THE WALL STREET JOURNAL.
WSJ.com
AUGUST 23, 2011, 7:07 P.M. ET

Obama and the Smartphone Wars

Unless the president intervenes, the International Trade Commission could send the wireless industry into a tailspin.

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Patent litigation is a game created by government, and constructively so. But the game appears to be getting out of whack in the smartphone patent wars.

Patents encourage innovation by protecting inventors to profit from innovation. Yet a steady thrum of patent litigation is also a healthy sign—it shows that violators are not being overly deterred from developing useful goods and services that, ahem, owe something to prior art.

But getting the balance right is not always easy. In the smartphone wars, a nearly unprecedented intervention by President Obama is being called for. But we'll get to that.

Though the smartphone legal wars have lately assumed a flavor of everybody vs. everybody, including Apple, Google, Microsoft and RIM, as well as handset makers Motorola, HTC and Samsung—and even Oracle, owner of the Java software language—it helps to keep the focus on Apple vs. Google.

In Google, you have an industry disruptor without many patents to bring to the table. Google has been disruptive because it's giving away its Android software free. Free is a problem for the incumbents, who don't have Google's search advertising revenues as a way to monetize their software inventions.

Secondly, and we mean this in the nicest possible way, Google is a patent violator. In a complicated software-hardware business, especially when so many functions are converging in a single device like a smartphone, patent violation is expected, routine and unavoidable. A 4G smartphone is said to implicate a hellish half-million patents.

If Google is the disruptive force, Apple is the one being disrupted. But Apple is different from most patent litigators. Apple isn't looking for a cross-licensing deal. Apple isn't looking for license revenues. It's looking to protect and maximize the iPhone's design superiority and unique user experience.

Associated Press

Now we come to a third factor that threatens to send the merry game off a cliff. In its 2006 eBay decision, the Supreme Court made it harder for

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companies to win injunctions against infringers—to ban their products. This, and the fact that most cellphones are assembled overseas, sent many disputants running to the International Trade Commission, an administrative agency largely empowered by the 1930 Tariff Act. The ITC can also hear patent disputes, and while it can't award damages, it can drop the nuclear bomb of blocking infringing devices from being imported.

One company sounding the alarm about the potential consequences is Verizon. Its chief counsel, Randal Milch, has circulated a chart showing all the tasty devices, including iPhones and Android tablets, that could be blocked by pending ITC rulings.

But another peculiarity of the ITC is that its rulings can be waived by the president. Verizon thinks it would be great if President Obama, in a blanket statement, made clear he would not let stand any decision blocking importation of consumer wireless devices. The parties then would have to recur to normal patent litigation, and whatever rights and wrongs are discovered could be settled by exchanges of cash. Mobile is a rare industry exhibiting growth, job creation and animal spirits. Who needs a paralyzing meltdown?

But while Verizon's point is stirring, there's one big problem. Such a decision might seem Solomonic, but in fact it would prejudge a fundamental patent-cum-business model dispute between Apple and Google, one that shouldn't necessarily be subject to a split-the-baby resolution.

Google has come from nowhere to build a dominant position in smartphone software based on tying a free Android to Google search advertising (which is fine) and, arguably, by helping itself to seminal Apple innovations that created today's smartphone industry (not so fine).

Google's approach implicitly assumes that nobody has a right to exclude Google from use of their intellectual property. At best, after litigation, they might have a right to be compensated by Google.

But this is not how the patent system is supposed to work. Let us understand that Google's purchase of Motorola is the purchase of a bargaining asset; it does not automatically put Google in the right. Apple, as a patent holder, has every right to seek to preserve *exclusive* use of its inventions. In its eBay decision, the Supreme Court allowed that the possibility of "irreparable harm" might justify banning an infringing product outright, equivalent to an ITC import exclusion.

Those given to hyperbole might wonder what could be a clearer example of "irreparable harm" than Google stealing an industry. We hasten to add this shouldn't stop the president from intervening to prevent an ITC train wreck. But he should also make it absolutely and unequivocally clear he's not trying to deny any company its day in court, nor prejudging any company's right to seek a judicial ruling that would have exactly the same result as an ITC exclusion order.