

# If You Can't Innovate, Litigate

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In the patent wars, [Microsoft](#) has always been the biggest bully in the room. Disappointed by poor sales of smartphones, Microsoft has resorted to every tactic to try to claw customers away from [Google's](#) Android platform. When CEO Steve Ballmer [was asked in a 2010 interview](#) whether it was difficult to compete in an environment where Android is free, Ballmer replied "you're going to see license fees clearly for Android." He wasn't talking about Google changing its pricing; he was talking about Microsoft forcing Android phone providers to pay patent licensing fees.

Microsoft has made good on its promise to make Android pay by using the threat of litigation to coerce Google's business partners into unfavorable licensing deals. In the patent world, the best defense against frivolous patent litigation is a strong portfolio of your own. Motorola, which was recently acquired by Google, has a strong patent portfolio and has shown that it will not be bullied. Motorola is engaged in bilateral patent infringement lawsuits with Microsoft, which have spilled over to the International Trade Commission. The ITC has the authority to ban products that infringe American patents from entering into the U.S. Microsoft recently won an order banning the importation of certain Motorola products, and Motorola countered by claiming that Microsoft's Xbox infringes Motorola's patents.

If Motorola wins a large victory then it will force Microsoft to the negotiating table to either pay its share of licensing fees or to work out cross-licensing deals that will benefit consumers. At least that is what Motorola must have believed [when it recently made an offer](#) to restart negotiations and end the current litigation. But working out a fair and reasonable outcome is not in Microsoft's playbook. Microsoft claims to be the victim and refuses to negotiate.

Microsoft is lobbying all areas of the government for support, working the Hill and recently asking a group of Senators to weigh in, complaining about Motorola's use of standards essential patents (SEPs). SEPs cover technologies that have been made a part of industry standards and are typically licensed on reasonable and nondiscriminatory terms (RAND). But is Microsoft correct in saying that because of their special status these patents should not be afforded protection by the ITC?

Absolutely not, and we need look no further than Microsoft's statement to the FTC in June 2011, [where Microsoft told the FTC](#) "the existence of a RAND commitment to offer patent licenses should not preclude a

patent holder from seeking preliminary injunctive relief or commencing an action in the International Trade Commission.” Microsoft went on to say that preventing a patent owner from using an SEP in a claim in the ITC could reduce the incentive companies who implement the patent have to negotiate with the patent owner.

Microsoft’s claim that it is protecting the industry is a thinly veiled disguise over its true purpose of protecting its patent advantage. When Google first tried to buy defensive patents in last year’s Nortel auction, Microsoft joined just about every Google rival to outbid them, forming an entity called Rockstar Bidco. This was despite the fact that Microsoft already had license agreements to use the Nortel patents. Then Rockstar Bidco [used most of Nortel’s patents to create a patent troll](#), breaching promises Microsoft made to the DOJ to obtain clearance for the Rockstar acquisition. These promises included not seeking injunctions on SEPs. Now that Google has merged with Motorola to combat these patent abuses, Microsoft claims Google is not playing fairly, in clear contrast to Microsoft’s own advocacy before the FTC.

The truth is Microsoft does not want to live with the fact that Google and Motorola’s patent portfolio might be as strong as its own. To do so would mean the patent war would go into a stalemate and the parties would be forced to come to the table and negotiate. Microsoft would then have to compete on the strength of its product and its innovation, where its phone software isn’t finding market success, and it has to compete in a market where Android is free. For this reason, the ITC should ignore Microsoft’s current lobbying tactics and decide the case on the merits. To do otherwise would be picking winners in an industry based on who can throw the biggest tantrums.

When you can’t win by innovating better, you litigate. But consumers benefit when innovation laggards cannot use the courts and agencies to handicap those who win the innovation race.