

Smartphone Standard Essential Patents Aren't Driving Litigation

By David Kappos and Kirti Gupta

December 14, 2022

Reproduced with permission. Published December 14, 2022. Copyright 2022 Bloomberg Industry Group 800-372-1033. For further use please visit <https://www.bloombergindustry.com/copyright-and-usage-guidelines-copyright/>.

Amid debates about a smartphone-driven patent war, normalized data shows that standard essential patents aren't causing increased litigation, say Cravath's David Kappos, former Commerce Under Secretary and USPTO Director, and Kirti Gupta, Vice President and Chief Economist at Qualcomm.

Some critics say the US patent system is in the middle of an active conflict, or patent war. We are hearing of one particularly egregious culprit: standard essential patents for smartphones.

Yet empirical data on patent litigation does not support this narrative. In fact, it flatly contradicts it. Smartphone patents and SEPs are not to blame for the historically modest amount of patent litigation happening in the US.

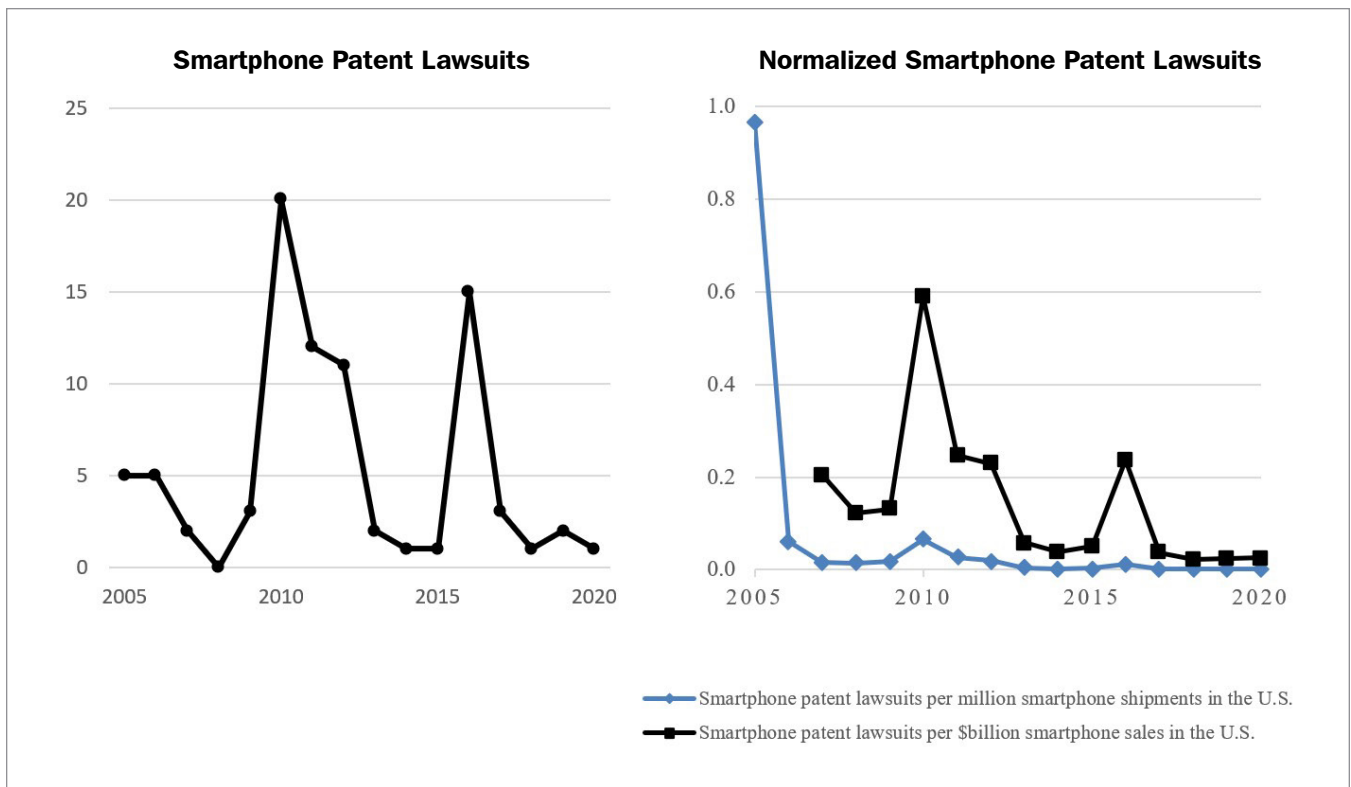
There is room to reground the conversation on the state of patent litigation in the smartphone industry by focusing on the data, rather than hyperbolic anecdotes, to reveal what the smartphone patent war alarmists are missing.

Decreased Litigation

To understand the extent of patent litigation in the smartphone industry, we examined the major mobile wireless device suppliers, which we defined as smartphone original equipment manufacturers with over 5 million shipments in at least one year between 2005 and 2020. There are 53 such OEMs.

Next, we reviewed patent litigation in both US federal district courts and the International Trade Commission, occurring among these major smartphone companies, finding 85 cases involving 321 unique patents.

This novel data set shows the number of smartphone patent lawsuits between 2005 and 2020—when normalized to the size of the smartphone market— is actually declining.



Credit: Cravath, Swaine & Moore and Qualcomm

Next, we normalized by both the number of US smartphone shipments and the total dollar volume of US smartphone sales. In both cases, the normalized patent litigation rate shows that smartphone patent litigation has actually decreased since its peak in 2005.

In other words, the current total smartphone patent litigation docket is smaller in proportion to the size of the smartphone market than it was in 2005.

Furthermore, smartphone patent litigation comprises less than 0.5% of all patent cases—at the peak of smartphone patent litigation, there were only 20 smartphone patent cases among almost 4,000 total patent cases.

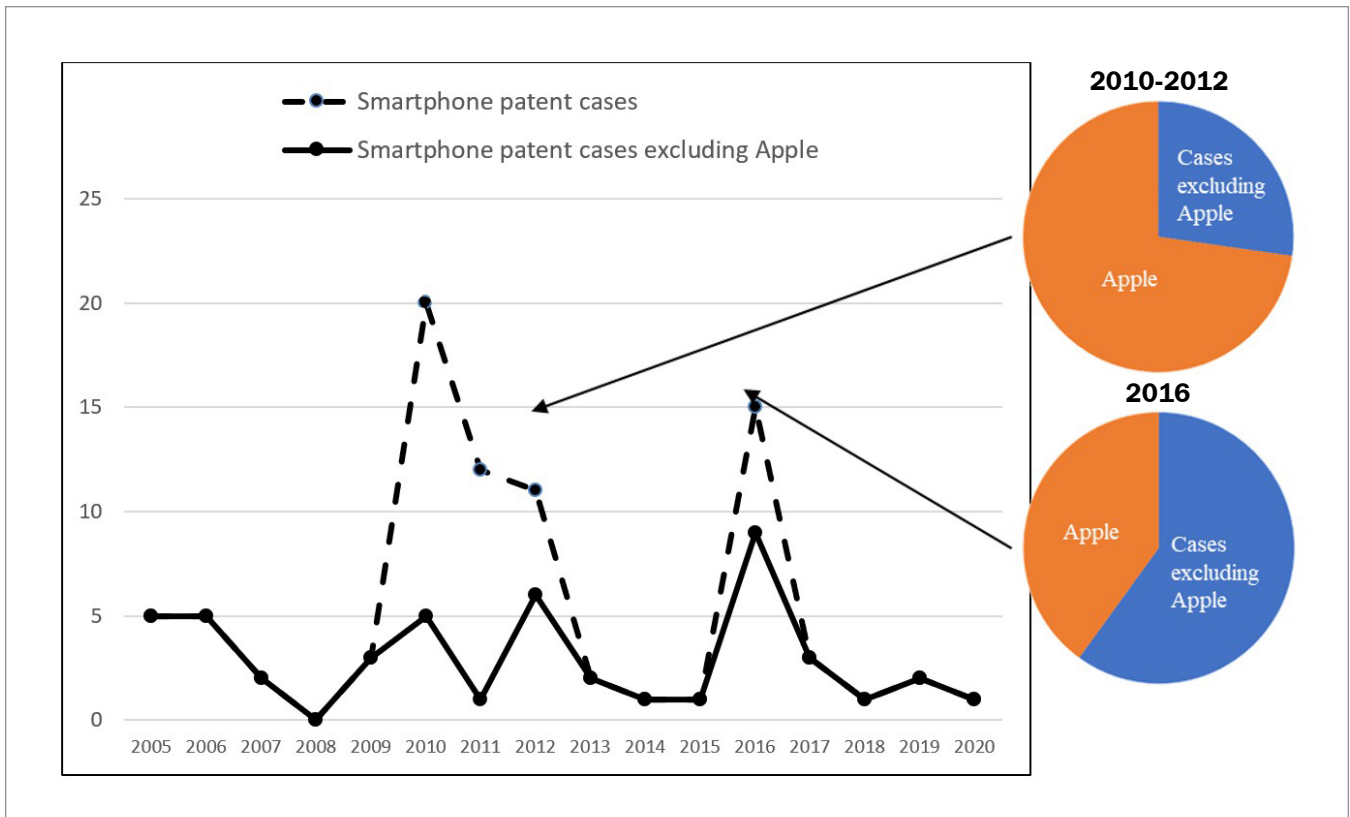
By comparison, biotechnology and biopharmaceutical cases account for nearly 15% of the total US patent docket. To use the nomenclature of critics, any perceived patent war in the smartphone industry is substantially deescalating, not escalating.

We also must consider that participants in the smartphone industry are not monolithic, and the patent litigation that does exist in the industry is largely confined to a few market participants.

For example, smartphone patent litigation spikes in 2010-2012 and 2016 can be attributed overwhelmingly to Apple. Of the 58 total cases occurring in these time periods, Apple was involved, as either plaintiff or defendant, in 37 (or 63.8%) of these cases.

Apple’s outsized role in smartphone patent litigation is unsurprising given its business strategy has preferred litigation over licensing.

Boris Tekler, former head of patent licensing at Apple, explained in *The Economist* that “efficient infringement, where the benefits outweigh the legal costs of defending against a suit, could almost be viewed as a ‘fiduciary responsibility,’ at least for cash-rich firms [such as Apple] that can afford to litigate without end.”



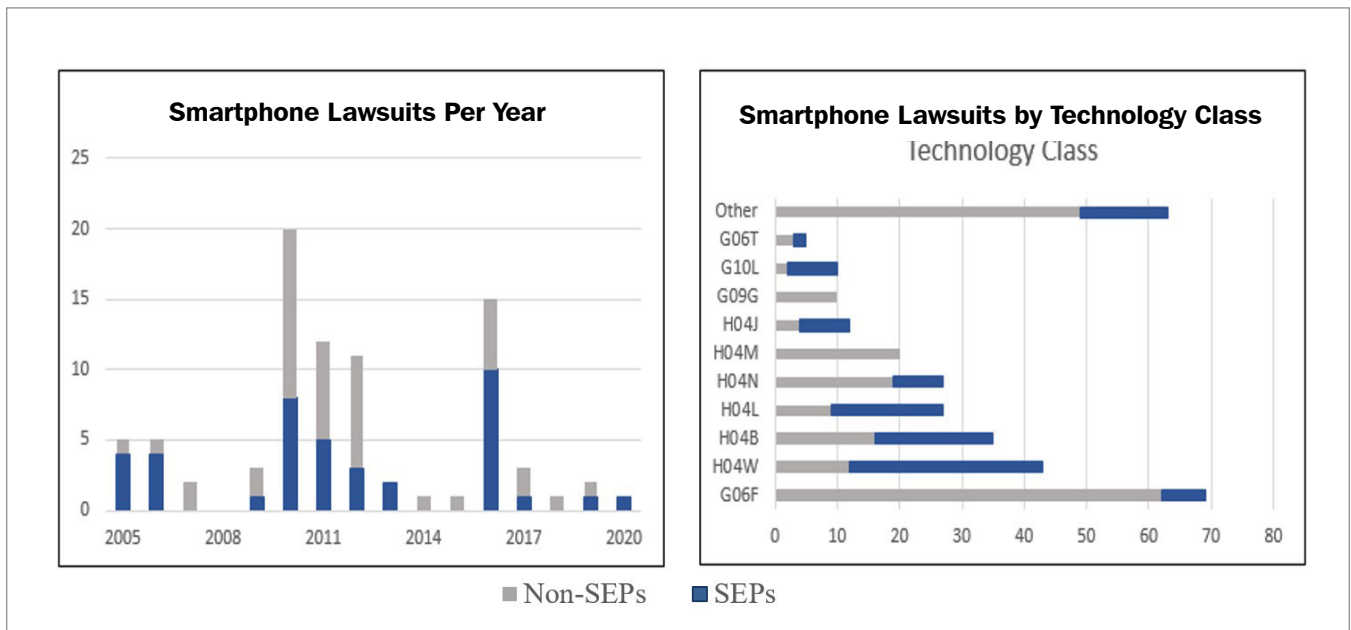
Credit: Cravath, Swaine & Moore and Qualcomm

SEPs Not Responsible

At the center of the overhyped debates are SEPs, which protect technology that standard development organizations have deemed essential to an industry-adopted technical standard. According to critics, SEPs are a root cause of, and the most devastating weapons used in, smartphone patent wars.

Critics claim that SEP owners abuse SEPs, referring to this theoretical risk as patent “holdup”: the risk that the SEP owner coercively demands—under threat of a damages claim or an injunction—an unjustifiably high royalty rate from implementers seeking to use the industry standard.

However, the majority (53%) of smartphone patent litigation cases did not involve any SEPs. Moreover, of the 321 unique patents involved in smartphone litigation, only 115 (or 36%) were SEPs. Plainly, SEPs are not the driving force behind smartphone patent litigation, as they are not even asserted in most cases.



Credit: Cravath, Swaine & Moore and Qualcomm

Conclusion

For years, critics have warned that so-called patent wars are engulfing American innovation and specifically the smartphone industry. These critics have misinterpreted or ignored the empirical data, which paints a starkly different picture.

It is high time our science-based policy returns to discounting non-factual rhetoric, and instead takes heed of facts and data. Let's take a first step towards this by calling out smartphone patent war rhetoric for what it is: patently fearmongering.

This article does not necessarily reflect the opinion of Bloomberg Industry Group, Inc., the publisher of Bloomberg Law and Bloomberg Tax, or its owners.

David J. Kappos is a partner in the corporate department of Cravath, Swaine & Moore. Previously, Kappos served as Under Secretary of Commerce and Director of the US Patent and Trademark Office.

Kirti Gupta is vice president and chief economist at Qualcomm and senior adviser at Center for Strategic and International Studies.