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THE PHILOSOPHY WENT WRONG: GOOD ARTISTS COPY, GREAT ARTISTS STEAL: A VIEW ON PATENT ISSUE IN THE SMARTPHONE INDUSTRY

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ABSTRACT

Smartphone Industry experiencing a high increasing return in the short run indicating the fact that in the long run increasing return to scale holds, but does the strategy of Patent to restrict entry or to cut competition hold?, Or in other words does the strategy of dominant players to cut the benefit of increasing return to new players and maintain its supernormal profit holds?, rather than going into the painstaking way of each and every cases of patent issue, our purpose is to develop the story around the real issue and confirm that the patent as a binding and restrictive mechanism will not hold given the case of a prior art.

KEYWORDS

competition, patent, prior art, platform, innovation.

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INTRODUCTION

The purpose of this paper is to look at the patent issue in one of the fastest growing technologically competitive industry, which was first revolutionized by Apple Inc. and then later by Google's Android Platform. The credit for the growing competitiveness in this industry goes largely to the Android platform as it opened markets for existing, new, and low cost manufacturers. This area of research is noteworthy, given the conflict between growing competitiveness and patents claim raise by the top players, as it reflects the actors' action in this industry associated with development that can provide a relative advantage for capturing the market share. In this paper we will deal with the patents dispute philosophically, in a historical set up, to look at the incompetency of patents right as a competitive strategy in the Smartphone industry. The reason being obvious, 'a smartphone might involve as many as 250,000 active patents (largely questionable)', and mostly involves cases of a 'prior art'ⁱⁱ or overlapping rather than originality.

IMPORTANCE OF THE STUDY

Smartphone patents licensing and litigation generally refers to as Smartphone war, is associated with Commercial struggle among major players in Smartphone Industry to holds and maintain market dominance vis-à-vis Competitor. The existence of Patents, though, did let companies with patents right such as Apple Inc., Microsoft, Qualcomm and others to get healthy return on their investment but with availability and accessibility of Open source Android Platform Operating system, the market experience enormous possibilities, resulting in clash of interest, leading to large number of patent litigations. In this paper we look at the development of Apple Inc., as one of the best adopter of prior art and Once it's successfully placed itself in the technology Industry then we look at its patents claim on various manufacturer especially Samsung, the main threat to its dominance in the Smartphone industry and whether such claim is justify or not.

OBJECTIVE OF STUDY

To outline the development of Apple Inc., as an adopter, by using available information of prior art, and whether Smartphone war in patent litigation category could be hold as a mechanism for competitive strategy in the Smartphone industry or not.

RESEARCH METHODOLOGY

This study looks at the development of Apple Inc., from 1970's onwards and its adoption of available information to provide product for the mass consumer market to only high end consumer. Once market is created, then the emergence of other players to capture remaining market and hold a portion in lucrative market is provided with rational argument. In this paper, we have documented the frustration of Late Steve Job, one of co-founder and ex-CEO of Apple Inc., after Android operating system platform is making it way and denting the business of Apple Inc., This historical research study, look at patents issue, to explore the past events in an attempt to interpret the facts and explain the cause of events, and their effect in the present events. Thus, the research here used is a qualitative technique.

HISTORY WHISPERED IT ALL

The debate in this section follows an unconventional path starting from the 1980's. In the software computer industry, PARC (Palo Alto Research Center Incorporated), formerly 'Xerox PARC'ⁱⁱⁱ had an unparalleled run of innovation and invention, in the 1970's. Steve Job along with Apple engineers visited Xerox PARC in exchange for a lucrative agreement of selling Apple 100,000 shares for one million dollar, the then hottest tech firm in the U.S. what he saw, expressed his feeling to one of PARC engineer as, "Why aren't you doing anything with this? This is the greatest thing. This is revolutionary."^{iv} The user interface that Steve Job saw became part of star desktop. However, Xerox was not able to properly commercialized and profitably exploit PARC's innovations for which it had been severely criticized. In the interim, for the Apple Company's next generation of personal computers, he demanded the team working on it to change the course in line with PARC's innovative development. "The Apple engineers not only copied the original idea of PARC but also invented the pull-down menu, menu bar and the trash can—all features that radically simplified the 'original Xerox PARC idea'.^v As a result, Apple was able to produce the first commercial successful 'Graphical user interface (GUI)'^{vii} product, the Macintosh, heavily inspired by PARC's innovative progress. This development gave birth to the Mac OS. In the second half of the 1980's, Apple accused Microsoft of violating its copyright by adopting the 'look and feel' of Macintosh GUI, in spite of licensed agreement for window 1.0. The lawsuit followed because when Microsoft incorporated changes in the upgraded version, Apple found it to be comparable with Macintosh GUI. Apple listed 189 GUI elements as infringed, but the court decided that 179 of these elements had been licensed to Microsoft in the window 1.0 agreements and the remaining ten elements were not copyrightable, either due to lack of originality or limitation in which an idea could be expressed. In the midway, Xerox filed a lawsuit against Apple for copyright infringement to become the primary beneficiary, rather than Apple in the Lawsuit between Apple versus Microsoft. In the lawsuit filed by Xerox's a major issue was the right to the screen displays, known as GUI. It was a copyrighted technology that Xerox PARC had developed and merged in "its" star desktop in 1981, which was unlawfully use three years later in Apple's Macintosh. However, the timing was not right, so the Xerox case considered being inappropriate for a variety of legal reasons. At that time, no one disputed that Xerox PARC developed many of the ideas behind such user interfaces. However, the presided judge dismissed almost all the copyright lawsuit filed by the Xerox PARC against Apple Computer Inc., but the important question regarding, "how much," the similarity of user interface associated with copyright infringement remains unanswered. This development not only prevented monopolization by Apple in the modern desktop user interface but also raised serious concerns for the inventor, as it became difficult to distinguish between the inventor and iminventor^{viii}.

"The good artists copy, great artists steal" comment made by Steve Jobs, which he attributed to Picasso, during a 1996 Public Broadcasting Service documentary called "Triumph of the Nerds" to explain how Apple steal all of the best ideas and put them into their products. In his words, "We have always been shameless about stealing great ideas."^{xix} A decade and half later on March 02, 2010, 'Apple sues HTC over 10 patents and files an ITC complaint against HTC over 10 other patents.'^x As part of the press release, Steve Jobs said the following:

"We can sit by and watch competitors steal our patented inventions or we can do something about it. We have decided to do something about it. We think competition is healthy but competitors should create their own original technology, not steal ours."^{xi}

'It is one of the most misunderstood and misused creative phrases of all time.'^{xii} Analyst interpretation determines the side of the story, which is likely to be both sides result in 'an ambiguous generality.'^{xiii} There were several quotes made from

"One of the surest tests [of the superiority or inferiority of a poet] is the way in which a poet borrows. Immature poets imitate; mature poets steal; bad poets deface what they take, and good poets make it into something better, or at least something different. The good poet welds his theft into a whole of feeling, which is unique, utterly different from that from which it is torn; the bad poet throws it into something, which has no cohesion. A good poet will usually borrow from authors remote in time, or alien in language, or diverse in interest."

T.S Eliot – The Sacred Wood: Essays on Poetry and Criticism. Philip Massinger (1992).

As far as the Picasso quote was concerned, No authentic source confirmed definite attribution. Steve Jobs as being a perfectionist doesn't care as long as it works well. This ideology could be attributable to Apple later development as well under him, which turned Apple Computer fortunes to become one of the desirable luxurious consumer brands around the world.

THE UNTOLD STORY OF GREAT PRODUCT

The Apple Inc. success was attributed to innovative design; loyal consumer base, eco-system development around its Platform and well executed marketing strategies. Very few People know that the first-generation iPhone looks were comparable to LG KE850 Prada which was announced on December 12, 2006 much before iPhone 2G on January 9, 2007. In 2007, LG Prada won five different awards for the best design, so in terms of innovative design Apple Inc., authority are somewhat questionable. To further elaborate, consider the development of the iPhone, which began in 2004 consisted of about 1,000 Apple employees with "Project Purple."^{xiv} The first rule of Project Purple was that employees working on it do not talk about it. It was also the second rule. This shows the secretiveness of this project, so there is no question of copying the idea by South Korea based LG Electronics. Also, the KE850 Prada got a 2007 international product design award, where entries had to be shipped by September 2006. This clearly shows Apple's inability to produce any such design as represented by earlier iPhone.

Given the development in the Smartphone's history in addition to complementary technology history, Apple Inc. announced iPhone 2G on 7 January, 2007, the first multi-touch (first use in 'Mitsubishi DiamondTouch'^{xv}, 2001), Smartphone, capable of handling all operations. It also includes 'accelerometer sensor'^{xvi} (first use in Nokia E90 communicator) and 'proximity sensor'^{xvii}. The idea of introducing multi touch product was not unique. Microsoft Pixel Sense, which started development in 2001 also support multi touch and was launched on 29 May 2007. Even the world's first commercial multi touch product could not be attributed to Apple iPhone. In fact in 2004, a French firm called Jazz mutant unveiled the Lemur, which serves as a controller for music devices, turn out to be first commercial multi touch device. Thus, the key development for multi touch devices started evolving for commercial launch around 2000. This is remarkably different from Xerox GUI development, which was independent, a rare case of originality and not of a prior art.

One of the key features of the iPhone was its swiping gestures, which supported 'slide to unlock,' however this feature was a part of 'Neonode N1m' almost alike to the one which made the iPhone famous. Also, one of the reasons for which Apple's iPhone platform turned out to be ahead of potential competitor at that time was the content ecosystem that it offers, however almost 'a decade earlier Japanese telecommunication players pioneered a dynamic, multibillion dollar content ecosystem'^{xviii}, but they were not able to replicate the same success outside Japan, attributed as "Galapagos Effect."^{xix} Therefore, as a part of innovative technology industry, Apple drew together, a number of innovations already developed separately; touch screen Smartphones, capacitive touch screens, sophisticated multi-touch user interfaces and so on, and combined them into a great product larger than the sum of its parts. 'This process of merging and purifying of former innovations is the rule, not the exception, in technologically innovative industries. Android is basically the latest example of the process.'^{xx}

A BRIEF PERIOD OF ERSATZ^{XXI}

The influence of Xerox Parc GUI, on first Mac OS was well known. As a broad-spectrum too, the path breaking development affects the behavior of later development of competitive players. In the Smartphone industry, such influences led to maturity of the market and expansion of choices. The trade-off exists, in terms of, comparing these benefits with the cost of invention. However, most of the development in the Smartphone industry is a case of prior arts though contested due to overlapping aspect, especially in the software technology.

The Japanese content ecosystem success, commercial feasibility of multi touch devices, swiping gesture feature, iconic design of LG KE850 Prada, touch screen phone and so on, all these are influential development. It would have been practically impossible for the iPhone development team to come up with a device by ignoring all such advances. Just as iPhone got influenced, the aheadability features of it are likely to sway Google Android's development in the initial phase. Apple sued HTC and Samsung for such comparability, 'since Android is an open source OS so it is hard to establish a direct benefit to Google.'^{xxii}

If we look at the influential role of wireless carrier in the U.S market which compel the manufacturer to tailor the devices as instructed, then the Apple exclusive launch of first iPhone with AT&T might have influenced other carrier to tailor the earlier prototype of Android's devices to compete, which had led to some of the dispute from the product platform perspective. For instance, the resemblance of Samsung Galaxy S series, first two, apart from other models, which too is a part of litigation, in terms of design and features could be attributed to influence of iPhone aheadability as well as to meet demand of carrier providers along such line. The launched of iOS 7, resemble features comparable to window 8 and Android's OS mainly 4.0 Ice-cream Sandwich onwards along with user interface additions by manufacturer like Samsung. 'Either'^{xxiii}, this can be due to limitation in which an idea can be expressed or the influence of aheadability of competitor in this new competitive set up. This query is better left unanswered and I leave it for the reader to decide.

THE ENDLESS POSSIBILITY

The patent issue is not only complicated because of overlapping claims but also so of the broadness of 'prior art' recognition in the litigation. Even Microsoft, which is a multinational software corporation, cannot avoid patent litigation. To avoid patent infringement is practically impossible, partly because of its size and partly because there is no standard of the jargon that is being used. In addition, 'it is difficult to understand the patent applicability with respect to a specific technology.'^{xxiv} This opens up endless possibility, 'a "bubble" around Smartphone patents'^{xxv} combined with the ridiculous size of patents, which accounted for an estimated 250,000 patents that affect Smartphones. As a competitive strategy, adopting patents as an instrument to compete requires a large number of patent litigation, country specific, large resource too and opens up the possibility of counter patent litigation. As a hot lucrative market, the number of patent litigation has increased enormously since 2010, outlining the emergence of competition.

THE JUST OUTCOME OF PATENT RIGHT

In this paper we explore the difficulty associated with using patent right as a form of strategy due to overlapping claims in addition to cases of prior arts. This is not to establish that patent right is useless. Microsoft was able to convince major producer of Android's base OS devices like HTC and Samsung apart from '18 others'^{xxvi} to enter into contract, in spite of Google's invalidating such claim as "bogus patents."^{xxvii} Interestingly, 'HTC also entered into contract with Apple Inc., for licensing'^{xxviii}. 'Microsoft and Apple Inc., also have contracts to prosper without affecting each other's with patent litigations'^{xxix}. Several other players are also involved in patent licensing. If two or more players involve in licensing each other, it is cross licensing. The idea of cross licensing is to protect innovator incentive that comes from patent infringement and at the same time optimizing consumer's choices. But the hindsight reveals that the cross licensing involve 'complex set up of agreement or demand'^{xxx} from directly involved players such as Apple Inc., in the Smartphone Industry. In fact, Apple Inc., was willing to license only "lower

level patents" to Samsung, given its key role as supplier because it doesn't want to repeat the mistake which it done in the past by entering into licensed agreement with Microsoft for Window 1.0. As for indirectly involve players such as Microsoft, holding a small piece of pie from Android platform at reasonable rate, 'estimated to be \$ 5 per Android device'^{xxxi}, is like an icing on a cake in the Smartphone industry, given that its Window Platform is not doing well compare to Android Platform. In fact, in 2011 Microsoft reportedly earned more from Android than it did from Window Platform. As, all the major players of the product platform category had licensing agreement with Microsoft except Motorola, a sustained source of revenue is guarantee to Microsoft.

The outcome of Patent litigation is very slow as compared to the fast evolving nature of Smartphone industry. Since 22nd of October 2009, Nokia sued Apple, Apple counter sued Nokia, Apple sued HTC, HTC counter sued Apple, Motorola sued Microsoft, Motorola sued Apple, Apple counter sued Motorola, Microsoft sued Barnes & Noble, Apple sued Samsung, and Samsung sued Apple and so on. The outcome is that the number of litigation increased significantly and they are not over, as numerous litigations still continues. For major players, for instance Microsoft, Apple Inc., patent is not only protecting their patented innovations legitimate or illegitimate, but also forms a part of their source of revenue. This is true for emerging players too like Samsung, but 'the historical positioning tilt favoritism towards Apple Inc., and Microsoft'^{xxxii}. However, given the case of prior art or over lapping, the Smartphone war with respect to patents claim hardly affect the competition in the Smartphone Industry and there is no one way that an idea can be represented, possibilities are many. So, whatever is the claim and documentation provided in the court, the end result in almost all cases provide triumph for the adopters with some cost but given the nature of increasing return along with market expansion in the Smartphone Industry, this little cost is negligible and therefore cannot be used as a strategy to limit competition.

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ENDNOTES

- i. <http://www.techdirt.com/blog/innovation/articles/20121017/10480520734/there-are-250000-active-patents-that-impact-smartphones-representing-one-six-active-patents-today.shtml>
- ii. "Prior art, in most systems of patent law constitutes all information that has been made available to the public in any form before a given date that might be relevant to a patent's claims of originality. If an invention has been described in the prior art, a patent on that invention is not valid.
- iii. PARC (Palo Alto Research Center Incorporated), formerly Xerox PARC, is a research and development company, with a distinguished reputation for its contributions to information technology and hardware systems.
- iv. http://www.newyorker.com/reporting/2011/05/16/110516fa_fact_gladwell?currentPage=all
- v. An engineer at PARC demonstrates the user interface to Steve Job. He moved the cursor across the screen with the aid of a "mouse." Directing a conventional computer, in those days, meant typing in a command on the keyboard. He just clicked on one of the icons on the screen. He opened and closed "windows," deftly moving from one task to another. He wrote on an elegant word-processing program, and exchanged e-mails with other people at PARC, on the world's first Ethernet network.
- vi. http://www.newyorker.com/reporting/2011/05/16/110516fa_fact_gladwell?currentPage=all
- vii. Graphical user interface (GUI), typically allows users to interact with electronic devices using images rather than text commands.
- viii. Iminventor is used to denote the combination of improvement and invention on top of the prior art.
- ix. <http://gizmodo.com/5483914/steve-jobs-1996-good-artists-copy-great-artists-steal>
- x. <http://www.engadget.com/2010/03/02/apple-vs-htc-a-patent-breakdown/>
- xi. <http://www.feld.com/wp/archives/2010/03/are-apples-competitors-stealing-its-patented-inventions.html>
- xii. <http://arthistory.about.com/b/2009/01/26/good-artists-borrow-great-artists-steal.htm>
- xiii. To see some of interpretation, look at <http://gizmodo.com/5483914/steve-jobs-1996-good-artists-copy-great-artists-steal>
- xiv. Dan Rowinski (07-08-2012). "4 Real Secrets We've Learned So Far About Apple". Readwriteweb.com
- xv. The DiamondTouch table is a multi-touch, interactive PC interface product from Circle Twelve Inc
- xvi. The accelerometer is a built-in electronic component that measures tilt and motion. It is also capable of detecting rotation and motion gestures such as swinging or shaking.
- xvii. A proximity sensor is a sensor able to detect the presence of nearby objects without any physical contact.
- xviii. <http://brie.berkeley.edu/publications/wp199.pdf>
- xix. The "Galapagos Effect", is used to describe Japan's unique culture of technology that has not expanded beyond Japan's borders, in the same way that the Galapagos Islands exemplify unique evolutionary development in nature. Source : <http://accjournal.com/the-galapagos-effect/>
- xx. <http://arstechnica.com/tech-policy/2012/02/if-android-is-a-stolen-product-then-so-was-the-iphone/2/>
- xxi. The word ersatz means a product has being made or used as an alternative usually an inferior one for something else. The word also means an entity is created in imitation of some natural or legitimate product.
- xxii. It's easier to make handset manufacturer liable, who directly generate revenue and profit from Android OS, than Google, which gives the OS for free under licensable agreement and only indirectly creates revenue through mobile advertising and services.
- xxiii. In this case, exclusive dis-junction is use.
- xxiv. <http://www.crn.com/news/networking/48800085/world-wide-web-inventor-warns-of-patent-licensing-royalty-threat.htm>
- xxv. <http://www.techdirt.com/blog/innovation/articles/20121017/10480520734/there-are-250000-active-patents-that-impact-smartphones-representing-one-six-active-patents-today.shtml>
- xxvi. <http://www.fosspatents.com/2013/04/just-like-one-week-ago-when-foxconn.html>
- xxvii. <http://arstechnica.com/information-technology/2011/10/microsoft-collects-license-fees-on-50-of-android-devices-tells-google-to-wake-up/>
- xxviii. http://www.phonearena.com/news/Apple-and-HTC-reach-10-year-licensing-agreement-deal-will-settle-all-lawsuits-between-the-two_id36477

- xxix. <http://www.telegraph.co.uk/technology/apple/9474162/Apple-reveals-secret-patent-deal-with-Microsoft-in-Samsung-trial.html>
- xxx. In an October 2010 document titled "Samsung-Apple Licensing Discussion." Apple's document outlines a licensing cost of \$ 30 per Samsung handset and \$ 40 per tablet for all Samsung devices running Symbian, Bada, Window mobile and Android. Considering, the range of devices manufactured by Samsung this would translate into \$ 4 to \$ 15 per devices. The documents also mention an additional 20 per cent discount if Samsung agreed to cross license its patents. In addition, another "level of discount" would be provided if Samsung stop using Apple's most proprietary features, which were not defined in the documents. This shows the complexity of agreement that Apple wanted Samsung to enter. Source: http://www.macobserver.com/tmo/article/new_court_docs_reveal_apples_patent_licensing_royalty_demands
- xxxi. HTC is believed to be paying Microsoft \$5 per device based on 2010 license deal. Source: <http://www.businessinsider.com/microsoft-barnes-and-noble-partnership-is-a-crummy-deal-for-the-mobile-industry-2012-4#ixzz2WzJQVEfy>
- xxxii. The main determinant of favoritism was players positioning shamelessly by copying, as Apple does by copying Xerox GUI and Microsoft and Intel done with IBM. "The documentary on the history of Apple and Microsoft shows it was all about copying, not patents; at one point, Larry Ellison jokes about how IBM stupidly ceded the chip market to Intel and the DOS/application market to Microsoft when it could have owned it all."
Larry Ellison (born August 17, 1944) is an American entrepreneur and the co-founder and CEO of Oracle Corporation, a major enterprise software. Source: <https://www.techdirt.com/blog/innovation/articles/20130409/09212322633/documentary-history-apple-microsoft-show-it-was-all-about-copying-not-patents.shtml>

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