



Surrender the Patent and the Application. Legal Study for Supporting the Business Approach

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ABSTRACT

This article deals with presenting the legal consequences associated to surrender a patent and to the shifting of the procedure for obtaining the patent when the proprietor of the patent is the employer. It focuses on two main relevant aspects. First of all, the article presents the general framework for giving in the patent as a special case of voluntary assignment and copes with the implications of the legal offer to surrender the patent even when more than one person is the owner. I have thus learned that if the proprietor fails to prove that all the conditions for the surrender are fulfilled (herein included that the employee was properly notified) the patent will not leave the ownership of the employer. Secondly, the article analyzes the relevant provisions of the law on service inventions in case the employee identifies the intention of the employer to surrender the patent while also focusing on presenting possible elements of the employers' disinterest to protect the technical solution. The legal provisions are thoroughly examined in order to understand the reasoning behind the disinterest of the employer to surrender its right, including in the context of the right to protect the technical solution as a trade secret.

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1. Introduction

This approach aims to briefly analyze situations in which the holder of rights acquired under the law does not wish to obtain protection through a protection title (as patent or utility model certificate) or, if he has obtained this protection, wishes to waive it. For the purpose of this study, the applicable legislation concerns the special provisions provided for by Law No. 83/2014 on service inventions („Law on Service Inventions”) and in relation to the provisions of Law No. 64/1991 on patents („Law on Patents”). Surrendering patents or patent applications in the tech hardware sector, for example, is usually a strategic move with distinct financial, operational, and competitive ramifications. All such consequences are primarily relevant from a legal standpoint. Understanding the legal implications will ease the construction of all business decisions related to the abandonment of patents.

Therefore, the study will analyze, on the one hand, the disinterest of the proprietor for specific legal protection, and, on the other hand, his interest in giving in the protection. We specify that, for the purposes of this study, we will not analyze the immediate consequence of the owner's conduct, namely the lack of legal protection through the specific mechanisms of patent protection. For example, the need to verify the mediated purpose of the same conduct of the subject of law is not of interest for this analysis.

In this context, the study below will be oriented towards verifying the legal effects produced by the behavior of the person entitled to protection by verifying the consequences towards those who have created the invention or have acquired rights regarding it. In this direction, it is important to learn to what extent the unilateral manifestation of the owner's motivation activates subsidiary protection for other subjects of law relevant to the protected intellectual creation.

The article will present the situations in which the subject of patent protection acts to establish (dis)interest, namely renunciation of the patent, when protection has been obtained and withdrawal of the application for protection, in situations in which the interest in the lack of protection manifests itself during the procedure for obtaining the title.

After examining the owner's indifference in protection by title, the study will focus on the employer's disinterest in the invention to which he is entitled. This apathy can manifest itself, on the one hand, after the patent is granted and, on the other hand, before the patent is granted.

According to the provisions of art. 36 paragraph 1) of Law on Patents, the holder may renounce, totally or partially, to the patent, based on a written declaration registered with the local patent authority (State Office

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for Inventions and Trademarks - OSIM). As we will see, art. 36 para. 1) of the same law outlines the rule pertaining to patent renunciation. It specifies that a unilateral action by the renouncing party is required which will have legal significance both with regard to the legal status of the renunciator, but also in relation to the co-holders, when multiple persons jointly hold rights to the patent.

The particular situation of waiving the protection title was established by the provisions of Law on Service Inventions which amended, among other things, the content of art. 36 para. 2) of the Law on Patents and regulated the cases in which the employee is interested in obtaining patent protection when the owner does not have such an interest.

2. Impact on business

While this study focuses on patent law and employee inventions, its implications extend significantly into the realms of finance, HR, business strategy, and overall management. For instance, in terms of finance, patents are valuable assets. Understanding the conditions under which a patent can be surrendered or assigned directly impacts the financial valuation of a company's intellectual property portfolio. Moreover, knowing that employees can potentially claim inventions abandoned by the company is crucial for accurate asset assessment.

It is therefore crucial to understand the legal framework surrounding patent surrender and employee inventions, so that professionals in finance can make more informed decisions that protect their company's interests, motivate their employees, and promote innovation.

Unfortunately, there is a relative scarcity of Romanian case-law on strategic surrender decisions. The Romanian legal provisions, although modified for more than a decade, can be challenging in case of a conflict between the employee and its employer when there is a need for patent surrender.

It is certain that there is an abundance of disputes over entitlement to the grant of a patent between employers and employees. In practice, many inventions are made by employees (i.e. university professors or research and development staff). The outcome of the conflict is therefore of utmost importance since in making their inventions, these people will most likely be using the facilities and resources of their employer.

3. The statement of waiver

As established in art. 36 para. 1) of Law on Patents, a unilateral act of will is required for the renunciation of the patent. The determination to renounce is externalized after obtaining the patent and must be unquestionable regarding the deprivation of the protection conferred by the patent. The act of will of the holder is irrevocable in the sense of renunciation, and its annulment can be requested only if the existence of defects of consent from the moment of renunciation is proven.

From the point of view of the effects, these will occur only for the future, the renunciation producing legal consequences effective from the date of its publication in Official Bulletin of Industrial Property - BOPI. The implication for third parties is that they will be able to freely exploit the technical solution that was the subject of the patent. Also, if license contracts are in place, renunciation can occur only with the consent of the licensee.

Although, at first glance, the general situation analyzed here does not imply the existence of any employment relationship or contractual obligation that would require obtaining the agreement for the waiver or that would establish any other right for the person interested in becoming the patent holder, the law (G.D. no. 547/2008 for the approval of the Regulation implementing Law on Patents – the „Regulation“) requires the waiver holder to present evidence, including the absence of an employment relationship that could generate rights for the employee inventor. .

We observe that, from the provisions of the Regulation, the opposability of the renunciation is conditioned, among other things, by an alternative negative proof, respectively, either (i) in the case where the invention is one of service, the rights of the employee inventor have been respected in the sense of the lack of request for the transfer of the right, or (ii) the invention is not regarded as a service invention.

In both situations, from a formal point of view, I trust that the proof that the holder must make also relies on an expression of the employee's intention. For example, if the invention is one of service, demonstrating adherence to the stipulations of art. 36 para. 2) of the Patent Law requires a declaration from the employee stating that they have not requested the transfer. I am of the opinion that, even in the situation where the invention is not qualified by the employer as one of service, it is still necessary to prove the manifestation of the employee's will in the sense of renouncing to challenge the manner of framing the invention under the conditions of art. 4 para. 4) of Law on Service Inventions („inventor may challenge the way in which his invention is classified by the employer, at the competent court, according to common law, within 4 months“).

Thus, if the holder does not provide evidence of compliance with the conditions of the Regulation, their expression of intent will not be considered a valid renunciation, resulting in the right to the patent remaining within the renunciator's estate.

However, I consider that, if the provisions of art. 36 para. 2) of Law on Patents are applicable, such a manifestation of will, ineffective from the point of view of renunciation, will have the value of an intention to renounce the patent subject to communication to the employee inventor, because this is the express obligation

established by law. According to legal doctrine, when the mechanism of service inventions is invoked—where the employer has claimed the technical solution—a straightforward waiver by the employer is no longer feasible (refer to Binctin N. (2020), *Droit de la propriété intellectuelle*, 6th edition, LGDJ, 2020, p. 431 ff.).

4. Renunciation of the co-holder

If several persons jointly hold rights over a patent for invention, the renunciation of one of the co-holders to the patent requires the issuance of a notification by the renouncing co-holder to the other co-holders.

As established by the Regulation, renunciation can be executed either for the benefit of the other co-holders or for that of a third party, and the renunciator's obligations towards the other co-owners terminate once OSIM records the renunciation in the National Register of Patents. As such, the renunciator is not obliged to renounce in favour of the other co-holders, being free to choose the third party to whom their act of renunciation will produce a benefit.

With regard to these provisions, certain clarifications are necessary. First, in the situation where the renunciator manifests their will to renounce in favour of a third party, they can do so without the need for any approval from the co-owners, the provisions of art. 36 para. 1) of Law on Patents being fully applicable. However, OSIM will acknowledge the renunciation only if the renunciator submits a request signed by all co-owners when the patent has multiple holders.

In this context, we raise the question of whether the requirement of signing the renunciation request by all co-holders represents an application of the general rules in the matter of ordinary co-ownership in the sense that any acts of disposition can only be carried out with the agreement of the co-owners.

In my opinion, the answer should be negative in the sense that the requirement of signing the renunciation request by the co-holders is only necessary in those situations where all co-holders renounce to rights. Otherwise, the lack of signature of a co-holder on the request formulated by the renunciator would be equivalent to a refusal of the co-holder to renounce (especially when this renunciation would be made for the benefit of a third party), without the possibility for the renunciator to have remedies against the recalcitrant co-holder.

In other words, art. 63 para. 1) lett. c) of the Regulation does not condition the renunciation on obtaining the co-holders' agreement for the respective renunciation since the renouncing co-holder has the possibility to extinguish their state of indivision including through renunciation to their share of the right in favour of a third party.

Secondly, in cases where the renunciator opts to renounce in favor of a third party as well, the respective renunciation is equivalent to an assignment. In these conditions, the Regulation establishes that each co-owner can, at any time, assign their share of ownership over the patent. Art. 84 para. 6) of the Regulation is consistent under these aspects.

However, the respective assignment will be free of charge, and the co-holders will not be able to claim the application of the provisions regarding the right of preference to assignment. Such right of preference to assignment of co-owners is regulated by art. 84 para. 7) of the Regulation. Therefore, in this case of renunciation in favour of a third party versus co-ownership, the legislator was not interested in the co-holders' preference for acquiring the patent. For this reason, the common law rules regarding pre-emption to sale will not be applicable to the renunciation made by the co-holder since the renunciation in favour of a third party does not meet the conditions of a sale, respectively transfer of the property right against a price.

Thirdly, we consider that there will be a conflict between the rules regarding co-ownership and those related to the rights of the employee inventor, in the situation where the renouncing co-holder is a legal person who acquired the right over an invention made by their employee.

For example, the hypothesis we analyse concerns the situation in which the renunciation to the patent intervenes in favour of a third party, respectively in favour of the renouncing employee who made the invention. Without delving into specifics about renunciation in the context of service inventions, it should be noted that the mechanism for renunciation in such cases is outlined by the Law on Service Inventions.

In this case, the special provisions regarding service inventions establish which is the third party in favor of whom the renunciation is made and generate obligations for the latter regarding the transfer of rights to them. Please refer to the content of art. 36 para. 2) of Law on Patents: *„in the case of service inventions, the patent holder is obliged to communicate to the inventor his intention to renounce the patent; at the inventor's request, the holder is obliged to transfer to him the right to the patent, as well as the documents related to the patent, under the condition that the employee grants the employer a non-exclusive license for the patented invention. The conditions for granting the non-exclusive license are established by specific provisions of the employer's internal regulations. In the absence of these specific provisions, the conditions for granting are established by agreement of the parties”*.

From this perspective, we observe that there will be a conflict between the rights of the renouncing co-holders and the rights of the employee inventor regarding the share of the co-holder that is renounced. Although, as we will see in a distinct section, the Law on Service Inventions does not regulate the hypothesis of waiving the rights to the patent, we consider that the provisions of art. 36 para. 2) of Law on Patents will be applicable first, and then, to the extent that the employee does not request the transfer of the right over the patent, the provisions related to co-ownership.

5. The particular situation of employee inventions

From the analysis of the provisions of the special law on service inventions, the employee is a subsidiary holder of protection through a patent. Legal doctrine consistently structures rights in employee inventions and their classification for awarding legal title (see Pollaud-Dulian, F (2022), *La Propriété Industrielle, Economica*, 2nd edition, 2022, pp. 255 ff.). If the employer is not interested in exploiting the invention made by the employee, thus being disinterested in protecting it through a title of protection, they are obliged to allow the employee inventor to legally manifest such interest themselves.

From this point of view, the institution of renunciation to the patent has gained importance depending on the moment in time in which the disinterest of the holder employer to exercise their rights arising from the title of protection manifests itself.

Unlike the previous regulation, Law on Service Inventions introduced two major changes regarding the situation of renunciation that we are analyzing. First, it was regulated, by art. 9 para. 3) of Law on Service Inventions, the situation in which the disinterest in protection through title manifests itself before the patent is issued. Secondly, art. 36 para. 2) of Law on Patents was modified, which establishes the situation of renunciation to the patent for invention, by taking over the mechanism from art. 9 para. 3) of Law on Service Inventions.

We observe, therefore, that the texts aim to protect the rights of employees in the situation in which the disinterest of the primary subject to protection appears both before obtaining the title of protection, but also after this title is obtained.

And in these hypotheses, renunciation is still a unilateral act of will that is however conditioned by the lack of a request from the employee inventor for the transfer of the right. In other words, by virtue of the law, the renunciation contains an irrevocable offer to assign the title of protection to the employee inventor. As such, the renunciation is made under the resolutive condition of the acceptance of the patent by the employee.

In this situation, the employer (holder of the right) is legally obliged to the employee to assign for free the right regarding the title of protection over the service invention, an assignment that is conditioned by a free, non-exclusive license to use the invention in favor of the employer.

Therefore, the renunciation made by the holder is under a resolutive condition, and the assignment is under a suspensive condition. Through the renunciation mechanism, in the case where the conditional offer reaches the employee, the acceptance of the offer represents the fulfillment of the resolutive condition for renunciation and, therefore, the agreement is formed.

It is easy to see that the obligation to assign becomes due from the moment when two cumulative conditions are met. First, the employer must communicate to the employee their lack of interest in exploiting the invention as a holder and, then, the employee must declare to the employer their agreement for the latter to obtain the license. Such intent to grant the employer the offer for the license is thus a condition of effectiveness of the employees intent to take over the patent.

Therefore, the transfer of the property right over the title of protection will take place at the moment when the employee communicates to the holder their agreement for granting the non-exclusive license and the employer accepts such the offer for such license. For particular situations where the offer to surrender the patent is made during a patent revocation procedure in the Common Law system, see Bainbridge. D. (2012), *Intellectual Property*, Ninth Edition, Pearson Education Limited, 2012, p. 495.

We consider that the manifestation of the intention to renounce to the patent creates for the employee only one right, respectively the right to be communicated the intention to renounce (this is only a "means" right). The fact that the employee is aware of the employer's disinterest does not help them acquire the right over the patent, but their manifestation of will in the sense of acquiring the right is necessary.

And in the previous regulation, but also in the current regulation, the manifestation of will in the sense of renouncing to the patent gives rise also to a "purpose" right, namely the right to transfer the patent to the employee (for an analysis of the difference in legal regime between partial surrender of a patent and restriction of patent claims, see, for example, Binctin N. (2020), *Droit de la propriété intellectuelle*, 6e edition, LGDJ, 2020, p. 358).

From this point of view, if the renunciation will be considered null, this, by conversion, will have the value of a manifestation of will in the sense of renunciation. In other words, by canceling the renunciation declaration, the intention of the patent holder to renounce is manifested, which will allow the employee to formulate the request for transfer. Based on the knowledge of this declaration, the inventor can claim the transfer of the patent.

From the point of view of the procedure through which the employee acquires the right over the patent as a result of the renunciation, we observe that the conclusion of a legal act to which the law obliges is necessary. Therefore, the law itself obliges the employer to give their consent to the conclusion of the transfer act.

Based on this perspective, the question arises whether this obligation to consent to the conclusion of the transfer contract can be enforced by the employee through the general mechanisms established by art. 1.527 in conjunction with art. 1.279 para. 3) and art. 1.669 para. 1) Civil Code. It is about the possibility of the employee to request the court to pronounce a court decision by which to supplement the consent of the employer renouncing the transfer of the patent.

We consider that such an approach would not be of interest since the contract is formed at the moment when the employee accepts the granting of a non-exclusive license by them, without the need for any additional formalities. And from a procedural point of view, such an action by the employee would be dismissed as lacking interest.

6. The employer's disinterest

I have identified that Law on Service Inventions regulates two hypotheses of the employer's disinterest. It is about, first of all, the situation in which the holder of the right no longer wants to continue the subsequent procedures for filing the protection request for the service invention. Upon careful reading of the initial thesis of art. 9 para. 3) the text certainly refers to the hypothesis in which the employer files the protection request but no longer wants to continue the procedures.

The text, however, does not specify whether the protection request only targets protection through a patent in Romania or (and) in other states or, on the contrary, the protection targets other states, less Romania. Naturally, the hypothesis only considers situations in which it is a European patent application or an international protection application, such instruments being likely to ensure patent protection for the same technical solution in several states

I am concerned about this aspect because the immediately following thesis from the same art. 9 para. 3) seems to isolate the protection that the holder can activate. According to the legislator, this second hypothesis regulates the situation in which the employer is not interested in protection in other states, less Romania. I came to this conclusion from the grammatical analysis of the text.

I have therefore separated the two hypotheses in relation to the simple disjunctive conjunction "or" and we have identified that it fulfills its purpose and links propositions of the same kind.

Therefore, grammatically, the legislator urges us to consider two situations that have an identical dispositive legal treatment: the employer "no longer wants to continue the subsequent procedures for filing the protection request for the service invention **or** [emphasis added - LP] is not interested in protecting the service invention (...)". We argue in favor of our grammatical interpretation including by the fact that both hypotheses resume the noun for which we apply the standard device.

Up to this point, simplifying, the two theses from the analyzed article target two different behaviors of the employer: (i) it has started a procedure to obtain protection by the fact that it has filed a request, the procedure is in progress, but it no longer wants to continue it and (ii) it has not initiated any procedure for obtaining any protection, for example the unilateral act that externalizes its will in the sense of seeking protection through title is missing.

The two scenarios pose several challenges that should be factored into evaluating the employer's disinterest.

First, the withdrawal of the employer's request will produce different consequences depending on whether the request for obtaining the patent has been published or not. In this sense, art. 22 of Law on Patents establishes the rules for publishing the requests filed with OSIM.

I am of the opinion that only the theory of withdrawing the request after its publication gives the employee the right to apply the provisions of art. 9 para. 3) of Law on Service Inventions because, by publication, the technical solution has entered the public domain, under the conditions of art. 9 para. 3) of Law on Patents. In this regard, art. 9 para. 3) of Law on Patents establishes that: „The state of the art also includes the content of applications filed with OSIM and of international applications for which a national phase has been opened in Romania or of European applications designating Romania, as they were filed, which have a filing date prior to that provided for in paragraph (2) and which were published on or after this date, according to the law”.

The employee's right to assignment if the employer withdraws the patent request, which can be identified by applying the provisions of art. 9 para. 3) of Law on Service Inventions by analogy, will not arise when the employer has decided not to obtain a title of protection in order to be able to protect the solution under the regime of secret. And because the request filed with OSIM unpublished is not destructive of novelty, the technical solution remains secret.

As such, the employer remains the holder of the protection and will (be able to) be the legitimate holder of the secret, and the employee will be legally obliged to maintain the confidentiality of the technical solution under the conditions of art. 10 para. 3) or 4) of Law on Service Inventions. In general, art. 10 of Law on Service Inventions establishes an obligation for the employee inventor to maintain the confidentiality of the technical solution and not to disclose it without the written consent of the employer. The same obligation is also established for the employer, but also for persons other than the inventor who, by the nature of their job duties, have become aware of the existence of the invention. Para. 3) and para. 4) of art. 10 of Law on Service Inventions establish the liability of persons who violate this confidentiality obligation, which may be contractual, if it was established by the employment contract, or tortious, under the conditions of art. 1.349 and 1.357 of the Civil Code. Therefore, in this situation, the withdrawal of the protection request before publication does not contain an offer of assignment, and it is necessary for the applicant to prove compliance with the renunciation conditions.

Next, in the second hypothesis analyzed above, as we have seen, the disinterest in protection of the employer is total and is even prior to filing the request.

From my perspective, the disinterest even targets a possible protection of the technical solution through commercial secret since maintaining a technical solution under the regime of secret is not compatible with the provisions of art. 9 para. 4) of Law on Service Inventions. Naturally, as we will see, the incompatibility we are referring to only concerns states in which the employer informs the employee that he is not interested in obtaining protection. In other words, for those states, the employer expressly consents to the disclosure of the technical solution.

The grammatical interpretation of the hypotheses from art. 9 para. 3) of Law on Service Inventions must however be continued with the systematic and teleological interpretation in order to see, in the end, what was the purpose of the normative act. We observe in this sense that the second hypothesis of the norm that we analyzed above only targets the situation in which the employer does not seek to protect the service invention in specific states, other than Romania.

We raise the problem of interpreting this provision for two reasons. First, it is not clear whether the first hypothesis that we analyzed contains (and it) such a circumscription, in the sense that the legislator, at least apparently, seems to be interested in applying the mechanism from 9 para. 3) only if the patent request is withdrawn. However, we do not know if the withdrawal must target other states, less Romania or only the request formulated (in Romania), regardless of whether it is a national, European or international patent request.

Secondly, we are trying to find the rationale of the norm and by reference to the general provisions related to the legal regime of inventions from Law on Patents. We remind that the provisions of art. 36 para. 2) of Law on Patents does not distinguish between renunciation to the patent obtained nationally and/or to the patent obtained as a result of obtaining the title of protection by following the European or international protection procedure.

It is therefore necessary to interpret the legal provisions in order to see whether these cover also the situation in which the employer is not interested in protection in Romania, so does not file a patent request. Interpreting the legal provisions, I am of the opinion that the hypothesis established by the first thesis of art. 9 para. 3 of Law on Service Inventions applies accordingly to the situation in which the employer is not *ab initio* interested in protection in Romania.

I have reached this conclusion through the following argument. The rationale for which art. 9 para. 3) institutes the offer of assignment in favor of the employee targets the employer's disinterest in protection through title and the correlated interest as the one who created the technical solution to become the holder of the protection. This rationale results from the rule that the one who creates a technical solution is also the holder of that technical solution. Law on Service Inventions is in this sense the special situation against the rule.

This means that, whenever we identify such interest, we must see if the same rules can be applied. The analyzed norm expressly covers the employer's disinterest for title in other states less Romania (second thesis). This means that we need to analyze the employer's behavior with regard to protection in Romania and we will see that the employer has three relevant options. Either to formulate a patent request for protection in Romania, or to decide to protect the solution through commercial secret, or not to do anything with regard to protection.

If the first option is expressly covered by art. 9 para. 3) (first thesis), the last two variants above imply, to different extents, the employer's passivity.

However, in the case of protection through secret, passivity targets not following the procedure for obtaining the title of protection, but also implies a positive obligation regarding taking measures to protect the information under the regime of secret. For reference, under the terms of Law no. 11/1991 on combating unfair competition, in particular with regard to the obligation of the person who legally holds control over the information to take reasonable measures, in the given circumstances, to keep the information secret. See, for a comprehensive treatment of the private-law mechanisms for protecting confidential information, Dincă, R. (2009), *Protecția secretului comercial în dreptul privat*, Universul Juridic, 2009.

Also, even if not interested in protection through secret, the employer will have an obligation, this time negative, not to disclose the technical solution without the employee's agreement. This obligation results from the provisions of art. 10 para. 2) final thesis of Law on Service Inventions.

As such, non-compliance with any of the obligations above will have as a consequence the employee becoming aware of the employer's disinterest in protection, art. 9 para 3) serving as a basis for instituting the employer's obligation to assignment when there is such disinterest, not covered by the legal provisions.

7. Conclusions

In summary, this study provides a short analysis of the legal ramifications associated with the surrender of patents and the withdrawal of patent petitions, with a specific focus on the implications for employee inventions.

The examination of relevant legislation and regulations reveals the critical importance of adhering to established legal protocols to ensure the validity and enforceability of renunciations. In cases involving

multiple rights holders, meticulous compliance with notification requirements and distribution of rights is paramount.

The analysis further elucidates the legislative intent to protect the interests of employee inventors in situations where the employer exhibits disinterest in pursuing or maintaining patent protection, regulating two hypotheses of disinterest.

This study underscores the need for businesses and legal practitioners to possess a thorough understanding of these legal nuances to navigate patent-related decisions effectively. Financial assessments of intellectual property portfolios must account for the potential assertion of claims by employee inventors on abandoned inventions, which requires a deep understanding of patent law.

Therefore, it is prudent to consider that, by waiving patents, companies may only enhance their competitive positioning on the market on the long run, without producing any employee satisfaction. Thus, such disinterest of the employer in the patent may affect short-term asset valuation but may lead to long-term financial benefits. This mainly refer to strategic partnerships or joint ventures that might not have been possible when the patent was enforced – giving leverage for mutual benefits. It can also serve as advantage for the entity that surrenders the patent for introducing complementary products or services by allowing others to build upon their technology – lowering the barrier for entry on the market may serve as ramp for shifting the positioning on new technologies.

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