

# D YOUNG & CO PATENT NEWSLETTER *no.41*

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## All Quiet on the West Coast Front A Cease Fire for Apple v Google?



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As we start to enjoy the first warmth of summer some of the heat seems to have ebbed from the “*smartphone wars*”, which are in the news once again. Whilst Apple and Google have agreed to cool things off (for now), the European Commission has also issued two significant decisions regarding standard essential patents and how they should be licensed. We welcome the increased clarity that these decisions should bring to the commercial realities of patent licensing in Europe.

We also have some great educational events coming up too (details below and on our website). If you can't make it to either of these, do sign up for our next biotech case law webinar – you could even win an iPad mini!

Wishing all our readers a very enjoyable and successful summer.

**Editor:**  
**Nicholas Malden**



## Events



### 25 June 2014 - Workshop & Convention BIO 2014, San Diego US

Aylsa Williams will be participating in a mock EPO opposition workshop during the Biotechnology Industry Organization (BIO) International Convention, which takes place on 23-26 June in San Diego. See page 08 of this newsletter for more information.

### 02 July 2014 - Seminar

**Are You Protecting Your Designs? IP law to protect and enforce your designs, London UK**  
D Young & Co, joined by guest speakers from Joseph Joseph, Brompton Bicycle and Jo Love, give an essential guide to design protection in a morning seminar on 02 July 2014, followed by a networking lunch.

### 16 July 2014 - Webinar

**European Biotech Patent Case Law Update**  
Join us for our three year anniversary webinar update of recent biotech European decisions. For a chance to win an iPad mini, register and attend one of the three webinars on the 16 July 2014 to be entered into our prize draw.

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## Article 01

# All Quiet on the West Coast Front A Cease Fire for Apple v Google?

**O**n Friday 16 May 2014 it was announced that Apple and Google have reached a decision to drop the ongoing lawsuits between them and will work together to reform patent law. A joint announcement stated that:

*“Apple and Google have agreed to dismiss all the current lawsuits that exist directly between the two companies. Apple and Google have also agreed to work together in some areas of patent reform. The agreement does not include a cross license”.*

The suits at issue are those 20 or so suits across Europe and the US that Google inherited when it purchased Motorola Mobility in 2012 for more than \$12 billion. Although on the face of it, this announcement may seem as seismic, in reality, it is probably more symbolic – Motorola, the once great mobile manufacturer, is no longer much competition to Apple.

The relationship between Apple and Google is complex. Obviously, Apple and Google make the two most prominent operating systems in the mobile sector: iOS and Android.

**At present, Apple is embroiled in a bitter patent war with Samsung, the biggest maker of phones having the Android platform, and this dispute between Apple and Samsung is far from settled.**

Google has been helping Samsung in this war, and will continue to do so, notwithstanding this agreement.

In fact, during a recent trial between Apple

and Samsung, Samsung argued that Apple's real target in the litigation was Android and tried to argue that it did not need to copy Apple's technology for the software as many of the disputed features were present in the Android software. Indeed, it is rumoured that Samsung and Google had an agreement that Google would pay some of the defence costs and take some liability for patents related to Android. So, although there is a cease fire between the two companies directly, hostilities may not cease completely.

Where companies do agree though is that curbs need to be placed on patent licensing firms. Apple had the dubious honour last year of being the most sued company when it came to US patent lawsuits and Google was 4th. However, even though both companies wish for the same ends, both companies behave very differently in this regard.

Google is funding lobbyists to get the US Congress to put more stringent requirements on firms filing lawsuits, to cause the loser to pay the winner's legal fees and to expand post grant review procedures at the United States Patent and Trademark Office (USPTO).

On the other hand, Apple is part of a group that have warned Congress not to limit patent rights too much.

With the complex relationship between these two tech giants being so complex, it will be interesting to see what impact, if any, this agreement will truly have.

**Author:**  
**Jonathan Jackson**



### Useful links

Apple v Samsung - The Impact of the Central Limitation of European Patents on Existing Litigation (April 2014):

[www.dyoung.com/article-applevsamsung](http://www.dyoung.com/article-applevsamsung)

Apple v Samsung – More Skirmishes in the Patent War (April 2014):

[www.dyoung.com/ipcases-samsungvapple0413](http://www.dyoung.com/ipcases-samsungvapple0413)

# Come on in, the Water's Fine! Make a Splash in the Deepening Pool of Chinese Prior Art

A recent decision handed down from the UK Court of Appeal illustrates the potential treasure trove of prior art available for parties challenging the validity of patents. Conversely, it also presents a potential headache for patent applicants and proprietors defending any such validity attack.

## TFK v Phil and Ted

The case in question involved German company Trends for Kids GmbH (TFK) who alleged patent infringement by the memorably named Phil and Ted's Most Excellent Buggy Company Ltd (Phil and Ted) - see 'useful links' below right for link to full decision. Phil and Ted's response was to challenge the validity of the TFK patent. At first instance Phil and Ted were successful and this was subsequently confirmed on appeal.

The details of the case relate to, as the name suggests, a child's buggy. The invention concerned a buggy configuration which converted between a seat and a flat bed to allow the child to sleep. It also included the feature of a reversible adapter to allow the child to face forwards or to face backwards.

In short, the courts decided that the patent was obvious over the prior art. The specifics of the decision are not what makes this case interesting but rather the prior art which was successfully cited by Phil and Ted against the patent.

The success of the obviousness attack was attributed to a Chinese utility model. This decision highlights the fact that prior art documents can be found in less usual places than the English language documents commonly sought after.

## Utility models and industrial designs

The sheer volume of prior art being created in the form of utility models is in itself quite incredible. The volume of utility models is such that Asia is creating a deepening pool of opportunities for parties contesting the validity of patents. Of course, utility models are limited to less complex inventions but nevertheless there are many patents granted

Challenges to patent validity can be strengthened by the pool of utility model prior art



in Europe and elsewhere that could be vulnerable to obviousness attacks based on documents selected from this ever growing pool of prior art, not least from China.

The World Intellectual Property Organization (WIPO) statistics database for 2012 illustrates just how much prior art is being created.

The WIPO database shows that as far back as 2010 a total of nearly 440,000 utility models were filed in Asia in a single year (an overall increase of 27% for the region compared with 2009-10).

China alone accounted for 82.6% of all utility models counted in the WIPO statistics. Combine this with industrial designs in excess of 510,000 and this represents approaching a million new documents in a single year from Asia alone.

## Comment

Is this anything to be concerned about? Well, it goes without saying that if you are intending to challenge the validity of a patent, be it at opposition or in the courts, then subject to the cost of searching and to the technology involved, it may well be worth dipping a toe into the deep pool of prior art that is being created in the form of Chinese utility models.

## Author:

Anthony Albutt



## Useful links

WIPO Statistics:

<http://dycip.com/wipostats>

Phil & Ted's Most Excellent Buggy Company Ltd v TFK Trends for Kids GmbH & Ors [2014] EWCA Civ 469 (16 April 2014), full decision online at:

<http://dycip.com/philandted>

# Standard Essential Patents, FRAND Commitments and Anti-Competition Rules

## Lessons From the Front Line in the Smartphones War

In the latest development in the smartphones war, the European Commission has now issued two decisions in respect of standard essential patents (SEPs), fair, reasonable and non-discriminatory (FRAND) commitments and anti-competition rules. The commission started two investigations in 2012 after Motorola and Samsung both tried separately to enforce SEPs against Apple in Europe. The decisions for these two investigations have now been published and provide a welcome clarification as to what could amount to an abuse of a dominant position when dealing with SEPs.

### Standard Essential Patents

Patents are generally considered to provide an acceptable balance between allowing up to a 20 year monopoly as an incentive for investments into innovation and, on the other hand, publishing a complete disclosure of the invention as a further spur to innovation and a protection of the public interest. Patents are therefore not considered as being anti-competitive *per se* and the anti-competition bodies have always been reluctant to get involved in licensing negotiations, which are generally considered as being a private contractual matter.

Standard setting organisations, such as the European Telecommunications Standards Institute (ETSI), identify particular patents as being SEPs. In other words, the inventions protected by such patents are necessarily implemented when the corresponding standard is implemented. In general, holders of SEPs agree to license their SEPs on FRAND grounds. This is designed to ensure a balance between making technology standards accessible to manufacturers who wish to produce products which conform to a given standard (thus promoting standardisation and its associated benefits to the industry and, ultimately, to consumers) and ensuring fair remuneration to the SEP holders who have invested in and developed the technology to make the standard possible. However, the FRAND terms are not determined in advance and have to be determined between the SEP holder and the potential licensee.

SEPs are licensed on FRAND grounds to reward innovation but enable standardisation



Problems can therefore arise between SEP holders and potential licensees in determining what exactly constitute FRAND terms. In the Motorola and Samsung cases, such a disagreement led to both Motorola and Samsung (as SEP holders) seeking an injunction on Apple products using the standards in question (the 2G GSM standard in the case of Motorola and the 3G UMTS standard in the case of Samsung). The question considered by the commission was whether or not Motorola and Samsung were abusing their dominant positions as holders of SEPs by threatening such an injunction.

### Motorola v Apple

In the Motorola decision, it was decided that Motorola had abused its dominant position in seeking and enforcing an injunction against Apple. Motorola had previously agreed to license the SEP in question to third parties on FRAND terms. Furthermore, Apple had agreed to have, in the case of a dispute, the German courts determine the FRAND terms between the two parties with a view to showing its willingness to take a FRAND licence. However, upon disagreement on what the FRAND terms should be, Motorola used instead the threat of an injunction against Apple in Germany with a view to forcing Apple into

a settlement under Motorola's terms. The settlement included, amongst others, the restriction that Apple could not contest Motorola's patents in German courts.

This was decided to be anti-competitive on the part of Motorola. The main reasoning for this was that the actions of Motorola could potentially lead to SEP holders asserting their dominant position by extracting high royalty rates from (or imposing other restrictive conditions on) licensees using their SEPs despite the licensees being 'willing' to take a FRAND licence. Such actions would ultimately have a negative impact on consumer choice, prices and innovation.

This decision also clarifies that licensees of SEPs can ensure 'safe harbour' against injunctions by SEP holders who offer their SEPs on FRAND terms by agreeing to have FRAND terms determined by a court or arbitration in the case of a dispute.



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It is worth pointing out that the decisions did recognise injunctions on the basis of SEPs to be a suitable remedy on unwilling licensees, thus giving SEP holders effective means to enforce their IP rights against licensees who are truly unwilling to license SEPs on FRAND terms. Whether or not a licensee is willing or unwilling will continue to be determined on a case by case basis when the 'safe harbour' provision is not invoked (meaning that a licensee is not necessarily unwilling just because they have not agreed for FRAND terms to be determined by a court, for example).

It was also decided that Motorola could not impose the 'non-contest' restrictions on Apple, the reasoning for this being that licensees (and, ultimately, consumers) should not have to pay fees for the use of SEPs which are not actually valid or infringed. Furthermore, the Motorola decision makes clear that licensees are not 'unwilling' simply if they wish to contest the SEPs they are licensing. Previously, following the 2009 'Orange Book' ruling of the German Federal Court of Justice, it was established that a licensee can raise a competition law defence against an application for injunctive relief if:

1. the licensee has made an unconditional offer to license under terms that cannot be rejected by the patent holder without abusing its dominant position; and
2. the licensee actually acted as if it had entered into a valid patent license.

In the context of SEP licensing, this latest development in the Motorola case thus means that point number (2) should not be interpreted as saying that a willing licensee is not entitled to contest the validity or infringement of an SEP. Such an interpretation would be anti-competitive.

This seems to reflect the commission's desire to continually improve the efficiency of European markets by ensuring that manufacturers and consumers are not paying a premium for SEPs that are

not valid, infringed or essential.

It is also noteworthy that the commission decided that, despite Motorola being found to have abused its dominant position and despite European law giving the commission the means to impose a potentially significant fine on Motorola, Motorola would not be fined for its actions against Apple. The commission appears to have recognised that the lack of clarity and harmonisation in Europe on the matters of SEPs and anti-competitive behaviour made it challenging for Motorola - and in fact for any actor in the telecommunications industry - to assess what would have constituted anti-competitive behaviour.

#### **Samsung v Apple**

In the Samsung case, Samsung had sought an injunction against Apple in several European Union (EU) member states on the basis of SEPs for the 3G standard. During the commission's investigation, however, Samsung committed to a licensing framework for establishing an agreement with licensees on FRAND terms. The decision has now made this licensing framework legally binding and has recognised that this framework is compliant with European anti-competition laws. The framework can be summarised as:

1. a mandatory negotiation period of up to 12 months; and
2. if the negotiation fails, a determination of FRAND terms by a court or by arbitration.

For licensees who agree to the framework, Samsung agreed not to seek an injunction against them in Europe on the basis of SEPs for smartphones or tablets for a period of five years.

#### **So where does this leave us?**

Certainly, use of the 'safe harbour' provision should give licensees more clarity, certainty and confidence in being able to license valuable SEPs on FRAND grounds without fear of their products being subject to injunctions if negotiations on the FRAND terms go sour. Furthermore, the fact that, in the event of a dispute, the FRAND terms are

to be decided by a court or arbitrator would suggest that the outcome of such FRAND disputes would hopefully result in terms which are fair to both licensee and SEP holder.

The commission is of the opinion that national courts and arbitrators are well placed to decide FRAND terms. They may, however, seek guidance from the commission regarding the interpretation of EU law. The commission is currently considering a number of questions referred to it by the Mannheim Regional Court regarding the setting of FRAND rates in the Motorola and Apple dispute, the results of which will be published on the commission website when they become available. It will be interesting to see how the commission considers the FRAND rates in this case should be determined and the influence that this decision will have on national courts and arbitrators in deciding FRAND terms in future cases of dispute.

**It will be particularly valuable to see how courts and arbitrators (which are, of course, judicial rather than commercial entities) make decisions regarding what exactly constitute FRAND terms, given that such decisions are highly commercial in nature and that companies already find FRAND negotiations very challenging.**

It will also be interesting to see how SEP licensees and national courts and arbitrators react to this latest development with regards to their confidence in contesting SEPs.

#### **Authors:**

**Bénédicte Moulin and Arun Roy**



#### **Useful link**

The European Commission website:

<http://ec.europa.eu>

# Get in the IP5 Fast Lane

## Your Guide to the IP5 Patent Prosecution Highway Pilot Programme

**T**he IP5 Patent Prosecution Highway (PPH) is a pilot programme between the five largest IP offices (Europe, Japan, Korea, China and the US) to allow faster and more efficient examination. The PPH allows these five offices to exploit search and examination reports ('work products') previously issued by another IP5 office.

### Is my application eligible for the PPH?

The IP5 PPH programme enables an application filed at a participating office, ie, an Office of Later Examination (OLE), to benefit from fast-tracked examination based on work products issued in respect of a corresponding application made in another IP5 office, ie, an Office of Earlier Examination (OEE). The OEE application can be a national application or a PCT application for which one of the IP5 offices acted as International Searching Authority (ISA) and/or International Preliminary Examining Authority (IPEA).

The following eligibility criteria are generally applicable, with minor variations in the different IP5 offices:

1. The OLE application must have the same earliest date (ie, priority or filing date) as the OEE application.
2. The OEE application must have at least one claim indicated by the OEE to be patentable/allowable.
3. All claims must 'sufficiently correspond' to the claims indicated by the OEE to be patentable/allowable. Claims are generally considered to sufficiently correspond if they are of the same or similar scope or of a narrower scope (ie, include a limitation of an additional feature supported by the application). Claims of a different category are not considered to sufficiently correspond.
4. Substantive examination of the OLE application has been requested at the same time or before filing the request, but examination has not begun.

### Time frame of the programme

The pilot programme is scheduled to run from 06 January 2014 until 05 January 2017, although this period can be terminated or extended if necessary.

### What are the benefits of the PPH?

Based on the available statistics (see figure 1, right), on average, the PPH route results in:

- Higher grant and first action allowance rates.
- A significantly reduced wait for a first office action.
- Significantly reduced periods to a final decision.
- Reduction of numbers of office actions.

For the applicant, this means:

- Potential for significant savings in prosecution costs.
- Generally faster grant.
- The PPH may provide the only route for accelerating examination in some patent offices.

### Does the PPH have disadvantages?

Although there is no official fee to request PPH, there are other potential costs. These include: obtaining translations of the work products of another IP5 office, such as examination reports (although machine translations can generally be filed initially and accurate translations can be provided later if requested) and paralegal and attorney costs for compiling and preparing the necessary documentation.

The requirement of the claims to have sufficient correspondence may be too restrictive to the applicant, since this could result in narrower claims in all countries compared with separate prosecution in each country. However, it may be possible to pursue broader claims by way of filing separate divisional or continuation applications (although this obviously increases costs).

There is only a narrow window for filing the request – it must be before substantive examination of the OLE

application has begun, but after the OEE application has been examined.

The PPH is an initiative that enables work-sharing between the offices; it is not a mutual recognition programme. IP offices typically have different criteria for assessing unity, clarity, sufficiency, and even inventive step, so a consistent outcome is not guaranteed, even where the claims sufficiently correspond.

At the United States Patent and Trademark Office (USPTO), PPH applications are likely to result in no patent term adjustment (PTA) benefit.

### Typical scenario

*"We have received a positive examination report or positive WO-ISA/IPER/IPRP from one of the IP5 offices - should we go ahead and use the IP5 PPH pilot programme?"*

**Yes:** We are happy with the allowable claims, and would like the application granted as quickly as possible.

We have a lot of applications and often receive a positive examination report or positive IPRP/ WO-ISA/IPER, and would like to streamline our patent prosecution procedures and save costs.

The allowable claims are narrow, but for commercial reasons (eg, we have a potential licensee or we need a granted patent to obtain funding, or the product we want to market is covered by the allowable claims), we are happy to have a patent granted quickly with these claims, but we intend to file divisional or continuation applications to pursue broader subject-matter.

**No:** We are concerned that the allowable claims are too narrow and would like to try to obtain broader protection.

We have not yet decided on our patent strategy and may wish to file divisional/ continuation applications - we would like more time to consider these.

We are waiting for funding and would like to keep our options open, and would not wish to pay validation costs for an EP application or maintenance fees until we have secured funding.

➤ **Figure 1**  
**Patent Prosecution Highway Portal Site**  
**PPH statistics: <http://dycip.com/pphstats>**

	JPO			USPTO			KIPO		
	PPH	PCT-PPH	All*	PPH	PCT-PPH	All*	PPH	PCT-PPH	All*
Grant rate (%)	75	93	69	86	88	53	88.6	85.9	65.6
First action allowance rate (%)	22	65	15	25.7	19.3	15.2	33.5	16.8	10.7
Average pendency to first office action (months)**	2.2	2.3	16.0	5.8	5.6	18.8	2.4	3.4	14.8
Average pendency to final decision (months)**	6.7	4.0	25.0	11.4	9.9	30.7	5.2	6.3	21.6
Grant rate (%)	93	-	69	88	-	53	85.9	-	65.6

\* All applications including PPH and non-PPH applications \*\* From the PPH request

## Europe, Japan, Korea, China and the US launched the IP5 programme in January 2014



responding to any objections without delay.

It is important to note that participation under the IP5 PPH pilot programme provides a means for the application to be prosecuted more quickly, but does not guarantee a granted patent.

As well as the IP5 PPH pilot programme, many other PPH programmes exist between a number of countries (for example, see [www.jpo.go.jp/pph-portal](http://www.jpo.go.jp/pph-portal)). These PPH programmes are continuously evolving and expanding.

### Other (non-PPH) programmes

It is worth noting that there are other possibilities for accelerating examination in some of the IP5 offices outside of the PPH.

The European Patent Office (EPO) has a 'PACE' programme under which accelerated search and/or examination can be requested at any time after filing an application (unlike the PPH programme, there is no restriction on the claim scope; further no reasoning is required and there is no fee).

The USPTO also has various accelerated examination initiatives such as the 'track 1 prioritized examination procedure' (although this requires payment of a large fee).

The Japan Patent Office (JPO), the Korean Intellectual Property Office (KIPO), the State Intellectual Property Office of the People's Republic of China (SIPO) also have fast-track procedures, although these are not universally applicable to all applicants and applications.

### The UKIPO-USPTO PPH

Those filing in the US may wish to consider taking advantage of the PPH scheme between the UKIPO and USPTO. Increasingly we are acting for clients who are applying for patents at the UKIPO in order to then expedite prosecution of an equivalent application in the US.

For further advice on this initiative, and the PPH IP5 more specifically, please contact your usual D Young & Co advisor.

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**Kit Wong**



### Application supporting documentation

The following document list is generally applicable for filing the request, although there may be additional documentation required depending on the IP5 office:

1. Request form.
2. Declaration or table showing the claims correspondence.
3. Copy of the office action(s) or PCT work product (eg, a positive IPRP, or positive WO-ISA or positive IPER) from the OEE application(s) and translation where applicable.
4. Copy of the patentable claims and translation where applicable.
5. Copies of non-patent documents cited in the office action(s) or PCT work product.

### Fees for application

There is no official fee for requesting participation in the IP5 PPH pilot programme.

### Procedure for grant or refusal

The OLE will consider whether the request meets the requirements. The applicant will be notified of any deficiencies in the request, and will be given one opportunity to correct these. If the request is granted, the application will be eligible for fast-track examination. If the request is not granted, the application will proceed as a normal application.

### What are the timescales?

The application will receive priority treatment for prosecution at the relevant IP5 office. However, the speed at which the application will be dealt with depends on the office. For example, the EPO will treat the application in accordance with the existing accelerated examination procedure under the 'PACE' guidelines (eg, issuance of an examination report typically within three months of the allowed request). However, whilst the other IP5 offices may provide similar guidelines, there are no strict time limits that the examiners are obliged to meet. Average statistics for some offices are shown in figure 1. Obviously, the applicant can also accelerate the procedure by



# D YOUNG & CO INTELLECTUAL PROPERTY

And finally...

## "Chairman, That Patent Should be Revoked!" Decide the Fate of a Mock Biotech Patent During BIO 2014

An EPO opposition division where you will help decide the fate of a mock biotech patent



**BIO 2014 break-out session ID2442**  
**25 June 2014, Room 23ABC**  
**San Diego Convention Center**

You are hereby summoned to attend oral proceedings at the BIO 2014 EPO mock opposition workshop.

A mock opposition workshop, arranged by the European Patent Office (EPO) at BIO 2014 will decide, with your help, the fate of a mock biotech patent.

An EPO opposition division will be chaired by Siobhán Yeats, Director of Biotechnology at the European Patent Office. European patent attorney Reuben Jenkins will defend

the patent in view of the objections presented by the opponent's representative Aylsa Williams, of D Young & Co LLP. Moderator, Donald Zuhn is an American attorney who will provide comments from a US perspective.

### Bio 2014

The 2014 BIO International Convention takes place on 23-26 June at the San Diego Convention Center in San Diego, California, US.

### Registration and further information

Registration is open. Please visit the BIO convention website to register: [convention.bio.org/register](http://convention.bio.org/register).

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

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