



## November 2021

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**- News about Sonoda & Kobayashi -**

**1. Sonoda & Kobayashi continues to include Chinese IP news in this newsletter**

Having opened a new branch office in Beijing, Sonoda & Kobayashi decided to feature Chinese IP news for the first time in the September edition of this newsletter.

Now two months later, we were able to confirm that there is sufficient interest among our readers for this type of news. From now on, along with the usual news from the JPO and the latest IP news from Japan, this newsletter will feature some news from China's patent authority CNIPA and brief articles on what is happening in China's IP landscape.

We thank you for your continued interest in our firm and hope that we can continue to bring you important and interesting news from the world of intellectual property.

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**- JPO and CNIPO News -**

**1. Opinions on the JPO's examination quality: 2021 survey results announced**

Every year, the JPO conducts user evaluation surveys on the quality of examinations. This survey is based on the recognition that it is essential to properly understand the needs and expectations of users (applicants, third parties enforcing rights, etc.) regarding examinations. Through this understanding, the JPO hopes to realize the highest quality examinations.

On the 20th of October 2021, the JPO announced the results of the survey it conducted in 2021. The survey was conducted from May to June 2021, and the response rate was more than 80% (640 out of 737 survey targets).

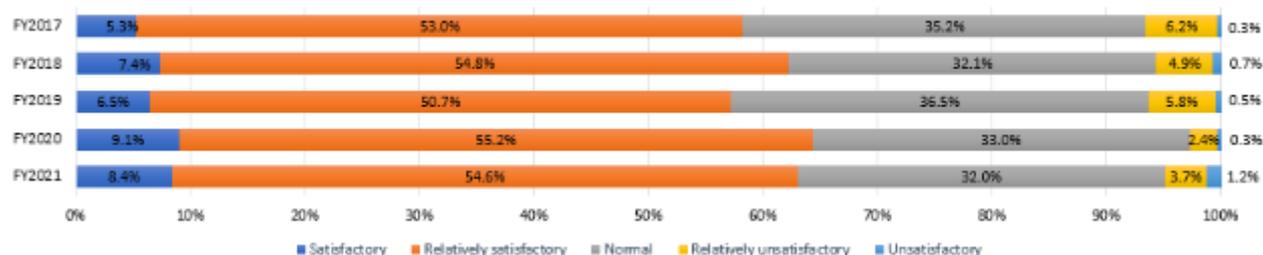
**Survey results for patent examination**

As for the overall evaluation of the quality of patent examination for domestic applications, 95.1% of the respondents rated the quality as "normal" or higher, and 63.0% rated the quality as "high" (i.e., "satisfactory" or "relatively satisfactory").

As for the overall evaluation of the quality of international search in PCT applications, 97.4% of the respondents rated the quality as "Normal" or higher, and 62.7% rated it as "High".

This year's responses are shown against those of the past year in the figure below:

## Patents



Looking at the free-response column, there were many comments expecting improvement in "communication with examiners during interviews, telephone calls, etc.". In relation to this, in April 2021, the JPO expanded the web conference service that can be used for interview examinations and improved the means for examiners to contact users by phone during telework.

As a result of the analysis, the JPO decided to prioritize "homogeneity of judgments," "homogeneity of judgments under Article 29(2) (inventive step)," and "homogeneity of judgments in international searches, etc." as items to be addressed.

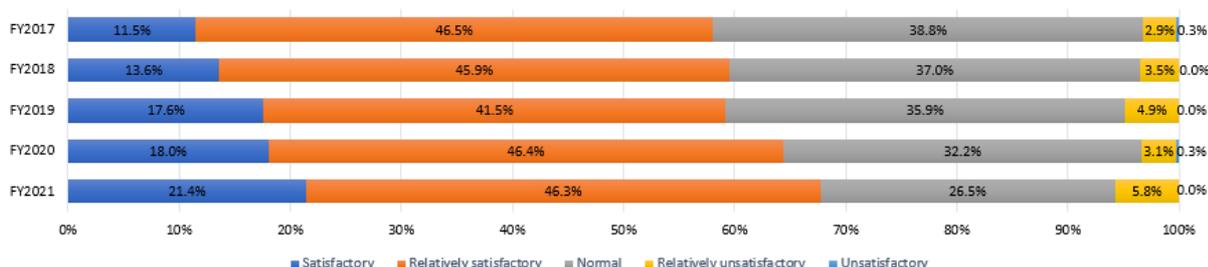
### Survey results for design examination

Regarding the overall quality of design examination, 94.2% of respondents rated the overall quality of design examination as "normal" or higher (down 2.3 percentage points the previous year), and 67.7% rated it as "high" (up 3.3 percentage points from the previous year).

As for the individual items related to the quality of design examination in general, the top rating for "communication with examiners through interviews, telephone calls, etc." was 77.9% (up 5.2% from the previous year). The results of this year's survey show that "homogeneity of judgment" and "description of reasons for refusal" were positively evaluated at 51.4% (up 1.0 percentage points from the previous year) and 66.9% (up 7.2 percentage points from the previous year) respectively.

This year's responses are shown against those of the past year in the table below:

## Designs

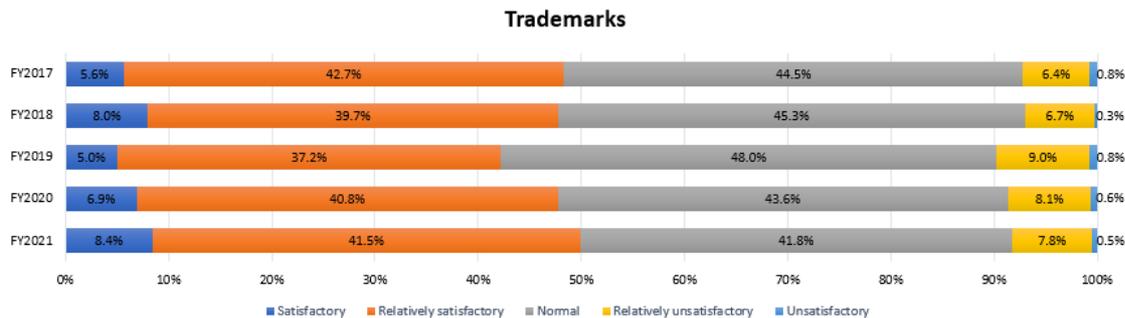


Based on the results of this year's survey, the JPO decided to strive to improve the homogeneity of judgments among examiners through discussions of cases, etc., and to improve the level of expertise through participation in online exhibitions, etc.

### Survey results for trademark examination

Finally, for the result of the trademark examination, 91.7% of the users rated the overall quality as "Normal" or higher (3 or higher on a 5-point scale), and 49.9% rated as a positive rating (4 or higher on a 5-point scale).

This year's responses are shown against those of the past year in the table below:



Looking at the free-response column, many comments were received regarding "communication with examiners on the phone, in interviews, etc.". In relation to this, in April 2021, the JPO improved the means for examiners to contact users by phone during telework and expanded the web conference service available for online interviews.

As a result of the analysis, the JPO has set "Determination of distinctiveness," "Homogeneity among examiners," and "Homogeneity with trial decisions" as priority items to be addressed.

For more information, please click [here](#) (in Japanese).

## 2. How are software-related inventions treated in the EU and Japan? The JPO published an updated version of its 2018 comparative study

On the 12<sup>th</sup> of November, the JPO published an updated version of its earlier 2018 "Comparative Study on Computer Implemented/Software Related Inventions".

This report, prepared jointly by the JPO and EPO, reveals differences and similarities between the examination practices of both offices on software-related inventions.

The updated 2021 version adds some new information to the past report.

1) A new section was added comparing "Sufficiency of Disclosure/Enforceability Requirements".

Through the examination of new cases, it was confirmed that the results of the JPO and EPO decisions are similar, while the criteria used for their judgment are different.

Moreover, for the EPO it is possible to reject the mere automation of non-technical matters (such as business methods) for a lack of inventive step, without first judging the sufficiency of disclosure.

2) A number of new cases were added to the already existing section on inventive step. These cases focus on AI-related inventions in particular.

By looking at these cases, it was found that there are differences in assessing inventive step for AI-related approaches. In particular, the EPO divides claimed inventions into technical and non-technical features and can deny inventive step in case the points of difference to the prior art are based on non-technical features. The JPO on the other hand does not divide claimed inventions in such a way and in principle considers all items in the claimed invention in determining the inventive step.

Further information on the news, please click [here](#) (in Japanese) and on the comparative report (in English) can be found [here](#).

### 3. Trends at the JPO for applications on newly eligible designs

On the 8<sup>th</sup> of October 2021, the JPO published a short news item on the recent trends in design applications. In particular, it reported on the popularity of new objects that are now eligible for protection under Japan's design law.

Since the 1<sup>st</sup> of April 2020, a partial revision of Japan's design law came into effect. This revision brought with it several changes, such as the possibility to register a design for images, buildings and interiors. Moreover, the system on related design was also broadened, among other things allowing applications for related designs to be filed 10 years after filing of the first design (instead of the previous 1 year).

These and other changes have been outlined by Sonoda & Kobayashi's Harumi Kokaji in the spring of 2020. You can find our past article [here](#).

Now, about 1.5 years later, the JPO reports how many applications it has received and granted for these new types of designs (images, buildings and interiors). The data from April 1<sup>st</sup> 2020 until November 1<sup>st</sup> 2021 is summarized in the table below:

Table 1: Number of applications and registrations of objects newly protect by the design law.

	Image	Building	Interior
Number of design applications	1707	563	360
Number of designs registered	605	263	105

Data retrieved from JPO [https://www.jpo.go.jp/system/design/gaiyo/seidogaiyo/document/isyou\\_kaisei\\_2019/shutsugan-jokyo.pdf](https://www.jpo.go.jp/system/design/gaiyo/seidogaiyo/document/isyou_kaisei_2019/shutsugan-jokyo.pdf)

Note that the number of design applications does include those applications that are still under examination. Therefore, this table does not display an accurate registration rate.

As for the related designs, the following data is available from April 1<sup>st</sup> 2020 until November 1<sup>st</sup> 2021.

Table 2: Number of related design applications since the revision of the design law came into effect

Number of Related design applications filed before publication of the original design	4949
Number of Related design applications filed after publication of the original design	1307

Data retrieved from JPO [https://www.jpo.go.jp/system/design/gaiyo/seidogaiyo/document/isyou\\_kaisei\\_2019/shutsugan-jokyo.pdf](https://www.jpo.go.jp/system/design/gaiyo/seidogaiyo/document/isyou_kaisei_2019/shutsugan-jokyo.pdf)

Given that previously, related designs could not be filed after the publication of the original design, the 1307 applications in the table above can be attributed to the changes in the design law.

For more information, please click [here](#) (in Japanese).

### 4. CNIPA published draft measures for the Establishment of a Permanent Representative Office in China by Foreign Patent agencies

On October 26, 2021, CNIPA issued its draft Measures for Administration, which aimed to allow foreign patent agencies to establish permanent representative offices in China. It includes four chapters:

- 1) "General Provisions"
- 2) "Conditions and Procedures for Permission to Establish Representative Offices"
- 3) "Administration of Representative Offices"
- 4) "Supplementary Provisions"

According to these Measures for Administration, foreign patent agencies and foreign law firms with relevant qualifications may apply for permanent representative offices in China.

Furthermore, Article 8 of Chapter II stipulates "Requirements on the qualifications of foreign patent agencies". In particular, foreign patent agencies shall have substantially carried out patent agency business for more than 5 years and have more than 10 patent attorneys in their home country. Also, the chief representative of the representative office shall have practiced patent agency for not less than 2 years.

Important is Article 16 of Chapter II, which stipulates the following "Business activities which the representative Offices can engage in":

- 1) Provide parties concerned with consultation on patent affairs in the jurisdictions where the foreign patent agency has been approved to engage in patent business.
- 2) Accept work from parties concerned or the Chinese patent agencies to handle patent affairs in jurisdictions where the foreign patent agency has been approved to engage in patent business.
- 3) Receive work from the parties concerned or Chinese patent agencies to provide consulting services for overseas investment, overseas early warning, overseas rights protection and other patent-related affairs of Chinese enterprises;
- 4) On behalf of foreign parties concerned, entrust Chinese patent agencies to handle Chinese patent affairs.

It should be noted that the representative office shall carry out business activities according to law and shall not engage in Chinese patent affairs such as acting as an agent for patent applications and invalidation of patent rights, as well as Chinese legal affairs.

It is expected that these draft measures will be finalized in the near future and published soon after.

For more information, please click [here](#) (in Chinese).

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## - Latest IP News in Japan -

### **1. Toyota and Baosteel sued by Nippon Steel for patent infringement**

*Japan Times, 14 October 2021*

*Reuters, 21 October 2021*

The Japan Times reported on the 14<sup>th</sup> of October about a lawsuit filed by Japanese steel-maker Nippon Steel against Baosteel and Toyota.

Nippon Steel is accusing Toyota and Chinese steel-maker Baoshan Iron & Steel (Baosteel) of patent

infringement of a patent for an important steel product used in electric vehicles (EVs).

The Japanese steelmaker is seeking damages equal to 20 billion yen (about 176 million USD) from each of the two companies. Moreover, Nippon Steel has asked the court to make Toyota stop the sale of EVs that contains motors using steel sheets allegedly made by infringing its patent.

This type of legal action is rare in Japan where big companies usually do not engage in legal battles with their business partners. According to Nippon Steel, the company had tried to discuss the matter with both companies, but it was not possible to reach an agreement.

Toyota on the other hand says that when it chose to sign a contract with Baosteel, it had confirmed that there was no patent violation. It said it had learned about the lawsuit with great regret and believes that such matters should be discussed between material manufacturers.

The Reuters article from October 21 elaborates on the issue with more details and further background.

The claim by Nippon Steel is that its patents for non-oriented steel are being infringed upon in terms of composition, thickness, crystal grain diameter and magnetic properties of the steel.

In general steelmakers in Japan are more focused on advanced niche markets, such as these specialized components, which has enabled them to maintain an advantage over larger Chinese competitors. For Nippon Steel, then, keeping this edge is of crucial importance, and it may therefore have more to lose than Toyota. The large car manufacturer after all is unlikely to be really affected by the damages and could always opt to buy more from overseas competitors of Nippon Steel to avoid disruptions to its supply chain. The biggest concern for Toyota would be if the court prevented it from using Baosteel's steel, as it would hamper its ability to increase the production of electric vehicles.

Despite this lawsuit, Reuters reports that UBS analyst Harunobu Goroh does not see a fundamental impact on the relationship between Nippon Steel and Toyota, who will remain strategic partners.

For more information, please click here for [article 1](#) and [article 2](#).

## **2. Secret patents are part of the Japanese Government's proposed bill on economic security**

*The Japan News, 15 November 2021*

*Asia Nikkei, 13 October 2021*

The Japan News reported on the 15<sup>th</sup> of November that Japan's government plans to submit a new economic security bill to the Diet, Japan's parliament, in 2022. The proposal will be put forward in a context of the US and China battling for technological and economic supremacy. The future bill would be aimed at promoting domestic development systems for economic security and contains important information on patents.

The bill would consist of the following 4 pillars:

- Making supply chains more resilient
- Maintaining the functionality of key infrastructure
- Protecting patents
- Bolstering the country's technology base.

With regard to patents, the bill proposes to introduce so-called secret patents.

Under the current system, patent applications are made public after 18 months. However, the government would now consider to not reveal the contents of some applications to prevent outflow of technologies that can be used in the development of future weapon systems.

In an interview in Nikkei Asia earlier in October 2021, a high-ranking politician from Japan's ruling Liberal Democratic Party (LDP), secretary-general Akira Amari already pushed for such types of secret patents.

He stated that in other countries, the public release of applications involving technologies with potential military uses for example can be blocked to keep them hidden from foreign countries or terrorist groups. Mr. Amari also suggested that in certain cases, authorities should provide compensation for companies whose patents are kept secret, so as to offset foregone licensing revenue.

Now, the article in The Japan News stated that the government's proposal would also include such a mechanism to pay compensation to patent applicants in question.

The other provisions in the proposal focus on matters such as providing subsidies for the construction of domestic factories for products such as semiconductors, prescreening of critical equipment in the telecom, energy and financial sectors, and boosting R&D for advanced technologies such as artificial intelligence.

For more information, please click here for [article 1](#) and [article 2](#).

### **3. Using trademarked mascot of the Tokyo Metropolitan Police leads to arrest of man fabricating business cards**

*Asahi Shimbun, 17 November 2021*

The Asahi Shimbun published an article on the 17<sup>th</sup> of November about a man who was arrested on suspicion of violating the trademark law.

According to the police, the man is suspected of possessing and trying to sell 26 fake business cards for 5 people featuring a design similar to "Pipo-kun", the mascot of the Tokyo Metropolitan Police department. These 5 people had a history of employment at the police department.

The suspect denied the charge saying "I did not know that Pipo-kun was registered as a trademark".

The suspect was running a site that sells goods related to Japanese gangster groups. When the prefectural police were searching for related parties in August, they found data on multiple business cards featuring "Pipo-kun" on a computer. Moreover, they found 224 business cards for 49 people using titles such as Saitama Prefectural Police or Fukushima Prefectural Police.

Each business card is said to have been sold at 1000 JPY. No case of misuse of the cards have been reported.

For more information, please click [here](#) (in Japanese).

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## **- Latest IP News in China -**

### **1. OPPO and SHARP end global patent litigation battle and sign a licensing agreement**

*Zhichanli, 14 October 2021*

On October 8, 2021, Guangdong Oppo Mobile Communication from China and Sharp Corporation

from Japan announced that they reached a patent cross-licensing agreement, marking the end of a nearly 2-year long series of patent litigation battles spanning multiple jurisdictions across the globe.

The series of court cases started on January 30<sup>th</sup> 2020, when Sharp filed an infringement suit against Oppo at the Tokyo District Court. It accused Oppo of infringing on its WLAN patents related to cellphone communication. Oppo, which had already established a strong foothold in the Japanese cellphone market at the time, responded by itself filing a lawsuit against Sharp in Tokyo, as well as another one in Shenzhen, China.

Later in March and April 2020, more lawsuits from Sharp against Oppo followed across Asia and Europe.

The legal battles have now ended with a cooperation agreement between both parties.

According to the IPHOUSE database, as of September 2021, Oppo has applied for more than 80,000 patents worldwide and nearly 40,000 invention and utility model patents in China, of which invention patents account for more than 87%.

In 2020, Oppo ranked second among enterprise patentees in China with 3585 invention patents, second only to Huawei. In the last 3 years, Oppo has ranked among the top three.

For more information, please click [here](#) (in Chinese).

## **2. Beijing Miantian Textile sued Japan's Muji brand operator Ryohin Keikaku and won RMB 400,000**

*Caijing, 4 November 2021*

*The Japan News, 6 November 2021*

On the 4<sup>th</sup> of November, Chinese news website Caijing reported on a commercial defamation court case between Beijing Miantian Textile, owner of the trademark "Muji" in China, and Japan's Ryohin Keikaku, the operator of the "Muji" brand in Japan.

The plaintiff, Beijing Miantian Textile sued Ryohin Keikaku for fabricating and disseminated false information about Beijing Miantian Textile's "squatting" of its "MUJI" trademark. It claimed that the false information had caused the public to misidentify Miantian Textile's products, such as towels and quilts, as "MUJI" counterfeit goods, thereby causing losses to Beijing Miantian Textile.

The final verdict was that the defendant, Ryohin Keikaku has to compensate the plaintiff, Beijing Miantian Textile for economic losses as well as for the expenses for stopping infringement. The total amount of compensation to be paid is 400,000 yuan (about 62,600 USD).

For more information, please click [here](#) (in Chinese) and [here](#).

## **3. Beijing Intellectual Property Court Accepts China's First Drug Patent Linkage Litigation Case**

*Beijing Intellectual Property Court, 11 November 2021*

On the 11th of November 2021, the Beijing Intellectual Property Court reported that it had accepted its first drug patent linkage litigation case after the implementation of the patent linkage system in June of this year.

Japan's Chugai Pharmaceutical is the plaintiff of this case, claiming that it is the holder of the marketing license and patentee for patent CN2005800098776A, titled "ED-71 Preparation". This patent is crucial to its drug "Eldecalcitol Soft Capsule". The company is suing China's Wenzhou Haihe

Pharmaceutical that had applied to China's National Medical Products Administration (NMPA) for a generic drug approval application identically named "Eldecalsitol Soft Capsule".

Therefore, Chugai Pharmaceutical has now filed a drug patent linkage lawsuit with the Beijing Intellectual Property Court in accordance with Article 76 of the newly amended Patent Law. It requested the court to confirm that the generic drug "Eldecalsitol Soft Capsule" that Wenzhou Haihe Pharmaceutical applied for fell within the scope of the rights of Chugai's patent.

In response to Chugai's request, the Beijing Intellectual Property Court found that Chugai's lawsuit complied with the requirements of lawsuit conditions for drug patent linkage and accepted the case. At present, the case is under trial.

For more information, please click [here](#) (in Chinese).

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## - IP Law Updates in Japan : Insights from Sonoda & Kobayashi -

### 1. Patent validity: Where and when to fight your patent validity disputes in Japan

Invalidating an opponent's patent can be a complex matter.

Like in most other jurisdictions, Japan offers various legal options for those engaged in disputes over patent validity. However, where and when to best fight your patent dispute remains a difficult question.

This article aims to give the reader a short overview of the legal means available, so as to help you find the optimal course of action.

#### Four legal avenues for challenging patent validity

In Japan, there are 4 principal routes or proceedings you can take to dispute the validity of a patent of another party. Each one comes with its own set of rules and conditions, and consequently has its own advantages and disadvantages. These are the 4 proceedings where patent validity may be disputed:

1. Opposition
2. Nullity action
3. Infringement lawsuit
4. Lawsuit for Declaratory Judgment of Non-Infringement

A distinction of note between these four is that numbers 1 and 2 (opposition and nullity action) are proceedings carried out before JPO Appeals Boards. This means that the people working on 1 and 2 are patent examiners with the relevant scientific education and background.

On the other hand, numbers 3 and 4 (infringement lawsuits and declaratory judgments) are proceedings carried out before a court. In the first instance, this means that Japanese district courts will be hearing the case. By and large, the judges at the district courts do not have a relevant scientific education or background for most patent cases.

In the next two sections, this article will discuss the proceedings in pairs, based on whether the procedure is done with the JPO or the District court.

## **Patent validity proceedings with the JPO: Oppositions and Nullity Actions**

As mentioned above, proceedings at the JPO are divided into oppositions and nullity actions. For a period of time between 2004 and 2015, only nullity actions existed in Japan. However, oppositions have since been brought back and are now an important tool when trying to invalidate a patent.

Oppositions are the more 'passive' of the two in the sense that once the opposition has been filed, there is limited opportunity for the opponent to make further written arguments; a style sometimes likened to the regular patent prosecution process.

Timing is important for opposition proceedings. If you find that a competitor's recently granted patent infringes upon yours, you can start an opposition procedure within 6 months from the publication of the competitor's patent.

The procedure has no public, in-person hearings and is purely conducted on paper.

In principle, what is required are your arguments why the patent should not have been granted.

You are not required to file the opposition in your company's name and using a 'strawman' to hide your identity is allowed.

On average the full procedure is completed within 7 months from start to finish. The main reason for this speed is that there is no back-and-forth exchange between you and your opponent.

The procedure is also relatively inexpensive, with professional fees usually ranging between five hundred thousand and two million Japanese Yen.

Generally, a little over a thousand oppositions are filed in Japan each year.

That said, oppositions do fail quite often: in the past years only 10% - 15% of oppositions were (partially) successful.

Nullity actions are more adversarial in nature compared to oppositions. In some way, they superficially resemble a court case as there are several rounds of written submissions as well as an oral hearing. Keep in mind that nullity actions are still handled by the JPO, or more specifically by their Boards of Appeal.

Nullity actions can be started at any point during the lifespan of the potential infringer's patent, and even after that, by an interested party. This is a party that competes in the same business.

Despite the format changes, nullity actions are usually still quite quick: they take some 10 to 11 months on average to complete.

Costs are higher and have a rather wide range. Between two million JPY and ten million Japanese Yen is to be expected in professional attorney fees.

Well over a hundred nullity actions are filed each year, a number that has come down since oppositions were reintroduced in Japan in 2015. Their success rate is somewhat higher, hovering at about 20% or more over the past years.

The essence of both the opposition and the nullity action is to invalidate a patent and create room for your company to operate. Relatively speaking, the procedures are fast and not very expensive. You will deal with the JPO and its examiners, who have highly specialized knowledge. Success rates are not very high however, and it is recommended that you provide detailed arguments.

## **Patent validity proceedings at the district courts: Infringement suits and declaratory judgments**

Litigating at a court can be another means to dispute the validity of patents. The procedures can be quite different from those at the JPO, so the remainder of the text will highlight the most important aspects.

An infringement suit against a patent can be started any time after a patent's grant. In fact, you could even file or be faced with a lawsuit after a patent has already expired, because Japanese law allows you to ask for damages over a period of max. 10 years from the suit. Therefore, theoretically lawsuits can be filed about 10 years after a patent has expired. That said, once a company finds out about infringement it only has 3 years to take action against an infringer. The above 10 year period would then only apply if the company finds out about the infringement well after the patent has expired.

If you happened to make your way to the Japanese district court (the Tokyo district court for cases in East Japan, and the Osaka district court for cases in West Japan), you would need to prove that you do in fact hold a patent or are a licensor of one.

Oppositions can be filed by any party, but infringement suits are reserved for rights holders only.

The opportunity to claim the invalidity of a patent comes during the court case as a defendant. In this position, you may want to consider raising the invalidity of your opponent's patent to help your case. This so-called invalidity defense happens in about 70% of court cases in Japan. Historical data indicates that for cases in which the invalidity defense is raised, the defense succeeds in slightly less than 50% of the time. While a successful defense on this basis technically does not invalidate the patent, it precludes a plaintiff from enforcing their patent right against the defendant.

The 50% figure may seem high in comparison with nullity actions or oppositions, however it is important to note that about 1/3 of lawsuits in Japan are settled, and these settlements are often in favor of the plaintiff, not the defendant. For this reason, waiting for an infringement suit to make an invalidity defense is not necessarily better than filing a nullity action.

Those going through infringement suits at court should be prepared for a lengthy procedure however, as most courts take 14 months to reach a judgement. The costs are naturally also quite a bit higher and can vary a lot. You may expect to pay between ten million and thirty million Japanese Yen in professional and official fees. About 150 new infringement lawsuits are started each year in Japan.

Finally, there is a fourth, and rather uncommonly used, option that you could use to assert the invalidity of a patent. This is starting a lawsuit for a Declaratory Judgment of Non-Infringement. This is a reaction to having received a warning letter threatening an infringement lawsuit. It involves that you as an alleged infringer, going to court and asking the judge for confirmation that you are not liable for infringement of the patent.

Though it is rarely used in practice, available statistics from 2014 to 2020, show that such declaratory judgments were upheld in 13 cases and dismissed in only 1 case.

Relatively speaking this type of lawsuit is swift and inexpensive. However, there is a possibility that an infringement lawsuit is still filed in tandem.

## **Summing up**

Which is the best way to claim the invalidity of a patent? The short answer is that this will depend on what is important to you. Oppositions are swift and relatively inexpensive, lawsuits are slower and can cost a lot of money and are initiated by the patent holder. Nullity actions in the meantime are somewhere in between. Above all, the strength of your legal arguments is of utmost importance. At Sonoda & Kobayashi, we are happy to help you defend your patent rights in Japan.

SONODA & KOBAYASHI is a law firm offering dependable legal services for intellectual property. Our multinational team of about 90 experts in technology, law, languages and international communication has served companies worldwide and gained a reputation for thoroughness and reliability.

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