

CORPORATE counsel

ALM Properties, Inc.

Page printed from: [Corporate Counsel](#)

[Back to Article](#)

War By Other Means

Why the patent suits over tablets? Chalk it up to changing times.

Why the patent suits over tablets? Chalk it up to changing times.

Jan Wolfe
Corporate Counsel
March 01, 2012

These are triumphant times at Apple Inc. But patent litigation over Apple's best-selling tablet computer, the iPad, could dampen the festive mood.

First, the good news for Apple and its devotees: The company thrived during the final calendar quarter of 2011—the first full quarter since its founder Steve Jobs's death—posting a staggering \$46.3 billion in revenue. As expected, iPhone sales were up 128 percent over the same quarter in 2010, accounting for more than half of Apple's revenue.

More surprising was the breakthrough success of the iPad, Apple's tablet computer. Apple sold 15.4 million iPads during the during the last quarter of 2011, more than twice the amount it sold during the same quarter the year before. That haul bested the 14 million estimated by many industry analysts, who seemed to overhype the threat posed to Apple by Amazon, Inc.'s Kindle Fire.

Sales of iPads generated Apple more than \$9 billion in the quarter. Apple controls a whopping 62 percent of the tablet market, with Amazon, Samsung Electronics Co., Ltd.; Barnes & Noble, Inc.; and ASUSTeK Computer Inc. rounding out the top five, according to a recent report by El Segundo, California-based IHS iSuppli Research.

Now, the depressing news: As Apple is well aware from the smartphone patent wars, tech companies are using the court system to gain an upper hand in the marketplace. Litigation over tablets has already turned into a thriving industry, in Silicon Valley and elsewhere, and—as the market continues to grow—even more court battles over the devices could follow. Why has this new area turned into a pitched battle so soon?

First of all, traditional personal computer makers are worried. Some are launching tablets, concerned that more iPad sales mean fewer PC sales. Hewlett-Packard Company has already tried to get into the lucrative tablet market, and was badly burned. Still, companies like Toshiba Corporation and Sony Corporation have jumped into the market, notwithstanding HP's failure to make a dent.

"The tablet is not a new device descended from heaven, it is a descendant of the PC," says Ron Epstein, CEO of Epicenter IP Group, a Redwood City, California-based patent licensing and brokerage group. "The folks who created the innovation that allowed the tablet to be the next step on the evolutionary chain could show up and ask for some return."

Patent litigation by PC manufacturers cooled off in the mid-1990s, but "Apple's moves in the [tablet] direction may change people's thinking," says Epstein, who has served as general counsel of Brocade Communications Systems Inc. and director of licensing at Intel Corporation. "As new tablets come up and gain traction in the marketplace, it'll be interesting to see how the PC industry reacts."

Many of these tablet patent suits could also be brought by Apple itself, which has a history of aggressively pursuing suspected infringers. In April, Apple began asserting a wide range of patents against Samsung in courts around the world, claiming that its tablets and smartphones "slavishly" copy the design of the iPad and the iPhone. Apple won injunctions preventing Samsung for selling its Galaxy Tab 10.1 in Australia and Germany. An appeals court later lifted the Australian ban. The German injunction is also under review. Samsung boldly celebrated the Australian victory by proclaiming the Galaxy tab "the tablet Apple tried to stop" in a full-page color ad in a Sydney newspaper.

Epstein doesn't fault Apple for its aggressive approach. "Apple has been remarkably innovative and quite rightly is using its patent portfolio to make sure that it can maintain exclusive control over that innovation," he says. That's a mistake it learned the hard way from the PC era, he says, when its IP litigation against Microsoft failed to halt the dominance of Windows.

Booming tablet sales could also spur more big-dollar patent auctions, like the ones that dominated headlines in 2011, Epstein says. In July an Apple-led consortium of tech companies agreed to pay Nortel Networks Corporation \$4.5 billion for more than 6,000 of its patents relating to 4G wireless phones. Not to be outdone, Google Inc. announced two months later that it would pay \$12.5 billion to acquire patent-rich Motorola Mobility Holdings, Inc. (at press time antitrust regulators had yet to sign off on the deal).

The tablet's allure lies in its multifunctionality; it blends the PC, the smartphone, and even the digital camera. Few companies boast a large enough patent portfolio to single-handedly bring such a device to market, says Epstein. "Most of these companies are exploiting new markets," he says. "Everybody has to borrow innovation from others. Buying patents is one way of doing that."

One of the most enticing items on the patent auction block may be Eastman Kodak Co.'s portfolio of more than 1,000 crucial digital camera patents, says Epstein. Kodak recently put those patents, which it values at between \$2.2 billion and \$2.6 billion, up for sale as part of a Chapter 11 bankruptcy and restructuring.

In a sign of the times, the same day Kodak put the patents on the chopping block, it started suing potential buyers Apple, HTC, and Samsung for allegedly infringing them. Both the iPad and the iPhone are named in Kodak's suit against Apple in Buffalo federal district court. "[These] lawsuits are presumably part of the sales and marketing effort for those patents: Kodak seeks to demonstrate that there are still some interesting assets in its portfolio that can be used to sue major wireless device makers," wrote IP analyst Florian Mueller on his influential blog FOSS Patents.

Kodak isn't the first litigant to lump smartphones and tablets into the same patent infringement complaint. In fact, tablets are frequently dragged into smartphone litigation. Both types of devices use the same operating systems, and—for all the sound and fury over smartphone wars—the real battle is between Apple's iOS and Google's Android for operating system dominance, Epstein says. "Tablet litigation is really just part of that platform war," he says.

He likens Apple's patent battle with Android to Apple's litigation against PC-era rivals like Microsoft and Intel, which lasted a decade before dying down in the mid-1990s. "We're in the equivalent of the year 1984. It's wide open," Epstein says.

"The people who are making decisions today lived through that," Epstein says. "And they would wisely like to use the lessons from that history."

Copyright 2012. ALM Media Properties, LLC. All rights reserved.