LEVEL PLAYING FIELD

Patent problems in patent law

A $1.52-billion ruling against Microsoft could hobble technological innovation.

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THE PATENT SYSTEM in the United States is so dysfunctional that it can even generate sympathy for Microsoft.

A federal jury in San Diego decided this week that the software giant's Windows operating system violated two patents held by Alcatel-Lucent, a telecommunications equipment vendor. The jury ruled that the way Windows Media Player created and played MP3 files — compressed audio recordings — infringed on audio compression patents that Lucent (later bought by Alcatel) and its subsidiary, Bell Labs, first obtained in 1994 and 1997. Microsoft was ordered to pay Alcatel-Lucent 0.5% of the average selling price of every Windows computer sold worldwide since 2003 — a staggering $1.52 billion.

The outcome won't send Microsoft to the poorhouse; having $29 billion in the bank tends to make a company shockproof. But if the verdict withstands appeal, every company making MP3 software or devices can expect to pay an additional sum to Alcatel-Lucent. This would be both damaging and perverse.

The purpose of patents, like copyrights, is to promote innovation by giving inventors exclusive rights to use and distribute their creations for a limited time. There's no requirement that a patent holder create products based on the invention; to do so would give big companies an unfair advantage over small players with good ideas. But lately there's been a trend in the opposite direction: Patent holders stay on the sidelines while large companies build the market for a technology, then the patent holders claim that their rights have been infringed and demand compensation.

High-tech products typically involve multiple patented ideas, many of them combined into technologies that are industry standards. As new standards emerge, the companies holding the underlying patents often form pools to simplify licensing and encourage use. But lately, a growing number of patent holders have stayed out of these pools, waited for the standards to gain popularity, then launched their claims for royalties. As a result, manufacturers can't be sure that they've obtained all the necessary licenses before bringing a product to market.

Lucent and Bell Labs worked on audio compression technology in the 1990s, but their focus wasn't MP3. Instead, two other patent holders, Fraunhofer Institute and Thomson, promoted the technology to standards bodies, then sold licenses starting in the mid-1990s. It wasn't until well after MP3 had become the compression technology of choice that Lucent started claiming that its patents applied to MP3 software. And the royalties that Alcatel-Lucent sought — about $5.50 per computer — are far above what the market has already established MP3 technology to be worth (Microsoft's MP3 licensing agreement with Thomson cost $16 *million*, not $1.5 billion).

The threat posed by this trend is that technology companies will limit their products' capabilities to minimize unexpected patent claims. That's the exact opposite of what patent law was designed to do.

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