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To Cross Or Not To Cross

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In today's hugely competitive technology market, there is bound to be many instances where one company knowingly or unintentionally uses a patented technology without the consent of the patent owner.

In a recent sparring match between two major players in the mobile phone manufacturing industry, Nokia Corp ("Nokia") threw the first blow in October when they filed a suit against Apple Inc ("Apple") for allegedly infringing 10 of its patents. The technology covered by these patents includes both phone calls and Wi-Fi access.

Apple has since responded by counter-suing Nokia, claiming infringement of 13 of its patents. Most of these patents are clustered around technology related to the iPhone, such as: connecting a phone to a computer; teleconferencing; menus on a touch screen; power conservation in chips; and "pattern and color abstraction in a graphical user interface".

Apple says the Finland-based company fell behind in the high-end mobile phone market because it chose to persist in "old-fashioned" phone designs at a time when smart phones with advanced user interfaces such as touch-screens were becoming increasingly popular. Apple claims that Nokia then chose to copy the iPhone, especially its user interface, to make up for this blunder.

It comes as no surprise then that Nokia filed another suit shortly thereafter, alleging that Apple was infringing 7 of its patents "in virtually all of its mobile phones, portable music players and computers".

One can't help but ask the question: Would Apple have sued Nokia if the latter had not initiated legal proceedings to begin with? And maybe more importantly, why did Nokia sue Apple in the first place? Was it because it sincerely believed it was protecting its intellectual property; or because it foresaw the imminent suits by Apple for the iPhone technology and wanted to strike preemptively?

In any case, a reciprocation of lawsuits is not uncommon under these circumstances. But what comes after all this suing and countersuing? Will the significant amounts of resources spent on this legal wrangling amount to nothing more than each company asserting its intellectual property rights and preventing the other from using technology belonging to them?

One amicable outcome from this, and one that usually benefits both parties, is **cross licensing**. In patent law, a **cross-licensing agreement** is an agreement according to which two or more parties grant a license to each other for the exploitation of the subject-matter claimed in one or more of the patents owned by each party. Most modern commercial products such as mobile phones have a large number of patents covering different aspects of the device as well as peripherals of the device such as application and user interface software. Hence it is very likely that the patents owned by each party cover different essential aspects of a given product.

By cross licensing, each party is not excluded from using technologies necessary to bring the commercial product to market. The term "cross licensing" implies that neither party pays monetary royalties to the other party, but this is not strictly the case.

It is not always necessary to resort to legal proceedings to reach an agreement to cross license. In January 2008, Microsoft and JVC entered into a cross license agreement. Each party is now able to practice the inventions covered by the patents included in the agreement. This benefits competition by allowing each more freedom to design products covered by the other's patents without provoking a patent infringement lawsuit. It is important to note that the agreement does not necessarily include all of the patents that each owns – it can specify any number of patents within the patent owner's portfolio.

Some companies file patent applications for the sole purpose of being able to cross license the resulting patents, and not for the traditional reason of trying to stop a competitor from developing a similar product. In the early 1990's, Taiwanese original design manufacturers, such as Hon Hai Precision Industry Co., Ltd., rapidly increased their patent filings after their US competitors brought patent infringement lawsuits against them. They then used the patents to cross license.

One of the limitations of cross licensing is that it is ineffective against patent holding companies. The primary business of a patent holding company is to license patents in exchange for a monetary royalty. Thus, they have no need for rights to practice other companies' patents. These companies are often referred to pejoratively as patent trolls.

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