

## The Mobile Phone Patent Wars

The New Year has seen another round of developments in the ongoing mobile phone patent battles between Apple on the one hand and the Android manufacturers on the other.

Apple has recently been successful in relation to its "slide-to-unlock" patent and Motorola Mobility's attempt to enforce patents that are essential to the 3G telecommunications standards in Germany.

Late last year the European Commission decided to instigate an investigation into Samsung's use of its standards essential patents against Apple in these patent disputes.

But where does this leave the parties? What is the state of play in the ongoing patent disputes as things stand? And where could these patent wars end up?

This article will explore the different strategies adopted by the two sides and consider where things might go from here in view of this.

### Apple's Approach

Apple's strategy has been to pursue and enforce patents that relate to a user's interaction with their iOS devices. These Apple patents relate, for example, to touch screen interactions such as "slide-to-unlock", scrolling objects on a touch-screen and multi-touch gestures.

Not only have Apple been technically innovative in developing their touch screen user interface, but it could also be said that their decision to pursue patents for many of the user interface and "softer" features of their iOS devices was innovative from a patenting perspective.

Historically, patents for mobile phones and similar devices have tended to be directed to what one might call the "hard" technology that they use (such as the communications protocols they use and their hardware).

There may be a number of reasons for this. Firstly, there was potentially a perception that such "softer" ideas and features of devices were not so significant to protect in the first place (and, indeed, there was perhaps less innovation in these areas initially, as in the early days the technical focus was on getting the devices to work). There may also have been a perception that the Patent Offices and Courts would be less likely to grant and enforce patents for such "softer" features.

Apple have not only recognised that the way that the users interact with a device is important in terms of a device's commercial attractiveness, but also that it would be possible to and beneficial to seek and obtain patents for such features.

Apple are now gaining the benefit of this patenting strategy. They have a large number of patents directed to aspects of their user interface and the way that users interact with iOS devices. It is these patents that Apple are primarily asserting against their Android-based competitors.



Apple are starting to have some success with this strategy. They have recently succeeded in enforcing their "slide-to-unlock" patent against Motorola Mobility in Germany. They have also already had some success with patents relating to the photo gallery and document scrolling arrangements of iOS.

The effect of this then is that it is difficult for Apple's Android-based competitors to mimic Apple's devices at the user interaction level, thereby allowing Apple to maintain its distinct and premium identity in the marketplace.

The downside of Apple's strategy is that if Android device manufacturers avoid mimicking Apple's user interface features, then they should not fall foul of Apple's patents to those features.

For example while it is true that Apple's "slide-to-unlock" patent will be infringed by a device that uses a "slide-to-unlock" feature that mimics that feature as seen on Apple's devices, the patent itself protects that feature relatively narrowly. There are clearly other ways in which a phone or other device can be unlocked that will avoid this patent.

Indeed, Motorola have already commented that the finding of infringement only applies to certain versions of their phones and that new phones will not be affected.

Thus, Apple will not be able to use their patents to stop Android devices. Rather, their approach is to try to prevent Android being able to use particular features of iOS.

### The Android Response

The Android manufacturers have been trying to enforce more "traditional" patents against Apple, and in particular patents that have been declared to be essential to the various mobile telecommunications standards that Apple's phones and devices (and indeed any mobile phone) need to use to be able to operate.

If Motorola Mobility and Samsung can persuade the Courts to grant them injunctions against Apple on the basis of their standards essential patents, that would be a very significant blow to Apple, as it could potentially require the removal of Apple's devices from sale, and not simply the modification or removal of certain features from the devices.

(It may also be that these standards essential patents are the only patents available to Motorola Mobility and Samsung via which to take action against Apple, as their focus for filing patents may not have been directed to "softer" features of their phones and other devices.)

This does mean that in many cases Apple cannot avoid infringement of the patents in question. However, because the patents have been declared to be essential to the 3G and other mobile phone standards, the Android manufacturers are obliged to grant Apple licences to these patents on FRAND (Fair, Reasonable and Non-Discriminatory) terms.

The consequence of this is that while Motorola Mobility and Samsung can potentially demand royalties for use of their standards essential patents by Apple, there would not normally be expected to be any prospect of obtaining injunctions to require Apple to remove their devices from sale or the patented features from their devices. This is part of the understanding that is reached when patents are declared as being essential to an agreed standard.



Motorola Mobility and Samsung have tried to test this expectation by asserting standards essential patents against Apple in Germany and arguing in the German Courts that they should be entitled to injunctive relief against Apple and that Apple should be required to pay higher royalty rates where Apple have not immediately agreed to take a licence.

(Motorola Mobility and Samsung have done this in Germany, because it is believed that at least certain of the patent Courts in Germany will be more likely to enforce standards essential patents in this way, notwithstanding the principle that such patents should always be available for licence on a FRAND basis.)

However, both Samsung and Motorola Mobility have recently suffered setbacks to this approach.

It was decided by an Appeal Court in Germany in February that an interim injunction that Motorola Mobility had been granted against Apple in respect of one of their standards essential patents should be stayed pending the full Appeal. This suggests it is unlikely that the German Courts will grant injunctions on the basis of standards essential patents.

Furthermore, asserting standards essential patents and arguing that such patents should lead to injunctive relief or other forms of remedy that go beyond a FRAND licence is a risky approach, as it raises questions of anti-competitive practice.

Indeed Motorola Mobility and Samsung have already been placed under investigation by the European Commission for potential anti-competitive practices based on their assertion of their standards essential patents against Apple.

By asserting their standards essential patents in this way, the Android manufacturers leave themselves open to complaints of anti-competitive practice.

### So Where Does This Leave Us?

At the moment Apple may be considered to be ahead in the mobile phone patent wars. They are having some success challenging features of Android that Apple contend have been copied from iOS, and those features are having to be removed from Android devices.

Apple will be required to pay royalties on FRAND terms to Android manufacturers that have standards essential patents. However, it seems unlikely that such patents will be able to be used to require Apple to remove features from their devices, nor to prevent Apple from producing and selling the devices that they wish. The Android manufacturers also run the risk of anti-competition investigations if they try to seek remedies that go beyond FRAND licences for their standards essential patents.

So where can Android go from here?

If Android mimics Apple's products, it is likely that Apple will be able to continue to harass Android with their patents and to chip away at features on Android devices. Apple will then be able to maintain their product differentiation.

But what if the Android manufacturers develop new, different, systems, and user interfaces? (And then file patents for those innovations.) Could that change the outlook?



In that case Apple may no longer have a series of patents that they can usefully enforce against Android devices, but Apple will still have to pay royalties for using the Android manufacturers' standards essential patents. Could that tip the balance of power in the mobile phone patent wars? This will require Android to step out from the shadow of iOS and develop a more distinct identity. Are Google and the Android manufacturers willing and able to do this?

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