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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
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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