

# The Daily Dispatch

## Weekly Special Feature

August 12, 2022

### ***Big Tech Has a Patent Violation Problem***

By: Paul R. Michel – Harvard Business Review (*Published on August 5, 2022*)



*Shana Novak/Getty Images*

For years, major American tech companies have complained about the threat of intellectual property theft. The U.S. government has projected that Chinese companies flouting IP protections costs the American economy as much as \$600 billion every year. But this problem of companies ignoring patents and other IP protections isn't just a cross-border issue — there's a similar issue right here in the U.S. If major tech companies seem less concerned about IP violations closer to home, that might be because in these cases they're often the perpetrators, not the victims.

For example, in January, the United States International Trade Commission, a quasi-judicial body that oversees trade enforcement matters, found that Google infringed on multiple patents held by the speaker maker Sonos. The commission gave Google 60 days to implement software updates to remove the stolen technology or else face a ban from importing a range of its products — including its Google Home smart speakers and Pixel phone — and selling them here in America. Google complied, at the cost of removing features and reducing the functionality of the products.

This was just one in a string of similar legal defeats that Google has suffered. In February, a jury in Texas ruled that

Google's Nest Thermostat infringed on a patent held by EcoFactor, and ordered Google to pay \$20 million. In a \$26 million verdict from November 2021, a federal jury found Google's YouTube platform in violation of a patent held by VideoShare LLC.

Google isn't alone, however. Other Big Tech firms have infringed on smaller competitors' technologies in recent years, and have also faced reprimands and hefty financial penalties from courts and the International Trade Commission. In August of 2021, a jury ordered Apple to pay \$300 million in damages to Optis Wireless Technology for infringing on that firm's patents. Apple similarly owes VirnetX, an internet security software firm, over \$570 million for infringement. And Cisco and Centripetal Networks, a Herndon, Virginia, startup, will return to the district court to litigate whether Cisco infringed Centripetal cybersecurity patents. Cisco previously owed nearly \$2 billion to Centripetal for infringement, only for that ruling to be tossed due to a judge's minor conflict.

These judgements have shown Big Tech that infringement doesn't come without legal consequences — but this solution might not have teeth for much longer. Instead of simply stopping their infringement and licensing rivals' technologies fairly, major tech firms — including Apple and Google — are now pursuing a legal workaround. They're trying to make it easier to invalidate rivals' patents by pushing for legislation that would weaken IP protections. After all, if there are no patents, there can be no infringement.

### **Business as Usual**

For years, executives at major tech firms have seen these legal judgments as just a cost of doing business. Damages for lost cases, even when stretching into the hundreds of millions, are a drop in the bucket for companies like Apple, which reported \$365.8 billion in revenue in 2021. Patent

# The Daily Dispatch

theft, sadly, is a rational strategy for corporate behemoths seeking to entrench their own dominance and neutralize a threat from an emerging startup. After all, it's cheaper to steal than to license smaller firms' technologies.

Just over a decade ago, this strategy became even more viable. In 2011 — in part due to the urging of tech lobbyists — Congress created a tribunal within the U.S. Patent and Trademark Office (USPTO) called the Patent Trial and Appeal Board (PTAB), which was ostensibly created to provide a faster, less expensive way to settle patent disputes outside of the courts. Instead, it opened up a new avenue for Big Tech gamesmanship of the patent system. Now, deep-pocketed tech firms could simultaneously challenge smaller rivals' patents in two arenas — in the courts and at the PTAB, where, in addition, they could file multiple and serial challenges against the same patent.

This gave major tech companies a major advantage. In many cases, after being sued by smaller rivals, large tech companies petitioned the PTAB to strike down patents that courts would potentially uphold and find tech behemoths guilty of infringing. Often the PTAB would do just that: It has at least partially invalidated 84% of the patents it has adjudicated in a final written decision. There are three main reasons for this: 1) the Board's evidentiary standard is lower than in court, 2) repeat challenges are allowed — by the defendant, of course, but also by anyone who wants to challenge the validity of the patent for any reason — and 3) patent owners are burdened with about \$500,000 per challenge, which Big Tech companies can afford, but startups often cannot.

In recent years, there has been some effort to correct this problem. Between 2018 and 2020, the USPTO instituted reforms aiming to prevent this type of abuse. Among other things, they specified that the PTAB can decline to review patent challenges in certain circumstances, such as when the patents are already contested in court on the same grounds and the court's decision is imminent. (Even so, Google, Apple, Samsung, Cisco, and six other prominent mega-companies accounted for over 80% of PTAB petitions in 2021.) There's sound logic in these reforms. After all, why should the PTAB, an administrative agency, address the same issues that an independent court already addressed

and resolved?

Apple, Cisco, Intel, and Google recently sued the USPTO in an attempt to overturn those reforms, but their challenge was unsuccessful.

## A New Attack on Patents

Now, however, Congress is pushing forward a bill that would effectively overturn the USPTO's efforts to balance the patent system. Introduced by Senators Patrick Leahy (D-VT), John Cornyn (R-TX), and Thom Tillis (R-NC), it's called the "Patent Trial and Appeal Board Reform Act." But far from improving the legal landscape for small inventors, it will render patent owners powerless to fend off duplicative petitions at the hands of Big Tech.

The sponsors of the bill claim that it will stop Big Tech's weaponization of the PTAB, but that couldn't be a more inaccurate representation. Instead, if passed as currently drafted, it would strip away the very protections that were put in place to level the playing field for small inventors, such as the PTAB's ability to decline legal challenges when a patent is already being contested in court on the same grounds, or the courts have already upheld the patent's validity. The bill also fails to limit the number of petitions the defendant can file as long as they are all filed on the same day.

If they succeed in weakening America's intellectual property system, it could be devastating for thousands of small, innovative startups — with disastrous consequences for the economy as a whole.

## Protecting Innovation

It would be a mistake for lawmakers to abet Big Tech's efforts to weaken the U.S. system of intellectual property protections. It would make our economy less vibrant and competitive. Instead, lawmakers should reject the PTAB Reform Act and instead revise it to block multiple and serial challenges, block challenges when the courts have already upheld the patent, and upgrade the PTAB's evidentiary standard to the courts' more rigorous "Clear and Convincing" evidence standard.

# The Daily Dispatch

Rampant IP infringement poses a major threat, not just to small startups, but to the U.S. economy as a whole. The very purpose of America's patent system is to incentivize companies, entrepreneurs, and inventors and their investors to take risks on untested ideas. Unsurprisingly, VC investments in early-stage startups fell sharply in 2021–2022.

Without confidence in the enforceability of patents, there would be very little reason to take these chances. And the result would be a much less dynamic, innovative, and prosperous economy.

---

Paul R. Michel (Ret.) served on the United States Court of Appeals for the Federal Circuit from 1988 to his retirement in 2010, and as its chief judge from 2004 to 2010.

---

Source: Paul R. Michel (2022). Big Tech Has a Patent Violation Problem. *Harvard Business Review*. Available at: <https://hbr.org/2022/08/big-tech-has-a-patent-violation-problem>

# The Daily Dispatch

August 12, 2022  
TODAY'S TOP NEWS

## Converge lowers capex guidance to P21-23 billion

Converge ICT Solutions, Inc. has revised its capital expenditure (capex) guidance for the year, lowering it to P21-23 billion from P26-28 billion previously. "With weak peso like today, capex is expensive," Matthias Vukovich, Converge chief financial office advisor, said during a press briefing on Thursday.

## Global-Estate's earnings surge 33% to P405M

Global-Estate Resorts, Inc. (GERI) posted a 33.2% increase in its attributable net income of P404.55 million in the second quarter as most of its business segments recorded higher revenues. Revenues surged by 41.5% to P1.74 billion for the April-June period from P1.23 billion in the same period last year.

## Cebu Air net loss down to P1.89B as revenues jump

Cebu Air, Inc., the listed operator of budget carrier Cebu Pacific, announced that it narrowed its net loss for the second quarter of the year to P1.89 billion from a loss of P6.49 billion previously. The company saw its revenues for the period jump 336.6% to P13.97 billion from P3.2 billion in the second quarter of 2021.

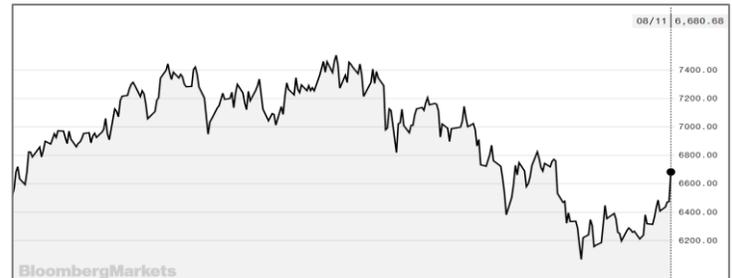
## Century Properties posts 26% profit hike to P175M

Century Properties Group, Inc. (CPG) posted a net income of P174.75 million attributable to equity holders in the second quarter, nearly 26% higher than a year ago, after posting double-digit revenue growth. The property developer reported gross revenues of P2.7 billion, 14.9% higher than the level a year ago.

## Holcim income drops 67% on soft demand

Holcim Philippines, Inc. reported on Thursday a 66.6% drop in its second-quarter attributable profit to P240.77 million from P721.27 million in the same period last year amid soft market and cost pressures.

## Philippine Stock Market Update



Previous Close:

6,680.68

Open:

6,676.27

52-Week Range:

6,054.79 - 7,552.20

1 Yr Return:

4.18%

YTD Return:

-5.82%

Source:

Bloomberg

## Foreign Exchange

As of August 11, 2022

US Dollar	Philippine Peso
1	55.47

## BVAL Reference Rates

As of August 11, 2022

Tenor	Rate
1Y	3.648
3Y	4.999
5Y	5.464
7Y	5.728
10Y	5.941
20Y	6.656

## Daily Quote

"The greatest test of courage on earth is to bear defeat without losing heart."

-- Robert Green Ingersoll

# The Daily Dispatch

## MORE LOCAL NEWS

### Jollibee net earnings up nearly threefold to P2.8B

Jollibee Foods Corp. (JFC) recorded a surge in its attributable net income to P2.79 billion in the second quarter, almost triple last year's P976.71 million, after booking "record-high" system-wide sales, it said on Thursday.

### Increased activities helped 2GO return to profit

2GO Group, Inc. returned to a net attributable profit in the second quarter of the year after losing P308.73 million a year earlier. The company reported an attributable net income of P108.14 million for the second quarter of 2022.

### Robinsons Retail's income doubles to P1.6B

Robinsons Retail Holdings, Inc. (RRHI) reported an attributable net income of P1.56 billion in the second quarter, more than double the P723.89 million earned in the same period last year. The company said revenues for the April-June period reached P43.23 billion, up nearly 20% from P36.04 billion in the same period last year.

### Fitch Solutions hikes PH growth forecast to 6.6%

Fitch Solutions, a unit of Fitch Group, raised on Thursday its 2022 growth forecast for the Philippines to 6.6 percent from its previous estimate of 6.1 percent, taking into account the robust expansion in the first two quarters.

### Monde's noodle sales fall 15% after EU warnings

Monde Nissin Corp. said Thursday noodle sales fell 15% in July after several EU countries issued health warnings and product recall against the company's top-selling Lucky Meal brand. Monde Nissin chief executive Henry Soesanto said the decline in noodle sales in July would have "dampening effect" on the company's Q3 results.

### SPNEC board OKs change in name

SPNEC said the change in the corporate name to SP New Energy Corp. "reflects the company's expansion from a single project in Nueva Ecija to a portfolio that includes operational projects and other developments" in line with its goal to developing 10 gigawatts of solar projects by 2025.

### Phoenix Petroleum earned P201m in Q2

Phoenix Petroleum Philippines Inc. announced Thursday its return to profitability with a net income of P201 million in the second quarter, its highest since the onset of the pandemic. The company said it gradually recovered from the P262.7-million loss it suffered in the first quarter.

### Pilipinas Shell net income surges in H1

Pilipinas Shell Petroleum Corp.'s (PSPC) net income ballooned to P7.8 billion in the first half as against P2.2 billion a year ago, as fuel prices soared during the period. The oil firm declare dividend of P1/share payable this September.

### JG Summit posts P2.7-B loss in H1

JG Summit Holdings Inc., the holding firm of the Gokongwei Group, said it recorded a P2.7-billion loss in the first half, from P936.69 million in attributable income last year. The company attributed this to the adverse impact of the significant peso depreciation on the company's foreign currency-denominated debt.

### Market surges; Jollibee, Ayala Land lead gainers

The stock market surged Thursday as investors breathed a sigh of relief after data showed US inflation finally easing from a four-decade high, giving the Federal Reserve some room to slow down its pace of interest rate hikes. The PSEi jumped 208.84 points, or 3.2 percent, to 6,680.68 on a value turnover of P8.6 billion.

# The Daily Dispatch

## TODAY'S TOP ASIAN NEWS

### Singapore economy set for further slowdown

Singapore's economy is set for a significant slowdown in H2 with demand for goods and services facing challenges both at home and abroad. Rising living costs and higher interest rates are likely to squeeze household and business spending alike, risking growth at both consumer-facing and trade-driven sectors of the economy.

### Keppel, KIT to invest \$445m in offshore wind farm

Keppel Corp and Keppel Infrastructure Trust (KIT) said that they will spend €305 million (\$445.3 million) to acquire a 25 per cent stake in Borkum Riffgrund 2, an offshore wind farm in Germany. It is their second joint investment in renewable energy assets and reinforces KIT's strategy to grow its energy transition business.

### ThaiBev defers brewery unit's Singapore IPO plans

Thai Beverage has deferred the initial public offering (IPO) of its brewery unit in Singapore once again, citing "prolonged challenging market conditions" for its decision. The maker of Chang Beer said it will continue to monitor market conditions and explore opportunities to maximise shareholders' value.

### China's provinces vow to meet GDP targets

BEIJING (BLOOMBERG) - Several Chinese provinces pledged to meet their growth goals for the year, even as top leaders downplayed the national target of "around 5.5 per cent" after repeated Covid-19 outbreaks and a property market slump.

### Asia shares up, softer-than-expected US inflation

Asian shares tracked Wall Street higher on Thursday (Aug 11) after a softer-than-expected US inflation report encouraged bets of less aggressive rate hikes from the Federal Reserve, while the dollar remained bruised after its biggest plunge in five months.

## TODAY'S TOP GLOBAL NEWS

### Disney profit up 50%, subscribers surpass Netflix

Bucking a streaming slowdown that has recently bedeviled Hollywood, Disney+ added 14.4 million subscribers in the most recent quarter, about 45 per cent more than Wall Street had expected and lifting Disney's portfolio of streaming services to 221 million subscribers worldwide, edging ahead of Netflix for the first time.

### HK Growth Hopes Crumble Under Covid Policy

Hong Kong's economy will struggle to expand at all this year as the city grapples with Covid restrictions, a trade slump and other global headwinds. The government is set to cut its forecast for gross domestic product growth for the year when it reports final GDP figures for the April-to-June period on Friday.

### J&J to end global sales of talc-based baby powder

Aug 11 (Reuters) - Johnson & Johnson (JNJ.N) will stop selling talc-based baby powder globally in 2023, the drugmaker said on Thursday, more than two years after it ended U.S. sales of a product that drew thousands of consumer safety lawsuits.

### Petrobras puts potash mining rights up for sale

SAO PAULO (Reuters) - Brazil's Petrobras said on Thursday it has begun the process of looking for bidders for its potassium mining rights in the Amazon basin. The asset is composed of eight mining concessions, four mining requests already granted and 22 requests for research which are still pending authorization.

### SoftBank shares rise 5% on trimming Alibaba stake

TOKYO, Aug 12 (Reuters) - Shares in SoftBank Group Corp (9984.T) rose 5% in morning trading in Tokyo on Friday after the Japanese conglomerate said it would book a \$34.1 billion gain by trimming its stake in Alibaba Group Holding (9988.HK), .