

# D YOUNG & CO

## PATENT

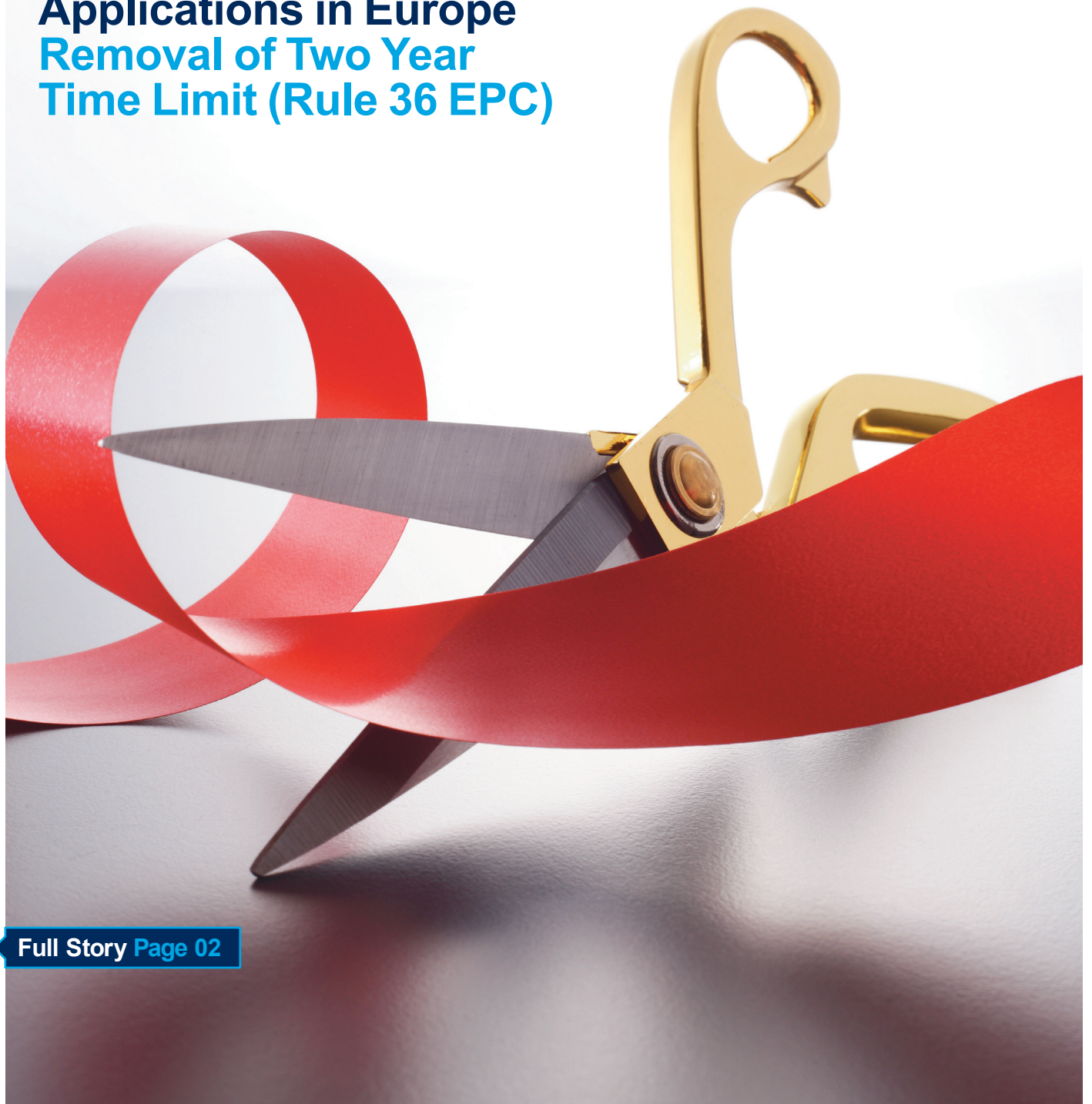
## NEWSLETTER *no.38*

December 2013

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## Filing Divisional Applications in Europe Removal of Two Year Time Limit (Rule 36 EPC)



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With 2013 approaching an end and 2014 in sharp focus, it is a time to reflect and to look forward.

This time last year our plans to launch our first overseas office were coming to fruition. Twelve months later, we are proud to now be sponsoring INTA's first conference in the UAE and to be influencing change at the heart of the evolving IP landscape in the Middle East.

During 2013, we have also grown our Dispute Resolution and Legal Group with the addition of patent litigator Richard Willoughby, who has been warmly welcomed as the firm's 'eyes and ears' with regard to the Unitary Patent (UP) and Unified Patent Court (UPC). Richard and our UP specialist team will be keeping newsletter readers updated as the UP and UPC unfold. We will continue to publish updates in this newsletter and readers can also visit [www.dyoung.com/unitary-patent](http://www.dyoung.com/unitary-patent) for our latest information and commentary on the UP and UPC.

We look forward to 2014's challenges and opportunities for client focussed change.

All of us at D Young & Co, from London, Southampton and Dubai, wish you Season's Greetings and a happy New Year.

Editor:  
Aylsa Williams



## Events



### 09-10 December 2013 - Conference INTA Dubai - Hot Trademark Topics in the MEASA Region

D Young & Co is sponsoring INTA's first conference in the United Arab Emirates (UAE). Mark Bone-Knell will present *Brand Protection and Enforcement for Major Sporting Events in the Middle East* during the *Hot Topics II* session at 4pm, Tuesday 10 December. Dubai office team members Anthony Carlick (patents) and Kate Symons (trade marks) will also be attending. Our Dubai office team would be delighted to meet with readers of this newsletter during the conference. See page 08 of this newsletter for more information.

[dyoung.com/events](http://dyoung.com/events)

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## Article 01

# Filing Divisional Applications in Europe Removal of Two Year Time Limit (Rule 36 EPC)

None will need reminding that Rule 36 EPC was amended back in 2009 to limit the time within which a divisional application could be filed at the European Patent Office (EPO). The EPO has, however, now decided to amend Rule 36 EPC and remove the controversial two year time limit.

Rule 36(1) EPC currently states:

- (1) *The applicant may file a divisional application relating to any pending earlier European patent application, provided that:*
  - (a) *the divisional application is filed before the expiry of a time limit of **twenty-four months** from the Examining Division's first communication under Article 94, paragraph 3, and Rule 71, paragraph 1 and 2, or Rule 71, paragraph 3, in respect of the earliest application for which a communication has been issued, or*
  - (b) *the divisional application is filed before the expiry of a time limit of **twenty-four months** from any communication in which the Examining Division has objected that the earlier application does not meet the requirements of Article 82, provided it was raising that specific objection for the first time.*

The two year time limit was originally introduced to limit the use of divisional applications as a tool for prolonging the pendency of subject-matter before the EPO. In particular, they wanted to reduce the practice of 'precautionary' divisionals - divisional applications filed the day before oral proceedings in case the parent application was refused.

However, contrary to this intention the two year time limit actually resulted in an increase

in the number of divisionals filed. This increase is mainly due to applicants being forced to make a decision on whether to file a divisional when they did not know how the prosecution of the parent would proceed.

Additionally, the Enlarged Board of Appeal's decision of G 1/09 (27 September 2010) means that applicants no longer need to file precautionary divisionals, since an application is 'pending' within the meaning of Rule 36 EPC until the end of the two month time limit for filing an appeal from a refusal decision by the examining division. Consequently, applicants can file divisional applications after refusal of the parent without the need to resort to precautionary filings before oral proceedings.

As well as failing to meet the aims of its introduction, Rule 36(1) EPC time limits have been difficult to monitor. The time limits do not apply to individual applications but to whole sequences of applications, so often to ascertain a divisional deadline for one application it is necessary to look at the examination of all the other applications of the same sequence. Furthermore, once a triggered time limit has expired, further periods for division may occur later under Rule 36(1)(b) EPC. An application must therefore be monitored throughout its prosecution for possible 'new' unity objections. This means that a more complex and resource intensive monitoring system is required, it is not possible to simply rely on a docketing department.

Following consultations and discussions on how Rule 36 EPC ought to be amended, the Administrative Council of the EPO has now agreed to amend Rule 36 EPC to remove the controversial two year time limit (by the Administrative Council decision CA/89/13 of 27 September 2013).

Amended Rule 36(1) EPC will read:

- (1) *The applicant may file a divisional application relating to any pending earlier European patent application.*

➤ **Further information online**  
*Decision of the Administrative Council of 16 October 2013 amending Rules 36, 38 and 135 of the Implementing Regulations to the European Patent Convention (CA/D 15/13):*  
<http://dycip.com/eporule36>

**Rule 36 EPC will be amended and the controversial two year time limit will be removed**



Rules 36(2)-(4) are unchanged.

Rule 135(2) EPC has also been amended to delete the reference to Rule 36(1) EPC being among the time limits for which further processing is ruled out.

Finally, in order to reduce the number of divisionals filed, the Administrative Council has agreed to amend Rule 38 EPC to establish an additional fee as part of the filing fee when a second or subsequent divisional application is filed. This additional fee will **not** be incurred by first generation divisional applications, only divisional applications prolonging an existing sequence.

New Rule 38(4) EPC will read:

**(4) The Rules relating to Fees may provide for an additional fee as part of the filing fee in the case of a divisional application filed in respect of any earlier application which is itself a divisional application.**

The fee will increase progressively as the sequence grows - this is intended to discourage the filing of long sequences of divisional applications - and the amount of this additional fee will be decided in 2014. The rules relating to fees will also have to be amended but this did not form part of CA/89/13.

**These rule changes will come into force on 01 April 2014 and will apply to divisionals filed on or after that date.**

Applicants who are considering filing divisional applications may wish to consider extending prosecution to ensure that their cases are pending on 01 April 2014. This should guarantee that a divisional can be filed. To discuss how this can be achieved and/or if you have any questions on these changes, please contact your usual D Young & Co LLP representative.

**Author:**  
**Rachel Bateman**



## Article 02

# Rising Star D Young & Co Top Tier Ranking for “Professional and Personal” Client Service

**W**e would like to thank our clients for their support and feedback to researchers in the latest round of IP directory surveys. We are delighted to report that D Young & Co LLP has been awarded top tier rankings in the IAM Patent 1000 and in Chambers UK.

Chambers writes that D Young & Co is: *“a leading name in the filing of both patents and trade marks. Its substantial roster of attorneys enables it to cover nearly every specialism and need, including litigation”*. They highlight a key strength being our responsiveness, with a client commenting that *“nothing seems to be too much of a problem. I don’t know how they do it but whenever there is an urgent issue they drop everything and make sure we get what we need.”*

D Young & Co is ranked in the IAM Patent 1000’s listing of European Patent Office (EPO) firms: *“an elite set of high-volume, high-calibre groups”*. IAM Patent 1000 also ranks D Young & Co as a ‘gold’ UK IP law firm, commenting that: *“Clients and peers alike heap bountiful praise upon “rising star” D Young & Co...It competes at the highest level on a worldwide basis...D Young & Co’s critical evaluation of patentability is faultless and its advice on patent strategy and prosecution shows a profound level of understanding of the technology involved...It has the perfect balance between an understanding of the law, complex scientific issues and the budget constraints of a business”*.

### Useful links

IAM Patent EPO firms table:

<http://dycip.com/IAMeporankings>

IAM Patent Magazine – Patent 1000:

<http://dycip.com/IAMpatent2013>

Chambers and Partners UK:

<http://dycip.com/chambersuk>

# Surfing the Internet

## Don't Let Leaked Information Wipe Out Your Patents

Practical steps can be taken by developers to prevent public disclosures wiping out your future European patent applications



**B**efore the advent of the Internet, publication of information to a global audience used to require significant planning and financing. This meant that it was difficult for an individual to publish information that was subsequently seen globally. However, the Internet has changed that. It is now possible to publish information to a global audience instantly and with very little effort.

It is an unfortunate effect of this ease with which information can be disseminated globally that information can also be leaked easily. The leaked information may relate to an exciting new product or unique feature of a product and may be provided by a single developer working for a manufacturer.

**Leaked information may only have been initially published on a single website, but within a couple of hours, this information will be disseminated over hundreds of websites across the world.**

These leaks are not only potentially damaging from a commercial perspective, by giving away information about future products, but also potentially damaging from a patent perspective, as these leaks may constitute

a public disclosure and thus prejudice any future European patent applications directed to the new product or unique feature within a product. In other words, the leak may make any subsequent patent application directed to that exciting unique feature worthless. This is particularly damaging if the exciting new feature would make consumers choose a product from one manufacturer over another manufacturer as the monopoly right provided by the patent is destroyed, leaving competitors to incorporate this exciting new feature in their products.

In this article, we investigate how to deal with these leaks from a patent perspective.

### Internet disclosures

As most of these disclosures occur on the Internet, we should first examine how the European Patent Office (EPO) deals with Internet disclosures.

The Internet is, by its very nature, a large and constantly evolving entity. It is very difficult to determine with any degree of certainty what information was disclosed and when that information was disclosed. These questions can be answered to some extent using Internet archiving tools such as *The Wayback Machine* which automatically trawls the Internet and takes snapshots of webpages at different times.

But notwithstanding what can be shown to have been disclosed on the Internet, the question to be answered is, "was this

*disclosure made available to the public?"*. The leading case at the EPO is T1553/06. Although the specific case is beyond the scope of this article, this case has a test that determines whether a specific Internet disclosure was made available to the public. An Internet disclosure is made available to the public:

*"If, before the filing or priority date of the patent or patent application, a document stored on the World Wide Web and accessible via a specific URL*

*(1) could be found with the help of a public web search engine by using one or more keywords all related to the essence of the content of that document and (2) remained accessible at that URL for a period of time long enough for a member of the public, i.e. someone under no obligation to keep the content of the document secret, to have direct and unambiguous access to the document, then the document was made available to the public in the sense of Article 54(2) EPC 1973.*

*If any of conditions (1) and (2) is not met, the above test does not permit to conclude whether or not the document in question was made available to the public."*

In many instances of leaks, the leaked

➤ **Further information online**  
The WayBack Machine:  
<http://archive.org/web>

Google alerts:  
<http://www.google.com/alerts>

EPO decision T1553/06, 12 March 2012:  
<http://dycip.com/t155306dec>

EPO decision T0436/92, 20 March 1995:  
<http://dycip.com/t920436>

## Article 04

# Inventive Step Evidence The Correct Approach

information is published on specific technology websites. Many of these websites rely on having a high position on search results. Therefore, these websites typically use very pertinent keywords and maintain their articles for many years. In many instances, therefore,

it may be argued that the leaked disclosure on these technology websites is made available to the public and is therefore prejudicial to a later filed patent application.

### Breach of confidence

Unfortunately, the European Patent Convention (EPC) does not provide a grace period for filing applications after disclosures. However, Article 55 of the EPC does allow that where there has been a disclosure due to an “*evident abuse*” in relation to the applicant, then such disclosure will not be seen as prejudicial to the patent application as long as the European patent application is filed within six months of such disclosure. In other words, for a leaked disclosure not to be prejudicial to a European patent application, two criteria need to be met.

1. The European application must be filed within 6 months of such a disclosure. It is very important to note that the priority date is **not** taken into account when calculating this date. Therefore, the European application must be filed within six months of the disclosure irrespective of any priority date.
2. There needs to be an “*evident abuse*” in relation to the applicant. Case law has developed in this area which suggests that the “*abuse*” requires actual intent to harm or actual knowledge that harm would or could be expected from a planned breach of confidence (see, for example, case T436/92). In other words, if the developer leaking the information to a website could expect harm from leaking the information, then it may be argued that this is an “*evident abuse*” in accordance with Article 55 EPC and then such disclosure would not prejudice the patent application.

### Practical steps

Ideally, no developer will leak information about upcoming products. However, such is the desire for upcoming products, leaks are difficult to stop. In the event of a leak, it is important to identify when a leak has occurred and to mitigate the damage from such a leak.

In order to identify when leaks do occur, it is possible to set up a Google alert. These provide email alerts when relevant content appears on the Internet.

It may be possible to identify leaked information from these alerts. Once a leak has occurred, steps can be taken to mitigate the damage from the leaks.

In order to mitigate the damage from such leaks, if Europe is an important market, it is vital to file the European patent application within six months of the leaked disclosure.

In order to argue that such disclosure was an “*evident abuse*” it is also important to show that any person who leaked the information had actual knowledge that harm could or would be expected as a result of the leak. As it is almost impossible to identify the source of a leak, it is desirable to show that **all** developers are regularly told about the damage that can be caused by leaks. Therefore, it is important to keep a record of not only what was leaked, but also to record what education developers have received showing that harm could or would be expected as a result of a leak.

It may be difficult to stop leaks, but when they do occur, it is important that your patent application is not washed away in any resulting flood.

Author:  
**Jonathan Jackson**



**M**r Justice Arnold, now the senior judge in the English Patent Court, recently re-emphasised the importance of correctly instructing experts on inventive step in the UK. In *HTC v Nokia* (see page 06 of this newsletter), Arnold J was somewhat critical of the manner in which HTC had instructed its expert when considering inventive step, indicating that this had been calculated to induce hindsight.

It seems that HTC’s expert was initially provided with both the patent in suit and some of the prior art. He then produced a critique of the patent, accentuating the negative over the positive. He subsequently considered the prior art but was also instructed to limit his consideration to parts of it, only reviewing the whole of one item of prior art shortly before trial.

The danger with this approach is that the expert necessarily will read the prior art in the light of the patent in suit. This risks the expert’s on inventive step being damaged by hindsight because his review of the prior art will be influenced by reading the patent.

The better approach is to ask the expert, as their first step, to consider the prior art and to give an opinion as to what, in the light of the prior art and the common general knowledge, what may be obvious from that. Only then should the expert be given the patent to look at.

In the past, Arnold J has commended parties for getting the approach right and his latest comment should serve as a reminder as to how to approach inventive step before the English courts. Those who get this wrong risk serious damage to what might otherwise be a good inventive step challenge.

Author:  
**Richard Willoughby**



# HTC v Nokia

## Licence Defences to Patent Infringement May be Narrow

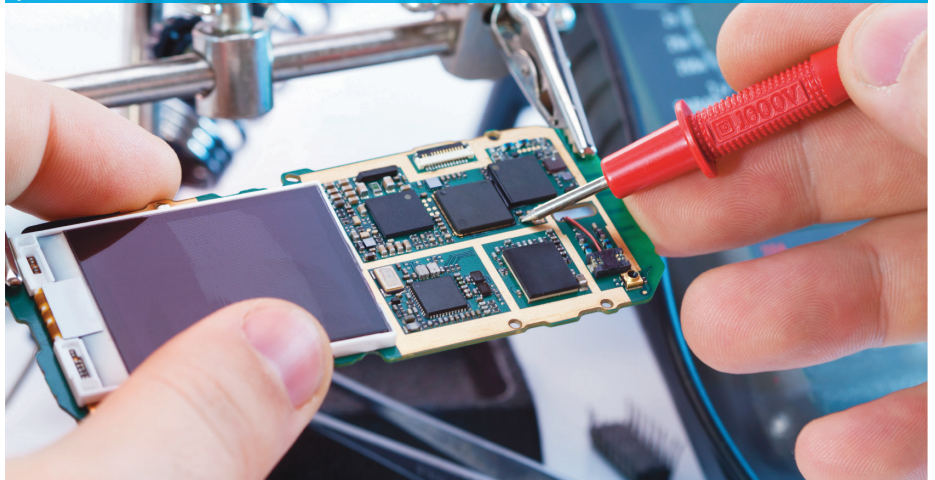
**O**n 30 October 2013, Arnold J gave judgment in *HTC Corporation v Nokia Corporation*, a case concerning a non-standards essential patent relating to mobile phones. In this case, Nokia alleged that several HTC phones infringed the patent through their inclusion of chips supplied to HTC, in Taiwan, from Broadcom and Qualcomm. HTC contended the patent was invalid.

In the event, the judge held the patent both valid and infringed but perhaps the most important aspect of the case concerned a licence and/or exhaustion of rights defence to infringement raised by HTC. In particular, HTC relied upon the existence of an agreement between Nokia and Qualcomm which contained a covenant from Nokia not to sue Qualcomm for infringement of various patents. The details of this agreement are confidential and not available to the public but it apparently contained a number of limitations which appear to have been relevant to the facts of the case and which meant there could be no express consent from Nokia to HTC's acts. HTC therefore relied on two legal principles to try to imply consent from Nokia: English law relating to implied licence; and the US law relating to the first sale doctrine.

The English legal position hinged on two cases from the nineteenth century. In *Betts v Willmott*, it was held that where a patentee sells a product abroad, an English patent cannot be used to prevent subsequent importation and sale in the UK. This is not because of international exhaustion of rights but through the granting of an implied licence to the purchaser in the foreign sale to do with the patented product as he pleased. Being a licence however, it can be limited by express terms provided these are made known to the purchaser but absent that it is unrestricted.

The situation with express licensees is different, however. In *Société Anonyme des Manufactures de Glaces v Tilghman's Patent Sand Blast Company*, the Court of Appeal then considered the situation where a patentee had licensed a foreign manufacturer but limited those rights to the

Nokia alleged that several HTC phones infringed their patent. HTC contended the patent was invalid



overseas market. In those circumstances, any licence to a subsequent purchaser must necessarily be similarly limited because the first licensee could not pass on greater rights than had been granted under the express licence. It was therefore held that the patentee could use the English patent to prevent products manufactured by the overseas licensee from being imported into the UK.

HTC tried to discredit the conclusion in *Tilghman's* patent by suggesting that it was illogical for the situation to be different between implied and express licensees. Although Mr Justice Arnold acknowledged this argument was not without merit, he found he was bound by the Court of Appeal decision in *Tilghman's* Patent. Applying English law, HTC could not have acquired greater rights than had been granted to Qualcomm under the agreement, and these rights did not include what HTC was doing in the UK.

The US first sale doctrine was relevant because the licence agreement was governed by Delaware law. The first sale doctrine is part of US federal patent law, not state law, so the judge had to consider whether US federal patent law would be regarded as part of Delaware contract law for the purposes of interpreting the agreement in litigation before a non-US court concerning a non-US patent. Mr Justice Arnold held that it would not be.

Nevertheless, the judge considered the applicability of the first sale doctrine just in case he was wrong. Having heard expert evidence on the main US authorities, he held that the first sale doctrine is limited to sales made in the US, and accordingly HTC's licence defence failed.

This case may have relevance to parties who negotiate or rely upon patent licence agreements for components such as the one between Nokia and Qualcomm. For example, it seems that the judge would have been prepared to apply the first sale doctrine of US federal patent law had this been explicitly recited in the licence agreement. In addition, although many licence agreements are worldwide in scope, the same is clearly not true in general for the exhaustion of rights and analogous legal doctrines.

And finally, we understand that shortly before going to press there will be a hearing to determine whether Nokia should be granted an injunction against HTC (which would cover significant HTC products) pending an appeal. This is an interesting point given some of the debates surrounding remedies in the Unified Patent Court and we will post an update on the result of that hearing on our website as soon as we are able.

Authors:

Simon Davies & Richard Willoughby



# Rule 164

## EPO Goes Back to the Future on Searching

➤ **Further information online**  
*Decision of the Administrative Council of 16 October 2013 amending Rule 135 and 164 of the Implementing Regulations to the European Patent Convention (CA/D 17/13):*  
<http://dycip.com/eporule164>

**T**he European Patent Office (EPO) has recently announced that it is revising its rules on the searching of Euro-PCT applications which lack unity, essentially returning to their previous practice of allowing the applicant to pay additional search fees.

**This is welcome news for applicants as it dispenses with the harshness of the previous rules and may avoid the need to file unnecessary divisional applications.**

### Background

Under Article 82 EPC, a European patent application shall relate to one invention only or to a group of inventions so linked as to form a single general inventive concept. The requirement for unity of invention is initially assessed at the search stage and can also be objected to during examination.

For directly-filed European patent applications, if the examiner considers unity is lacking during the European search, a partial search report is issued on the first invention. The applicant is set a period of two months in which to pay additional search fees to obtain a search on the remaining inventions. Any unsearched subject-matter lacking unity may not be pursued in that application: it may only be pursued in a divisional.

### Old Rule 164

Until 2010, the EPO adopted a similar approach for Euro-PCT applications, both where it acted as the International Searching Authority (ISA) and where it did not act as the ISA during the international phase. In both cases, if the EPO considered unity was lacking for the claims present on regional phase entry, the applicant had the opportunity to pay additional search fees so the remaining inventions could be searched in the regional phase, even if no additional search fees were paid during the international phase. However, Rule 164, which came into force in 2010, closed this opportunity to applicants who used the PCT route for European patent applications. For Euro-PCT applications

where the EPO acted as the ISA, the applicant was bound by its decision regarding search fees paid in the international phase. Where the EPO did not act as the ISA, it simply searched the invention first mentioned in the claims. In both cases no additional search fees could be paid during the regional phase: the applicant had little choice but to limit the claims to the searched invention(s).

The strictness of this rule was seen as highly unfair to many applicants, particularly those based outside Europe. For example, many US applicants nominate the EPO as the ISA, in order to obtain the EPO's initial view on patentability during the international phase. However, many US applicants were unaware of the strictness of old Rule 164, and consequently did not pay the additional search fees, so only the first invention was searched in the PCT phase. If, by the EPO regional phase, the applicant is only interested in one of the unsearched inventions (perhaps because the first, searched invention has been found to lack novelty), old Rule 164 effectively required them to file a divisional in order to do so. As there is no provision in the EPC for filing a divisional directly from a PCT application, the applicant was faced with entering the EPO regional phase, paying all fees in respect of an invention no longer of interest, simply to enable the filing of a divisional directed to any unsearched inventions. As the filing, additional page and designation fees are not refundable, this considerably added to the cost of patenting in Europe, particularly for long specifications.

Old Rule 164 was even harsher to Euro-PCT applicants where an ISA other than the EPO searched the application during the international phase. The closing of the opportunity to pay additional search fees at the supplementary search stage was seen as particularly unfair to applicants in cases where no non-unity objection was raised in the PCT phase, and some applicants even considered it as a discrimination against those using the PCT procedure compared with direct filing of European applications.

### New Rule 164

The EPO has responded to applicants' concerns by essentially returning to the old

procedure and bringing the search procedure for Euro-PCT applications more closely into line with those for direct filed European applications. Where the EPO did not act as the ISA, new Rule 164(1) states the EPO will give the applicant a two month period to pay additional search fees if a lack of unity is raised at the supplementary search phase.

The new procedure will differ slightly where the EPO acted as ISA. New Rule 164(2) indicates the EPO will give the applicant a two month period to pay additional search fees if unity is considered lacking for the claims present on regional phase entry. However, where additional searches are carried out, the EPO will not prepare a full stand-alone search report: instead they will issue the additional search results together with a first examination report, or a Rule 71(3) communication (notice of allowance) and, where appropriate, invite the applicant to restrict the invention to the searched subject-matter.

In both cases, as now any unsearched subject-matter lacking unity may not be pursued in that application. However, new Rule 164(5) states that, in either of the above cases, the additional search fees paid will be refunded on request, and only if during the examination procedure, the examiner considers the request for additional fees was not justified. This new rule also brings the provisions for Euro-PCT applications into line with those for direct European applications.

**The new Rule 164 will come into force on 01 November 2014 and will apply to any applications for which the first examination report (where the EPO was the ISA) or the supplementary search report (where the EPO was not the ISA) has not yet been drawn up on that date.**

Please contact us for more details.

**Author:**  
**Garreth Duncan**



# D YOUNG & CO INTELLECTUAL PROPERTY

And finally...

## IP in the MEASA Region D Young & Co Sponsors INTA Dubai

In the June edition of this patent newsletter, editor Anthony Albutt announced the launch of our first overseas office, in Dubai. We are delighted to be working with clients in one of the most exciting world markets, where IP is becoming increasingly important for both local businesses and also our international clients operating in the Gulf region.

D Young & Co International (Dubai) is working with the International Trademark Association (INTA) to promote IP in the Middle East and we are therefore delighted to be sponsoring INTA's first conference in the United Arab Emirates (UAE) this December.

The conference, entitled *Hot Trademark Topics in the MEASA Region*, takes place 09-10 December 2013 at the Jumeirah Emirates Towers, Dubai, UAE.

D Young & Co's Mark Bone-Knell will present *Brand Protection and Enforcement for Major Sporting Events in the Middle East* during the *Hot Topics II* session at 4pm, Tuesday 10 December.



### Meet us at INTA Dubai

Also attending the conference will be fellow Dubai team members Anthony Carlick (patents) and Kate Symons (trade marks). If you are attending the conference and would like to meet with our Dubai team please email [dubai@dyoung.com](mailto:dubai@dyoung.com) or contact your usual D Young & Co representative.

### More about our Dubai office

For further information about our Dubai office team and IP services, please visit our website: [www.dyoung.com/dubai](http://www.dyoung.com/dubai)

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## Our email addresses have updated to .com

Our main incoming email address is now [mail@dyoung.com](mailto:mail@dyoung.com). Please update your records to guarantee receipt of our email communications.