifetime).¹⁰ Other costs may be more difficult to quantify or predict, such as costs incurred in the course of maintaining vigil over activities of relevant players in the marketplace and evaluating whether those activities infringe upon various patent claims. Accordingly, each entity will benefit from periodic evaluation of the value conferred by patent protection, and how that value plays into the overarching business strategy.

Enforcement

Exclusive Right

Patent protection provides a unique legal position to the patent holder. No patent provides any party an affirmative right to engage in any conduct, produce any particular product or provide any service. Rather, patents represent a negative right — a right to exclude others from engaging in the practice of a patented process, or from producing or selling a patented product. This exclusive right is the basis by which many licensing agreements are upheld, and the origin of the right to require others wishing to employ a particular innovation to pay for such use and adhere to the limitations imposed by the rightful owner of the exclusive right to that innovation.

The unique nature of the patent right inverts the usual business analysis, requiring careful consideration of various solutions to a particular problem, and identifying those solutions most valuable in terms of advantage offered by *excluding others* from adopting that solution (as opposed to value offered by affirmatively adopting that solution). When one adds to this consideration the complex and expensive reality of maintaining and enforcing a robust patent portfolio, an efficient acquisition strategy becomes even more essential.

Deterrence

Among competitors, patents often have the effect of deterring legal action. Non-practicing entities (NPEs) are not affected because they do not have an operating business and therefore no infringement risk. With respect to operating competitors, the more robust one's IP portfolio, the greater the deterrent effect. While numbers alone do not guarantee desired results, entities with large portfolios have some added flexibility to counter infringement allegations. In essence, this creates an atmosphere of "mutually-assured destruction" that encourages use of vehicles other than litigation to resolve competitive disputes. This may be preferable from a consumer perspective because superior product and service offerings can dictate market success, rather than capacity to suppress competitors' offerings via threatened or actual litigation.

¹⁰ \$1,600 due at 3.5 years, \$3,600 due at 7 years and \$7,400 due at 11.5 years, according to the USPTO's 2014 fee schedule. <http://www.uspto.gov/web/offices/ac/qs/ope/fee010114.htm>.

Google demonstrated the effectiveness of this deterrence strategy via acquiring a large portion of Motorola's patent portfolio, increasing Google's IP footprint from about 750 patents to over 17,000.¹¹ Despite occupying a dominant position in the mobile marketplace in the interim following the acquisition, Google was infrequently targeted in suits among major mobile product and service providers.¹² This deterrent strategy can be particularly effective against direct competitors in a specific market space, as indicated by the fact that Google was only challenged once, by Oracle, in the same timeframe that nearly every other major player was engaged in a flurry of lawsuits with each other.

However, prevailing consensus dictates the greater focus should be on patent *quality* over patent *quantity*. While it may be possible to deter legal action or other interfering conduct by amassing a large patent portfolio, quantity alone is insufficient to achieve adequate protection over essential innovations. Here again, the assistance of professional counsel is indispensable, since the bite behind any threatened litigation turns significantly on the interpretation of claim language, coupled with the strength of the underlying patent's validity in view of relevant prior art.

Bargaining Strength

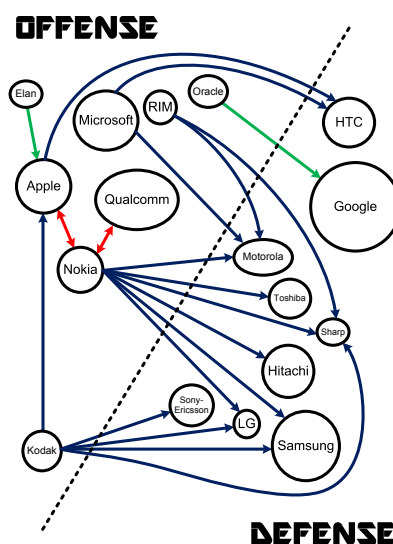
In addition to the deterrence strategies discussed above, a robust patent portfolio can provide significant benefits to various stages of business negotiations in multiple contexts. For example, deterrence principles are equally applicable to resolving legal action or negotiating license terms. The prototypical scenario involves negotiating a cross-license agreement with potential (or actual) plaintiffs as an alternative resolution to the drawn-out and expensive litigation process.

For relatively new or small market participants, a robust patent portfolio may provide bargaining strength in the form of negotiating power during a merger or acquisition process. In many cases, the value of a startup is largely, if not exclusively, determined based on the strength of the IP portfolio upon which the entity is built. Accordingly, developing a robust portfolio with broad claims that encompass a variety of alternative implementations of a particularly innovative solution will increase the patent holder's power in merger or acquisition negotiations.

Summary

As mobile technology advances and adoption of "smart" technologies becomes ubiquitous, the focus will shift from capabilities offered by mobile device hardware to the functionality enabled by mobile services in the form of software. The push to secure exclusive rights in this domain is ongoing, with IP and patents in particular taking center stage.

The increased focus on IP means that buyers must be fluent in discussing the scope and impact of a vendor's portfolio on a particular transaction, as well as the strength of that vendor's position in the market as a whole. Greater competition among vendors is an opportunity for buyers to ensure receiving the best possible product, supported by the best possible service, all while shifting any significant risks inherent to the transaction by negotiating robust indemnification, joint defense or other contractual protection from a preferred vendor.



¹¹ Google stated that the purpose of the acquisition was, in large part, to deter potential lawsuits and encourage cross-licenses. Google has since begun selling portions of the portfolio. <http://www.forbes.com/sites/greatspeculations/2011/08/17/google-pays-princely-premium-for-motorola-patents/> (last accessed March 19, 2014).

¹² "Mobile patent wars hurting innovation, experts say." *Infoworld*. Oct. 17, 2012. Grant Gross: <http://www.infoworld.com/d/the-industry-standard/mobile-patent-wars-hurting-innovation-experts-say-205074> (last accessed March 10, 2014).

From the vendor perspective, a robust patent portfolio and comprehensive strategy to leverage existing patents and secure valuable new patents is an essential component of any viable business strategy. Willingness and candor when addressing a purchaser's IP-related concerns demonstrates a true commitment to the business relationship, as well as to the underlying products and services. Those vendors who establish a comprehensive IP program, complemented by direct buyer engagement and robust consumer protection via indemnification, will emerge from the mobile arms race as dominant forces in a rapidly expanding market.



Gregory F. Wesner is a shareholder in Lane Powell's Intellectual Property and Technology Practice Group, where he focuses on patent, trademark, and other intellectual property litigation and related counseling. As a registered patent attorney, he assists clients with patent due diligence and freedom to operate. He also assists clients with brand development and enforcement, copyright portfolio development and enforcement, and trade secrets protection. Greg can be reached at 206.223.7272 or wesnerg@lanepowell.com.

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