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Newsroom

Schweibenz '98 on ITC Apple Ruling

The Economist spoke with Eric Schweibenz '98, a partner at Oblon Spivak in Washington, DC, about the ITC's recent ruling on Android infringement of Apple patents.

From **THE ECONOMIST**: "[World patent war 1.0](#)" by P.L.



Dec 19th 2011 -- HTC, a Taiwanese maker of smartphones, could clearly have done without this sort of Christmas present. On December 19th America's International Trade Commission (ITC) ruled on one of the most closely watched of the many patent battles being fought over mobile phones. It upheld a judge's decision, made in July, that some of HTC's devices that use Google's Android operating system infringe a patent owned by Apple, creator of the iPhone, but reversed his verdict that another patent had been violated. The offending handsets may no longer be imported into the United States after April 19th 2012. Not only is the ruling plainly unwelcome for HTC, but it illustrates how important an American trade agency has become as an arbiter of disputes that, at first blush, have little to do with international trade.

HTC sells around 40% of its smartphones in North America, nearly all of them using Android. In the third quarter the firm sold more smartphones in America than anyone else, a whisker ahead of Apple and South Korea's Samsung, according to Gartner, a market research firm. A ban on some of its Android phones is thus a blow, although it or Google may find a way of working around the patent. (Florian Müller, an analyst who tracks patent disputes, believes that upholding the judge's decision on the other patent would have done more damage.) To make matters worse, last month HTC shocked investors by saying that it expected its revenue in the fourth quarter to be no more than they were a year before. The company's shares have lost nearly two-thirds of their value since May.

Apple's victory is only the latest episode in a fierce war in which just about everyone you can think of seems to be suing just about everyone else for patent infringement. And these battles are being joined just about everywhere: at the ITC, in conventional American courts, in Europe and in Asia. On December 16th, for instance, the ITC said that it would review another judge's ruling that Apple had not infringed a patent owned by HTC. On the same day Samsung claimed in a German court that Apple's iPhone 4 and 4S and iPad2 infringed some of its patents. In September Apple succeeded in having Samsung's Galaxy Tab 10.1 banned from sale in Germany. It is arguing elsewhere, too, that the South Korean company is ripping off the iPad. Microsoft and Motorola Mobility are also squaring up in Germany. Oracle and Google are doing battle in America. What is more, few in the industry have escaped the attention of "non-practising entities", sometimes called "trolls", which own patents but do not produce the wares that rely on them. "This really is the first global patent war," says Joshua Walker, chairman of Lex Machina, which compiles and analyses data on intellectual-property litigation.

As a trade body, the ITC may seem to be a curious venue for patent disputes. Yet its legal role is long established; and in the mobile-device business it has become an obvious place for indignant patent-holders to go. Section 337 of the Tariff Act of 1930 (also called the Smoot-Hawley act, infamous among free-traders as the high-water mark of America's interwar protectionism) says that the ITC may ban imports that infringe American patents and for which an American industry exists. Its remit fits smartphones beautifully: few if any are not made abroad and they contain technology covered by tens of thousands of patents. It is not only used by American firms against foreigners (eg, by Apple against HTC); foreign companies complain to it about American ones and about each other, while Americans are pitted against Americans too.



The ITC has several advantages over American district courts, **according to Eric Schweibenz [RWU Law '98] of Oblon Spivak, a Washington, DC, law firm that specialises in intellectual property.** Perhaps most important, he says, the ITC moves at "light-speed compared with a district court": decisions are expected in 16 months rather than two years or more. The short shelf-life of mobile phones makes speed all the more important. Another factor is a Supreme Court decision in 2006 that made it harder to gain an injunction in a district court. In effect, the ITC does nothing but hand out injunctions: it awards no damages and can only ban the offending goods. When time is of the essence, a ban now may be worth far more than damages later. So far this year the ITC has

begun 68 investigations under section 337, more than in any previous year. In 2010 it started 56, and in 2009 only 31. "Clearly, consumer electronics are dominating the ITC right now," **explains Mr Schweibenz.**

At the same time, litigants have scarcely been steering clear of the district courts. Looking at the subset of cases in which a maker of mobile handsets stands accused and a handset is the offending product, Mr Walker of Lex Machina counts 77 filings by October 14th this year. The total for 2011 is likely to pass last year's tally of 84. Five years ago, there were only 26. Totting up mobile cases more broadly, there were 51 filed in September alone, he says.

Past patent wars have been given way to cross-licensing truces, in which companies pay for the use of each other's intellectual property. The mobile industry, indeed, already has many of these. Yet litigation shows no sign of subsiding, says Mr Walker. He argues that it has become "business by other means" and part of a move towards "competition by feature", in which companies strive to establish exclusive rights that can distinguish their products from those of their rivals. If he is right, everyone will not only carry on building up their patent arsenals, but will not hesitate to use them.

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