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Nokia Deal Gives Microsoft Patent Protection, Not Weapons

By **Ryan Davis**

Law360, New York (September 03, 2013, 8:08 PM ET) -- By acquiring Nokia Corp.'s handset business Monday, Microsoft Corp. will be shielded from patent suits by the companies Nokia already had licensing agreements with, but because it didn't buy Nokia's patents outright, it can't use them as weapons against smartphone competitors, experts say.

The \$7.2 billion Microsoft paid for Nokia's smartphone operations includes \$2.2 billion for a 10-year, non-exclusive license to practice Nokia's patent portfolio. The \$5 billion cost of acquiring the handset business also assigns to Microsoft many of Nokia's existing patent licenses with rivals like Qualcomm Inc. and Google Inc.'s Motorola Mobility LLC.

Microsoft, a newcomer to the hardware industry, does not have many patents covering wireless technology, so the deal will protect it from suits by Nokia's licensees over such technology as it works to build its smartphone business, said Animesh Kumar of the technology consulting firm iRunway.

"Microsoft can now go about unencumbered. It doesn't have to worry about being sued," he said.

However, because it only licensed Nokia's patents and did not buy them, Microsoft will not be able to assert them against other smartphone makers.

"There's a very limited strategic value to this deal," Jeffrey Johnson of Pryor Cashman LLP said. "It doesn't give Microsoft leverage against competitors."

Microsoft previously only supplied the Windows Phone operating system to companies that made smartphones that run it. Nokia was the predominant producer of Windows Phones, accounting for more than 80 percent of the devices using the software.

With the acquisition of Nokia's handset business, Microsoft will make Windows Phone devices itself, in what CEO Steve Ballmer said in a statement was a "bold step into the future" that will boost the company's profits.

In a presentation to the media, Microsoft said it currently makes less than \$10 per Nokia Windows Phone sold, but expects to make more than \$40 per phone as a result of the acquisition.

But shifting from making software to being a hardware player would be risky for Microsoft if it had to secure licenses for wireless technology used in smartphones, and would open it up to suits by the companies that own patents in those areas.

Joining forces with Nokia and licensing its patents clears many of those hurdles and should let Microsoft operate freely as a hardware maker, Kumar said.

Nokia was an innovator in mobile communications, and its patents cover a wide swath of technology related to the 2G and 3G wireless standards, which are "the building blocks of the mobile infrastructure," he said.

"Getting access to IP from the first guys in the space is immensely valuable," Kumar said.

Its presentation, Microsoft said that Nokia's 30,000 patents represent "one of the two most valuable portfolios relevant to wireless connectivity." The other portfolio of comparable value belongs to Qualcomm, which includes technology related to the more advanced 4G LTE standard. Microsoft said it will get the benefit of the "attractive royalty rates" Nokia negotiated in a 2008 deal with Qualcomm.

Microsoft, which already had its own licensing deals with smartphone giants including Samsung Electronics Co. Ltd., Apple Inc. and others, said that the deal will also include the benefits of license agreements Nokia reached with over 60 other companies.

"That's a very substantial piece of protection," Blaney Harper of Jones Day said. "Nokia fought long and hard ... for those licenses."

Without those licenses, smartphones produced by Microsoft's new hardware venture would likely have run the risk of infringing any number of wireless patents, but the deal "will bring mobile right into the center of the business for Microsoft," Kumar said.

"Microsoft definitely wants to focus on building its brand without worrying its going to be hit with an infringement suit that's going to get in the way of its emerging smartphone business," said Peter Toren of Weisbrod Matteis & Copley PLLC.

However, Microsoft made clear in its public statements that it is not buying Nokia's patents, but licensing them so that it can continue operating the same type of handset business that Nokia had been before.

As a result, Nokia will retain ownership of the patents and Microsoft won't be able to use them to either file suit against competitors or assert them as counterclaims should it be sued.

"It gives them a relatively limited benefit that's focused on protecting products that were largely within the existing Nokia-Microsoft universe," Johnson said.

Compared to some of the other major smartphone makers, Microsoft has not been aggressive about filing patent litigation, though it has reached licensing agreements with most of the major companies in the space over patents it says are practiced by Google's Android operating system and other software.

"Microsoft probably made the decision that it wouldn't get in the business of enforcing Nokia's patents," Harper said.

Because Microsoft didn't acquire the patents, Nokia can still use them to generate revenue by selling them to another company. In 2011, nonpracticing entity Mosaid Technologies acquired 2,000 patents originally filed by Nokia, and attorneys speculated Nokia might now try to sell off all of its patents now that it's leaving the handset market.

"Nokia has a pretty big portfolio," Harper said. "Someone, troll or otherwise, is going to try to monetize that value."

Licensing, rather than acquiring, Nokia's patents sets Microsoft's deal apart from Google's \$12.5 billion acquisition of Motorola's handset business in 2011. That deal included the transfer 17,000 Motorola patents that Google clearly said it intended to assert in litigation involving smartphone competitors over its Android operating system.

More than two years later, that effort has been largely unsuccessful, with Google unable to secure decisive victories in suits against Microsoft, Apple and others.

The acquisition of Nokia has more to do with Microsoft's ambitions in the smartphone business than it does with patent litigation, according to Maurice Ross of Barton LLP.

"I don't think this deal is about patents. Patents are only a bonus," he said. "Microsoft wants to modernize and transform itself into a competitor in the mobile device world and Nokia gives it a credible platform for the first time in this critical space."

Correction: An earlier version of this story incorrectly suggested that the license fee Microsoft is paying Nokia includes the assignment of Nokia's existing licenses. The error has been corrected.

--Editing by John Quinn and Chris Yates.

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