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IP theatre at the ITC: get your programmes

It is high drama and high stakes at the International Trade Commission for Apple, Samsung and the public interest. As their back and forth continues and the patent battle escalates to the level of legal theatre, the only thing for sure is that it is not over yet

The recent twists and turns in the very public patent dispute between Apple and Samsung have turned the spotlight on the US International Trade Commission (ITC). 'Spotlight' is an apt image, since the dramatic back and forth in the ITC patent dispute has turned into nothing short of IP theatre, a classic three-act play.

In Act One, as theatrical tradition has it, the conflict arises. Apple and Samsung each filed actions with the ITC, alleging that the other was importing/selling products (smartphones and tablets) in the US market that infringed their respective patents. Apple filed against Samsung (337-TA-794) on the basis of six patents, two of which were design patents. For its part, Samsung advanced four patents against Apple in an ITC filing (337-TA-796), one of which — in a case of classic foreshadowing — included a particular standards-essential patent (SEP).

Segue into Act Two, where fate first turns against Apple. On 4th June the ITC issued an exclusion order and a cease and desist order against Apple, barring it from importing or selling infringing products. While this was a victory for Samsung, it is also where the SEP sub-plot revealed itself. President Obama, acting as a *deus ex machina*, swept in and vacated the ITC order based on fair, reasonable and non-discriminatory terms obligations for SEPs. And the pendulum continued to swing in Apple's favour. On 9th August the ITC barred Samsung from importing or selling infringing products through an exclusion order and a cease and desist order.

In truly dramatic style and in rapid succession over barely two months, fortune turned against one before fate turned against other, via a dramatic rescue. As this increasingly complex ITC story unfolds, it gets harder to know the players without a programme.

A-list players

The cast here hardly need an introduction — Apple and Samsung are both A-list players on any marquee. However, this is high drama and the stakes are equally high, so a little commentary might be useful to set the stage. Apple and Samsung, for example, collectively accounted for north of 45% of total smartphone and over 50% of total tablet sales worldwide in the second quarter of 2013. To gauge size in another way, Apple's total sales (US$156 billion) in 2012 accounted for about 1% of all US gross domestic product (GDP). It's a truly impressive figure, until you do the same calculation for Samsung. The Samsung Group (of which Samsung Electronics, the cell phone/tablet manufacturing arm, is the largest part) had sales of US$247 billion in 2012, which accounted for a staggering 22% of South Korea's entire GDP. However, even at that scale, plot twists in the patent drama can still have a big impact. For example, the trading day after the ITC released its decision against Apple, its stock dropped by almost 2%, erasing nearly US$10 billion from the company's market capitalisation; after the presidential intervention relieving Apple of the exclusion order, however, the stock rebounded, restoring nearly US$7 billion of that value; and finally, in the week following the ITC decision adverse to Samsung, Apple saw its stock rise by nearly 7.5% — north of US$30 billion.

With the potential for impact on that scale against market behemoths, perhaps the most compelling element here is not the story or the players. It is the stage — the ITC itself.

The stage

To understand the nature of that power better, it is useful to look back at the history of the ITC, which traces its lineage to a time when countries regulated trade primarily through import tariffs (eg, the US Tariff Act of 1922 and the Smooth-Hawley Act of 1930). It was the Trade Act of 1974 which formally constituted the ITC as an independent agency with the charter and authority to protect US domestic industry. Later revisions by the 1988 Trade & Competitiveness Act and congressional legislation conformed to the General Agreement on Tariffs and Trade/Agreement on Trade-Related Aspects of Intellectual Property Rights, resulting in the current ITC Section 337 authority under which the Samsung/Apple actions were filed.

Broadly, Section 337 prohibits two types of behaviour in service of protecting a domestic industry that "exists or is in the process of being established":

- Unfair acts or competition (§337a.1.A).
- The import of infringing products (§337a.1.B-E).

The lion's share of ITC investigations under Section 337 involve patent infringement, despite the fact that it also covers copyrights, trademarks, trade secrets and even antitrust and false advertising. Combined, these construct a broad stage for the action to unfold.

Dénouement

We have a sense of the story, the players and now even the stage itself. The actors have ably played their parts and the critics — in the guise of the ITC and even the president — have published their reviews. So can we now assume the final act is complete and the Apple/Samsung drama has drawn to a close on the grand stage of the ITC? I would not be so sure. Even after the exclusion order, Samsung is still selling infringing/excluded devices under a 1.25% surety bond (not a royalty to Apple — the ITC does not have the power to award monetary damages; this is simply a guarantee against the potential recovery should Apple later prevail in court). In addition, the dramatic chain of events fuelled public interest debate on whether/how the ITC should exercise its exclusionary powers. Drama at this level seems more the stuff of Hollywood than of patents — and we all know how Hollywood loves a sequel.

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