

ReMarks



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Protecting the Commonwealth Games from Ambush Marketing

The twentieth Commonwealth Games will be held this summer in Glasgow, Scotland. Teams of athletes from all member nations of the Commonwealth, an association of 53 independent sovereign states whose people make up 30% of the world's population, are invited to participate in the Games, which will be broadcast worldwide to hundreds of millions of viewers. The appetite in the UK for such a high profile international sporting event has undoubtedly grown since the London Olympics in 2012 and implementing lessons learned from London will be particularly important for success in Glasgow.

Large scale sporting events require significant financial investment and sponsorship. Just as LOCOG the (London Organising Committee of the Olympic Games) did in 2012, the organisers of the forthcoming Commonwealth Games must ensure that official sponsors are assured that their investment is protected and their competitors are prevented from unofficially promoting a product or a brand through the Games. Preventing this kind of unauthorised association or “ambush marketing” by those seeking to free-ride on the associated goodwill of the Games requires significant planning and action in the lead-up to the Games.

As with the London 2012 Olympics, all of the official names, phrases, trade marks, logos and designs related to the Commonwealth Games and Glasgow 2014 are protected through a traditional range of registered and non-registered IP rights.

Notably, the Commonwealth Games Federation insisted that legislation be put in place to protect against ambush marketing and prevent unauthorised associations with the Games as a condition of awarding the 2014 Commonwealth Games to Glasgow. This legislative support is not intended to restrict legitimate businesses but to provide sponsors for the Games with the necessary guarantees that sufficient controls are in place against ambush marketing. The measures should also help to ensure that the legacy of the Games is maintained and that public health and safety is protected around event venues. The overarching legislation is the Glasgow Commonwealth Games Act 2008 (“the 2008 Act”), with the main framework



being implemented by the Glasgow Commonwealth Games Act 2008 (Games Association Right) Order 2009 (“the Order”) and the Glasgow Commonwealth Games (Trading and Advertising) (Scotland) Regulations 2013 (“the Regulations”).

The Order introduces a civil offence – the Glasgow Commonwealth Games Association Right – of using any representation to create an unauthorised commercial association between people, goods or services and the Games. Although not conclusive, the following lists show words which, if used in combination, are likely to be interpreted as infringement:

Table A	Table B
GAMES	GLASGOW
TWO THOUSAND AND FOURTEEN	MEDALS
2014	SPONSORS
XXth	GOLD
	SILVER
	BRONZE

In practical terms, this means that a business making use of the words “Glasgow Games” could face infringement action including injunctive relief, damages, forfeiture and destruction of infringing materials. The Association Right lasts for six months after the closing ceremony in August 2014.

Protecting the Commonwealth Games from Ambush Marketing *cont'd.*

Businesses that have traded using a name or other representation that creates an association with the Games since before January 2010 can continue to trade under that name or representation in the same manner as they have always done. Other defences include legitimate use of a person's own name or address and use of an existing registered trade mark or design.

A further form of protection for the public is the remedy for groundless threats of infringement proceedings in relation to the Association Right.

The organisers of the Commonwealth Games are permitted under the Regulations to control advertising and outdoor trading in the vicinity of venues during, and for a period before, the various Games events. The trading offence prevents advertising in relation to goods, services or a business in the "event zones". It will prevent billboards, leafleting, branded vehicles and promotional giveaways, and also extends to those offering public entertainment or seeking charitable donations.

As with the Olympics two years previously, businesses should take real care over the legality of promotions and advertisements seeking to benefit from the power of attraction of the Glasgow Commonwealth Games.

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Five IP Treaties Coming to Canada

Earlier this year, the Government of Canada laid on the table five international IP treaties, which, once implemented, would vary the options available to applicants seeking protection for IP rights in Canada:

- The Madrid Protocol provides for the international registration of trade marks in multiple countries by way of a single application.
- The Singapore Treaty harmonises formal procedures for registration of trade marks.
- The Nice Agreement provides an international classification of goods and services for use in registering trade marks.

- The Hague Agreement provides for the international registration of an industrial design in multiple countries by way of a single application.
- The Patent Law Treaty harmonises formal procedures such as the requirements to obtain a filing date.

The legislation to implement these treaties will likely require a number of amendments to existing IP statutes relating to patents, trade marks, and industrial designs. Only once the implementing legislation is adopted could Canada then consent to be bound by the treaties.

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IP5 Join Together in Patent Prosecution Highway

Earlier this year, the world's five largest patent offices ("IP5": European Patent Office, Japan Patent Office, Korean Intellectual Property Office, State Intellectual Property Office of the People's Republic of China, and United States Patent and Trademark Office) began

a Patent Prosecution Highway (PPH) pilot programme that will be effective for three years until 5 January 2017.

The goal of all PPH programmes is always to accelerate the prosecution of patents filed in multiple countries and reduce the backlog in the various IP offices. Under the IP5 PPH pilot programme, patent applicants filing in multiple IP5 offices may request PPH treatment for their applications, subject to the typical PPH requirements. It is hoped that the IP5's efforts will reduce costs and speed up prosecution for our clients, eventually resulting in more harmonised patent rights across the IP5.



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Patent Filings in Europe Up Again

Figures recently released by the European Patent Office (EPO) indicate a record number of patent applications were filed in 2013. 265,690 European and international patent applications were filed at the EPO, representing an increase of 2.8 per cent on the figure from 2012 (258,473). This is despite 2012 also having been a record year, meaning the trend for growth that started four years ago has continued, confirming that filing applications in Europe is still popular. Notably, 2013 also saw a record number (66,700) of European patents being granted.

A European patent application enables an applicant to file a single application at the EPO. This provides a simple way to get patent protection by pursuing a single application at a single patent office – the EPO – in a single language, which can be English. Once granted, patent protection can be secured in any one or more of the 38 member countries by attending to a few simple formalities. Applicants should, however, be reviewing their European filing strategies ahead of the introduction of the Unitary Patent, although this still appears to be some way off.

The largest proportion (35.3 per cent) of European applications filed in 2013 originated from the EPO member countries. The second largest contributor was the US (24.5 per cent), followed by Japan (19.7 per cent), China (8.4 per cent) and South Korea (6.3 per cent). In comparison with the previous year, the number of applications originating from China grew by 16.2 per cent over 2012, and those

from South Korea by 14 per cent. It would appear that the technological and economic growth in Asia is showing no sign of abating, and the continued interest in filing applications in Europe can only be good news for the European economy.

Of the applications originating from European countries, Germany (12.1 per cent of the total) and France (4.7 per cent) continue to be the largest contributors, with the UK in fifth place providing 2.4 per cent of the total – this represents a decrease of 3 per cent since 2012, although the figures from that year indicated a higher than expected growth compared with other European countries. Statistics for UK national applications are not yet available but, in these complex and fluctuating economic times, and with the fairly recent introduction of the UK Government's Patent Box tax relief, it will be interesting to see in which direction UK filing numbers are heading.

Across the Atlantic, the number of patent applications filed at the US Patent and Trademark Office increased by more than 6 per cent in 2013, according to preliminary data recently published. This too continues an upward trend, with the number of patent filings increasing annually since 2010. The ratio of US applications filed by US residents to non-US residents remains approximately 50:50.

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Enhanced Protection Regime for Geographical Indications in Singapore

A geographical indication (GI) is a sign that identifies a product as originating from a particular location which gives that product a special quality or reputation or other characteristic. Well-known examples of GIs include Bordeaux (wine), Darjeeling (tea) and Tuscany (olive oil).

Presently, a GI is protected in Singapore under the Geographical Indications Act, and it is not necessary to file an application to protect the GI. In Singapore, the law protects only the GIs of a country which is a member of the World Trade Organization, a party to the Paris Convention for the Protection of Industrial Property, or a country designated by the Singapore Government as a qualifying country from which GIs of that country can be protected. In addition, the GI must be protected in its country of origin. The producer, trader or association of such producers or traders of any such GI enjoy automatic protection.

As part of Singapore's commitments under the European Union - Singapore

Free Trade Agreement ("EUSFTA"), the existing regime will be enhanced to give greater protection for GIs. A new registry of GIs will be established within the Intellectual Property Office of Singapore ("IPOS") as part of this enhanced regime. It is expected that the GI Registry will be established sometime in mid-2014. When this GI Registry is established, it will accept applications for registration of GIs for (i) wines and spirits; and (ii) selected categories of agricultural products and foodstuffs. Owners of all registered GIs will have access to an enhanced protection regime once the EUSFTA enters into full force.

It is anticipated that the EUSFTA will come into provisional application in early 2015, upon which enhanced protection for GIs will commence. This is especially so for registered GIs for agricultural products and foodstuffs which will enjoy equal protection as wines and spirits from then on. At this time, amendments to the Trade Marks Act will also come into force to

align the GI Registry and the Registry of Trade Marks. For instance, it is likely that under these proposed amendments, a trade mark will be prevented from being registered if it contains a GI that is already registered with the GI Registry, or if there is a pending application for a GI that has an earlier filing date than the application for a trade mark that contains that GI.

The most significant aspect of the enhanced protection regime for GIs will come into force within three years of entry into force of the EUSFTA, which is when more robust border enforcement measures will be available to all registered GI owners. When these measures come into force, registered GI owners will be able to request the Singapore customs authority to bar the importation of infringing goods or seize exports of infringing goods.

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Trade Practice a Critical Factor in Greek Yoghurt Case

Earlier this year, the UK Court of Appeal handed down two judgments relating to trade mark infringement cases: *Zee Entertainment Enterprises v Zeebox and Fage UK Ltd & another v Chobani UK Ltd & another*. In the former, we saw another example of a UK court excluding almost all public opinion survey evidence from trade mark infringement cases, whilst in the latter, we saw how trade practice can still be a critical factor in establishing your trade mark case.

In *Fage v Chobani*, the Court of Appeal confirmed that the description of a product as “Greek Yoghurt” (as opposed to “Greek style Yoghurt”) if not made in Greece by a traditional straining technique, delivering a thick creamy effect, constituted an act of passing off actionable by traditional Greek yoghurt makers. The manufacturers of these traditionally

produced yoghurts in Greece had proved to the satisfaction of the first instance judge that the term Greek yoghurt was recognised as a distinct or special class of goods and not merely as an indication of geographical origin and as such attracted goodwill which they, as a member of that special class of producer, were entitled to protect. Survey evidence was admitted to establish that more than 50 per cent of the British public thought of the term in this way. However, the really persuasive evidence was that UK thick yoghurt producers themselves had avoided the term in favour of Greek style yoghurt for more than 25 years and that trade witnesses unanimously supported the practice or unwritten labelling convention, along with the premium price genuine Greek yoghurt was able to command over Greek style Yoghurt. The case reflects the usefulness of gathering evidence from the trade as to



actual market conditions; and that trade witnesses still have a vital role to play in trade mark and passing off cases provided that they confine themselves to fact and not speculation. The case may also suggest that if you want to stop such a designation becoming protected, you start using it generically on your own similar products very quickly, before it can develop goodwill.

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Increasing Interest in Location-Based gTLDs as First .brands Delegated

Earlier this year we saw a key milestone reached in the path towards a more colourful internet, as the first .brand generic top-level domains (gTLDs) were delegated by the Internet Corporation for Assigned Names and Numbers (ICANN). Monash University, the Melbourne-based public higher education institution and CITIC Group, the state-owned Chinese investment company became the first owners of their own branded gTLDs: .monash and .中信 (Chinese for “CITIC”).

Until these terms were delegated, the only gTLDs delegated by ICANN were for English and non-English language words, such as .ninja and .在线 (Chinese for “online”). Since then, we have seen further .brand gTLDs, such as .삼성 (Korean for “Samsung”).

Attention was also drawn to gTLDs as it was announced that a non-profit registry, Dot Scot Registry, had applied for a .scot domain. Dot London Domains had previously attracted attention by applying for .london and gTLDs such as .tokyo and .berlin have already been delegated. The domain name will allow businesses and other parties to promote their association with Scotland, its culture and heritage.

According to Dot Scot Registry, it has already received a flood of requests from organisations in the US, Canada, Australia, New Zealand and throughout Europe.

While not every business will be able to afford its own gTLD, all should be aware of the risk of cybersquatters that might purchase www.yourbrandname.scot, or any other address using your brand name and one of the new gTLDs.

Submitting your trade mark information to the Trademark Clearinghouse is a simple and cost-effective way to prevent third parties from doing so without you first being given the opportunity to stop them.

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IBM Success in the New gTLD URS System

IBM has successfully challenged the registration of two domain names under the new gTLD system, *ibm.guru* and *ibm.venture*, in the first case decided under the Uniform Rapid Suspension (URS) System.

The URS System was set up as an alternative to ICANN's Uniform Dispute Resolution Policy (UDRP) with the aim to provide trade mark owners with a quick, effective and economic way to protect their trade marks online. This case has shown just how effective and swiftly a trade mark owner can take action against the registration of an offending domain name.

A third party applied to register the domain names *ibm.guru* and *ibm.ventures*. Because IBM's registered trade mark was recorded with the Trademark Clearinghouse, (TMCH), the Applicant received notification of IBM's registered trade mark rights. The applicant nevertheless continued with the registration of the two disputed domain names and by ticking the relevant box on the application forms, acknowledged IBM's registered rights. In accordance with TMCH procedures, IBM received notification from the TMCH in this regard, which enabled IBM to take swift action.

A complaint was lodged with the National Arbitration Forum (NAF) and within only seven days a decision was made in favour of IBM. The NAF found that IBM provided clear and convincing evidence that (1) the domain names are identical with or confusingly similar to its registered trade mark IBM; (2) the third party had no legitimate right or interest to the domain names; and (3) the domain names were registered and are being used in bad faith.

It was found that, not only was the third party aware of IBM's registered rights at the time of registering the disputed domain names, but it was also established that these domain



names forwarded visitors to IBM's official websites. This does not constitute a *bona fide* offering of goods or services or legitimate non-commercial fair use of the domain names, but by redirecting the domain names to official IBM websites, the third party essentially acknowledged that the domain names can only refer to IBM.

As a result, IBM was able to obtain suspension of the disputed domain names for the remaining period of their registration, which is the sole remedy available under the URS System.

This case is a good example of how trade mark owners can take advantage of the benefits of having their registered trade marks recorded with the TMCH and we expect to see similar decisions moving forward.

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Standard Essential Patents and IP in China – *Huawei v InterDigital*

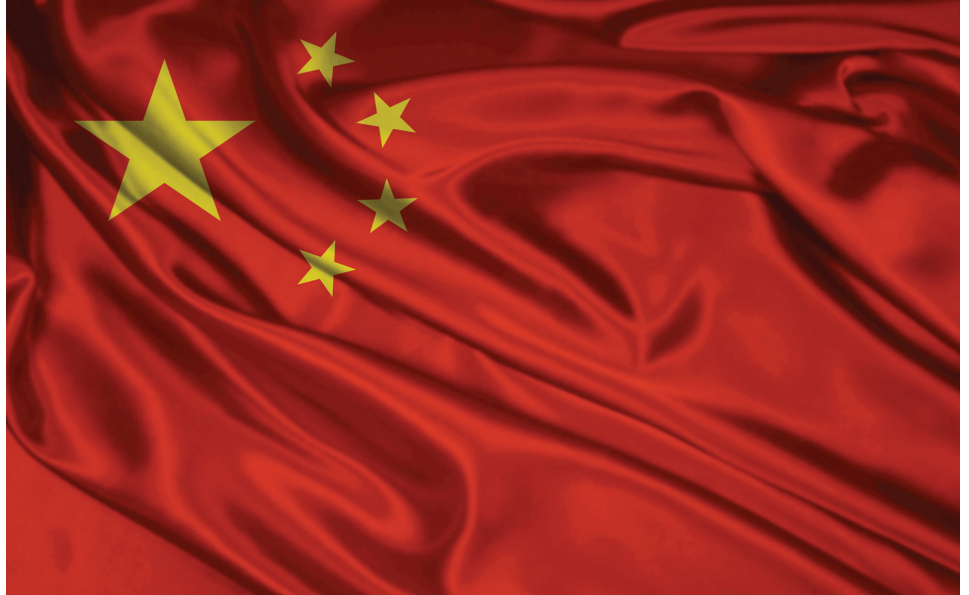
Standards ensure various components in a product operate in a specific way to perform a specific task. The most important standards in China are set by the State.

Owners of patents essential to standards may be required to license their patents on a royalty-free basis or on fair reasonable and non-discriminatory (FRAND) terms. This may block or hamper anti-competitive efforts through collusion or unilateral conduct based on patents. The interpretation and application of FRAND are receiving a lot of attention because of the uncertainty surrounding them.

In China, there is a relatively new antitrust regime called the Anti-Monopoly Law (AML). The development of FRAND in China would have global effect by reason of the size of its economy and influence to the World. The AML covers agreements, abuse of dominance and mergers, including provisions that concern IP.

Chinese courts occasionally resolve disputes on licensing of IPRs. In *Huawei v InterDigital*, Huawei sued InterDigital for violating its FRAND obligations, etc. The decision has not been published and the only disclosure of information came from InterDigital in its SEC filings. Thus it remains far from clear as to how the Chinese courts interpret and apply FRAND.

According to InterDigital, the Shenzhen Intermediate People's Court decided in relation to Huawei's first complaint (an abuse of dominance claim) that InterDigital had violated the AML by demanding royalties from Huawei that the Court considered excessive, bundling licensing of essential patents with licensing of non-essential patents, asking Huawei to provide a grant-back of certain patents, and commencing a USITC action against Huawei while still in negotiation with Huawei for a licence. The Court ordered InterDigital to



cease excessive pricing and improper bundling of essential with non-essential patents, and to pay Huawei damages of 3.2 million USD. The Court dismissed Huawei's other claims, including its allegation that InterDigital improperly sought a worldwide licence and bundle licensing of essential patents on multiple generations of technologies.

As to Huawei's second complaint (a FRAND claim), the Court determined that InterDigital's request for royalties on licensing of 2G, 3G and 4G essential patents under the Chinese law should not exceed 0.019 per cent of the actual selling price of Huawei's related products, without explaining this calculation. InterDigital intended to appeal both decisions.

The royalty rate at 0.019 per cent of the products' actual selling price appears low.

According to an article claimed to be authorised by the judges, InterDigital offered licensing terms to Huawei that were higher than those offered to other large telecoms companies. Also, InterDigital sought a royalty-free cross licence of Huawei's entire patent portfolio. This is considered as tying

abuse of dominance with excessive pricing and discriminatory pricing.

Some commented that the action was discriminatory since the royalty rates offered to Huawei were lower than that offered to other large telecoms companies. Others believed that the decision played to industrial policy concern over low royalty rates for the purpose of improving Huawei's position.

It was made known in May 2013 that InterDigital appealed to the Guangdong Higher People's Court, which apparently affirmed most of the rulings of the Shenzhen Court. The Guangdong Court also appeared to have found that the bundled licensing of SEPs globally can be justified on efficiency grounds and that it did not violate the AML. However, as the decision has not been published, the position remains unclear.

In closing, it appears that antitrust litigation may be useful in combat against demand of unreasonable licensing terms e.g. excessive royalties.

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Draft Design Law Change Allows Protection of GUIs in China



The Chinese State Intellectual Property Office (SIPO) has recently issued a draft for public comments on the proposed changes to the Guidelines for Patent Examination that would allow graphical user interfaces (GUIs) embodied in products to be eligible for design patent protection in China. In the draft, five key changes have been put forward.

Provisions relating to non-patentable matter for design patents have been revised. Currently, patterns shown on electric products, such as patterns on an electronic watch dial or on the screen

of a mobile phone, and software interfaces – products related to GUIs – are ineligible for design patent protection.

Under the proposed changes, this limitation would be removed. However, it is specifically stated that patterns embodied in display devices, which have no association with human-computer interaction or carrying out the functions of the products, would remain ineligible for design patent protection. These would include wallpapers shown on electronic screens, pictures displayed whilst turning a computer on and off and the layout design of web pages and game interfaces that have no association with carrying out the functions of the products. Ultimately, this would mean that GUIs embodied in products are eligible for design patent protection only if the GUIs directly correlate to the functions of products, whilst GUIs which are mere surface ornamentation will remain ineligible.

Secondly, provisions relating to design patterns have been revised. Currently, patterns of a product must be fixed and visible, and not flickering or only visible under specific conditions to qualify for design patent protection. However, under the proposed changes, this provision would also be removed.

New provisions relating to drawings or photographs of designs have also been added. Currently, the scope of

protection of a design patent is determined by the design of the product shown in the drawings or photographs provided in the patent. Under the proposed changes, a new provision related to GUIs would be included to specify that for GUI-related design patents, the drawings and photographs submitted should contain the view(s) of the overall product, with the location of the GUI clearly indicated. In cases where the GUIs include moving images, at least one state of the overall product would have to be shown, with only the views of the major frames required.

Fourthly, new provisions relating to the description of the design have been added. At present, design patents may include a brief description related to the design of the product shown in the drawings or photographs. However, under the proposed changes, for products with GUIs, the description would need to include the explanation on the use of the GUI, and the interactive mode and altered states of the GUI would also need to be provided.

Finally, new provisions on determining whether there are significant differences between a Design and the Prior Art have been added.

It is stated that for product designs with GUIs, if the other parts of the design concerned are regarded as common designs, then the GUI is considered as having notable influence to the overall visual effect of the product. This would mean that the changes and improvements to GUI would have more notable influences on the overall visual effect if the rest of the product were regarded as common design in view of the prior art.

The proposed changes to the Guidelines for Patent Examination in China will potentially enable GUI design filings in China as long as the GUIs are integrated with a product and are directly correlated to the functions of the product. It is likely that the draft will have to be further refined to more clearly define some particular aspects of the provisions related to GUI design filings, but it will potentially benefit many electronics companies worldwide seeking protection for their GUI designs in China.

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Patent Quality: What is it? Does it Matter? How to Get it?

The concept of “patent quality” is receiving increasing attention. Undoubtedly this is because it is inextricably linked to the economic value of a patent and the IP portfolio to which it belongs.

But what does “patent quality” mean? It means different things to different people, but it often is understood as a measure of how well a patent, and particularly its claims, defines, and protects, the fundamental principle that underpins the new and inventive contribution made by its inventors – a measure of the legal robustness of a patent.

Although the quality of a patent and its economic value are linked, the relationship is not straightforward and direct. There are a number of other factors that strongly influence the economic value of a patent including the ability to commercialise the invention in the patent, the market share of the product protected by the patent, the percentage of the proprietor's profits that are attributable to the product protected by the patent, the revenue generated indirectly by the patent through licensing and royalties, the impact of tax relief programmes like Patent Box in the UK, the impact of the patent on competitors and the cost of any relevant litigation associated with the patent.

The increasing interest in patent quality and the economic value of IP is driven by businesses becoming more IP savvy. We see businesses relying on their IP to an ever greater extent for raising capital, accessing technologies, leveraging contracts and more, but at the same time they are becoming less likely to take third party registered IP as *primie facie* valid. IP valuation activity, which normally includes an element of assessment of patent quality, is also on the rise and is applied in an increasing variety of commercial transactions.

The quality of a patent is important if the patent is of interest to third parties, that is, if it is commercially important. Patent quality will be assessed at least qualitatively during any due diligence carried out on the patent by competitors, collaborators, investors or other parties. Arguably the quality of a patent matters most if it is to be enforced, since it is in these circumstances that the validity of the patent is most likely to be challenged.

This leads to the question of what determines patent quality. The quality of a patent primarily depends on the quality of the invention, the quality of the drafting of the patent and on the quality of the examination of the patent.

The relationship between the quality of the patent and the quality of the invention is not entirely straightforward. With a ground breaking invention, there is likely to be less prior art

found by patent offices during search and examination than for an incremental invention. However, a single, previously unknown, prior art document can become a significant problem if a patent application is not well drafted. This is because there might not be suitable wording in the patent application to make an amendment to overcome the document. This problem is exacerbated with incremental inventions since more previously unknown and relevant prior art is likely to be found.

The drafting of the patent is critical to its quality because it is during the drafting process that the novel and inventive concept is defined. It is also during drafting that the wording that may be used to make amendments to the definition of the concept during examination before Patent Offices and in any post grant proceedings before Courts is established. Judging whether a patent is well drafted is not an easy task. Some characteristics to look out for in a “quality” draft are clear main claims that define the new and inventive concept without encompassing the prior art; multiple independent claims of different scope; claims in different claim categories; a range of different, and ideally tiered, definitions of the key features of the invention (sometimes called fall back positions); and a detailed description of the working examples of the invention.

The quality of examination of the patent is also important to its quality. Patent offices are equipped with the resources and skills to test the novelty and inventive step of the monopoly initially claimed in a patent application. It is thus routine for the scope of the claims in patent applications to be narrowed as a result of examination. Third parties are also able to challenge the validity of patent applications and patents, both before patent offices and the courts. In relation to commercially important patents, third party competitors will invest vast amounts of time and money in these challenges and new prior art and arguments are often developed. The wording that may be used to make amendments to overcome these challenges is that which was included in the original drafting of the patent.

So to answer the three questions in the title of this article: patent quality is a measure of the legal robustness of a patent, patent quality matters if you wish to commercially exploit your patent and patent quality is underpinned by the level of the invention covered combined with skilled and insightful drafting.

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