

Wael Zohni

Examining the Role of Patent Quality in Large-Scale “Patent War” Litigation

A Historical Comparison and Proposal for a Restorative U.S. Patent System



Nomos

MIPLC

Munich
**Intellectual
Property**
Law Center

Augsburg
München
Washington DC



MAX-PLANCK-GESellschaft

UNA
Universität
Augsburg
University

TUM
TECHNISCHE
UNIVERSITÄT
MÜNCHEN

**THE GEORGE
WASHINGTON
UNIVERSITY**
WASHINGTON, DC

MIPLC Studies

Edited by

Prof. Dr. Christoph Ann, LL.M. (Duke Univ.)
TUM School of Management

Prof. Robert Brauneis
The George Washington University Law School

Prof. Dr. Josef Drexler, LL.M. (Berkeley)
Max Planck Institute for Innovation and Competition

Prof. Dr. Michael Kort
University of Augsburg

Prof. Dr. Thomas M.J. Möllers
University of Augsburg

Prof. Dr. Dres. h.c. Joseph Straus
Max Planck Institute for Innovation and Competition

Volume 31

Wael Zohni

Examining the Role of Patent Quality in Large-Scale “Patent War” Litigation

A Historical Comparison and Proposal for a Restorative
U.S. Patent System



Nomos

MIPLC

Munich
**Intellectual
Property**
Law Center

Augsburg
München
Washington DC

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

a.t.: Munich, Master Thesis Munich Intellectual Property Law Center, 2017

ISBN 978-3-8487-5107-5 (Print)
 978-3-8452-9309-7 (ePDF)

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN 978-3-8487-5107-5 (Print)
 978-3-8452-9309-7 (ePDF)

Library of Congress Cataloging-in-Publication Data

Zohni, Wael

Examining the Role of Patent Quality in Large-Scale "Patent War" Litigation
A Historical Comparison and Proposal for a Restorative U.S. Patent System
Wael Zohni

78 p.

Includes bibliographic references.

ISBN 978-3-8487-5107-5 (Print)
 978-3-8452-9309-7 (ePDF)

1st Edition 2018

© Nomos Verlagsgesellschaft, Baden-Baden, Germany 2018. Printed and bound in Germany.

This work is subject to copyright. All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or any information storage or retrieval system, without prior permission in writing from the publishers. Under § 54 of the German Copyright Law where copies are made for other than private use a fee is payable to "Verwertungsgesellschaft Wort", Munich.

No responsibility for loss caused to any individual or organization acting on or refraining from action as a result of the material in this publication can be accepted by Nomos or the author/editor(s).

Table of Contents

Charts and Figures	7
Abstract	9
Acronyms and Abbreviations	11
I. Introduction	13
A. The Patent Wars	16
B. Purpose of Comparison	17
II. Origins of the U.S. Patent System	19
A. Overview	19
B. Pre-Constitutional Setting	20
C. House Resolution 10 (H.R. 10)	21
D. Patent Acts of 1790 and 1793	23
E. The “Registration Years:” 1793 through 1836	24
F. Summary	25
III. U.S. Patent Quality Today	26
A. Introduction	26
B. Congressional Review of USPTO Performance	26
C. 2016 GAO Report Findings	27
D. Analysis and Summary	28
IV. Patent War Today: Apple vs. Samsung	30
A. Background	30
1. iPhone vs. Galaxy	30
2. Patent Litigation	31

Table of Contents

B. Rulings	33
1. Patent Battles, Product War	34
2. Section 289 Damages	38
C. Analysis	39
1. Colossal Legal War	40
2. Invention vs. “Cool” Product	41
3. Questionable Patents	41
V. Patent War Yesterday: Wright v Herring-Curtiss	43
A. Background	43
B. Analysis	44
VI. Synthesis and Analysis	49
A. Drift from Historical Basis	49
B. Long-standing Patent Quality Concerns	51
C. Unwritten Rule on Utility	55
D. Comparing Apple and Wright Cases	58
E. Net Challenges	60
VII. Proposals	63
A. The “Utility Parameter”	63
B. “High-Tech” Patent Registration	64
1. Description	65
2. Compatibility with Existing Systems	66
3. Agency Examination Option	67
4. Benefits	67
5. Risks and Unknowns	68
6. Summary	69
VIII. Conclusion	70
A. Revisiting Apple and Wright	70
B. Looking Ahead	73
List of Works Cited	75

Charts and Figures

Figure 1: “slider toggle” on the bottom left and the “lever toggle” bottom right	36
Figure 2: Illustration of Wright concept of “wing warping”	47
Figure 3: Ailerons (moveable) with fixed straight wing of modern aircraft	47
Figure 4: U.S. Patent Lawsuits Filed in District Courts	52

Abstract

The dramatic world-wide impact of the ‘iPhone’ smartphone has made Apple Corporation a topic of modern-day legend. Samsung’s alleged “theft” of Apple’s iPhone concept in March of 2010 led to the start of what has come to be known as the “Smartphone Wars,” a cascade of litigation that has become just as legendary. Over one-hundred years prior, another well-known “patent war” concerning the establishment of modern aviation took place between the Wright Brothers and Glenn Curtiss. In this case, the Wrights viewed Glenn Curtiss as having stolen critical aspects of their claimed aircraft design enabling controlled flight. The Wrights pursued extensive litigation against Curtiss and others accordingly. Although widely separated by time and circumstance, these cases support similar negatively held notions of the patent system; namely, that it diverts valuable resources away from innovation and towards legal and business maneuvering. Anti-patent commentators refer to patent wars as evidence of burdensome transactional costs to society. On the other hand, proponents point out that such examples are an exception and that the patent system has facilitated benefits that far outweigh such costs. Reality appears to rest somewhere between these opposing views.

Although the U.S. Patent System has been essential to spurring innovation it has wavered in its efficiency and effectiveness at doing so. This paper first makes historical comparison and analysis of the *Apple* and *Wright* landmark patent war cases to illustrate that, irrespective of timing, benefits of a patent system fundamentally hinge on how well it defines and maintains “patent quality.” Much of the challenge in maintaining such quality relates to the subjective and often uncertain nature of invention criteria such as “non-obviousness.” As shown by recent trends, decreased patent quality leads to greater uncertainty about patent validity, which in turn invites more litigation.

This work then proposes that to improve constancy on patent quality the U.S. patent office should consider returning to original strategies envisioned by the Founders of the United States. This approach is outlined in Congressional House Resolution (H.R.) 10 passed in 1789. H.R. 10 describes a patent-registration system that emphasizes the utility of invention and reliance on public review to govern much of the patent granting pro-

cess. After more than forty years, the U.S. patent office turned to an examination-based system, not because of flawed virtues with registration, but lack of supporting technical and logistical capabilities required for its proper execution. Modern technology can now be applied to achieve the original vision sketched out in H.R.10 to restore patent quality control systems. A “high-tech” patent registration system can obtain the self-governing aspects intended by the Founders by integrating a utility parameter and information technology into the application process.

Further discussion is provided to illustrate how a restorative U.S. patent registration system can utilize existing infrastructure in an undisruptive yet dramatically improved manner; helping avert future patent wars and other costly litigation. Finally, this paper revisits the *Apple* and *Wright* cases from a theoretical standpoint that considers proposed reforms.

Acronyms and Abbreviations

3G	3rd Generation of mobile phone standards
AIA	America Invents Act of 2012
API	Application Program Interface
Art.	Article
CEO	Chief Executive Officer
CHFP	Certified Human Factors Engineering Professional
EP	European Patent
EPO	European Patent Office
Fed. Cir.	Federal Circuit
GAO	Government Accounting Office
GPU	Graphical User Interface
H.R.	House Resolution
IP	Intellectual Property
ITC	International Trade Commission
JMOL	Judgment as a Matter of Law
LTD	Limited
MP3	MPEG-2 Audio Layer III
R&D	Research and Development
S. Ct.	Supreme Court
TUX	Total User Experience
USC	United States Code
USPTO	United States Patent and Trademark Office

