

OUTSIDE PERSPECTIVES

Your Patent Portfolio May Be Worth More Than You Think

COMPANIES ARE GENERALLY AWARE OF the value of patents as offensive tools. A patent portfolio that covers a commercially successful product



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can be used to prevent competitors from selling infringing goods. Patents can also be used defensively. If a company owns a patent, then it cannot be sued based on that patent. The patent may not even cover any actual or planned products. Recent big-ticket sales of patents suggest that some companies are betting that a defensive strategy creates value in their patent portfolios.

Apple, Microsoft, Research in Motion and others recently acquired Nortel Networks Corporation's patent portfolio of more than 6,000 U.S. and foreign patents and applications covering wireless and Internet technologies. The auction lasted only four days and ended on July 1, 2011 when Nortel agreed to accept the group's bid. After a vigorous bidding war, the group agreed to pay \$4.5 billion for the portfolio, showing just how important IP can be to a company and the vital role patents play as strategic resources.

Despite the \$4.5 billion price tag on the significant impact it is likely to have on the technology world, Wall Street did not seem to take much notice of the billion-dollar sale. Apple, making the biggest jump in stock price among the winning bidders, closed at \$389.14 on July 1 — up nearly \$8.00 from its closing price the day before. Interestingly, it was losing bidder Google's stock price that saw the highest increase closing at \$521.028 on July 1 — up \$14.648 from the previous day. As for Nortel, its bonds came in above par after the auction, likely due to investors believing the bonds would be paid off from the sale.

Ten days after the close of the Nortel auction, United States and Canadian judges approved the final sale of patents from Nortel allowing Apple and company to officially acquire more than 6,000 patents. Nevertheless, while the sale has been approved and antitrust clearance was obtained back in June, antitrust concerns still loom. According to *The Washington Post*, The American Antitrust Institute has requested antitrust officials at the Department of Justice to investigate the sale prior to the Nortel Bankruptcy proceedings. Robert Skitol, an antitrust lawyer at the law firm Drinker Biddle was quoted as saying "Why is the portfolio worth five times more to this group collectively than it is to Google?" and "Why are three horizontal competitors being allowed to collaborate and cooperate and join hands together in this, rather than competing against each other?"

Notwithstanding the complications, as patent litigation increases in all fields, and in particular the technology field, acquiring patent portfolios can become part of a company's core strategy. For example, the recent acquisition may be a purely protective measure or more of a competitive measure. If used as protection, the powerful portfolio can help maintain a company's freedom to expand and develop new products and services and could potentially be a company's best defense against litigation. However, while some may view the acquisition as a defensive strategy, the companies involved may use the patents to move more into mobile technology or sit on the patents and pursue licenses through threats of litigation. Regardless, the group now controls a powerful patent portfolio that has the possibility to stimulate billions of dollars worth of offensive patent litigation.

The so-called "patent trolls" are the companies that focus on acquiring patent portfolios, don't practice the patented technologies themselves, and then sue other companies that use those patents without pay-

ing royalties. Patent trolls are largely found in the software industry. However, as seen from the recent Nortel portfolio acquisition, they can expand to other industries, including the cell phone industry and Internet technologies. This business model can be seen as a barrier or incentive to innovation. Either way, since 1995, these companies have been responsible for almost 20% of reported patent decisions, according to PricewaterhouseCoopers. Moreover, since 2001 the volume of patent troll cases has increased by 400%. This increase has placed a heavy burden on corporate IP litigation costs. According to the American Intellectual Property Law Association, the median cost of a patent suit with more than \$25 million at stake was \$6.25 million through trial in 2009.

To the Federal Trade Commission (FTC) and others that think open innovation benefits all involved and encourages ingenuity and competition, the Nortel acquisition is disappointing. Google, one of the losing bidders in this landmark auction, stated that the acquisition could lead to more litigation, but said it would “keep working to reduce the current flood of patent litigation that hurts both innovators and consumers.” Despite its comments, Google’s starting bid of \$900 million, coupled with its public statements, indicated it had a strong interest in acquiring patents and in fact it recently did just that. Google purchased Motorola Mobility for a staggering \$12.5 billion on August 15, 2011. With the purchase Google will acquire more than 17,000 patents and another 7,000 currently pending globally. An analyst from Frost & Sullivan wrote “[t]he Google-Motorola deal is not about hardware – it is about patents. In the Motorola acquisition, Google bought a patent portfolio and got a mobile business thrown in for free.” While Google said it would run Motorola as a separate business, it also believes the deal will strengthen Google’s patent portfolio so that the company can better protect and defend Android from legal threats from Microsoft, Apple and others. With Google following suit, it seems as though the Apple and company acquisition has jumpstarted a new era of patent buying in the technology world.

Patents have value as offensive and defensive tools. A defensive strategy may make sense in industries in which there are a large number of companies that aggressively enforce their patent rights. In-house counsel should review their patent portfolios to ensure they have defensive, as well as offensive, tools.

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