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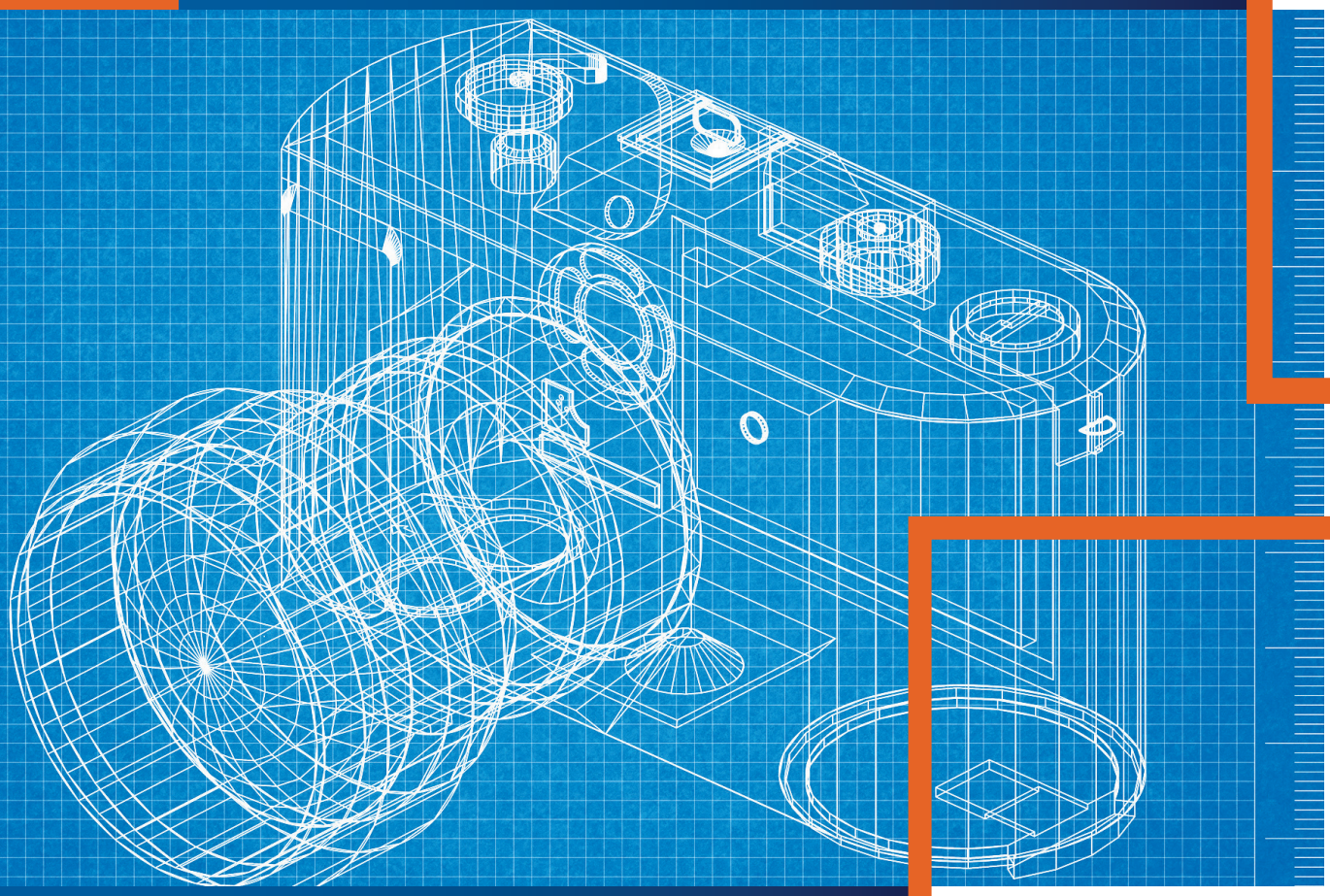

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1 Patent Enforcement

1.1 Before what tribunals can a patent be enforced against an infringer? Is there a choice between tribunals and what would influence a claimant's choice?

A patent can be enforced against an infringer before certain courts. Only two courts, Tokyo District Court and Osaka District Court, have the jurisdiction of first instance to handle patent infringement cases. When filing a patent infringement action, the choice of court depends mainly on (i) the place the defendant resides, and (ii) the place where the act of patent infringement took place. If both courts are available, the patent owner can choose as he/she likes.

1.2 Can the parties be required to undertake alternative dispute resolution before commencing court proceedings? Is mediation or arbitration a commonly used alternative to court proceedings?

No, the parties are not required to undertake alternative dispute resolution before commencing court proceedings. Neither mediation nor arbitration is a commonly used alternative to court proceedings.

1.3 Who is permitted to represent parties to a patent dispute in court?

Lawyers can represent parties to a patent dispute in court. In addition, patent attorneys (*benrishi*), who are qualified as agents in the course of patent prosecution, can also represent parties to a patent dispute in court if they have passed an examination for the qualification of representation in infringement actions and a supplementary note therefor is made in the patent attorney register. Patent attorneys (*benrishi*) do not need to be qualified as lawyers.

1.4 What has to be done to commence proceedings, what court fees have to be paid and how long does it generally take for proceedings to reach trial from commencement?

A complaint has to be filed with the court by paper media. The court fees depend on the amount of the claims. For example, for a claim totalling JPY 100 million, the court fee for the first instance is JPY 320,000. The average length of intellectual property litigation before district courts in the first instance (from the filing of the complaint through the rendition of the first-instance judgment) is 14.5 months (FY2024). This is the average length of all intellectual property cases, and the average length of patent cases is not published. Patent cases tend to take longer compared to other intellectual property cases, and it takes 18–24 months on average. There is no distinction between pre-trial and trial.

1.5 Can a party be compelled to disclose relevant documents or materials to its adversary either before or after commencing proceedings, and if so, how?

In general, each party is required to submit evidence to support its arguments on its own. However, after commencing proceedings, a party can request the court to order the other party to submit certain documents to the court. The court considers whether the documents are relevant to the facts to be proved and are necessary to prove the relevant facts. If the party ordered by the court does not submit the documents in accordance with the order, the court can deem the facts to be proved by the documents as true at its own discretion. Before commencing proceedings, if a party who intends to file an action has provided advance notice to the other party, each party can request the court to commission the other party to send certain documents to the court. However, even if the party who has received the instruction from the court does not send the requested documents to the court, there is no sanction.

1.6 What are the steps each party must take pre-trial? Is any technical evidence produced, and if so, how?

Each party prepares and submits briefs to state its own arguments and submits evidence to support its own arguments from time to time. If a party considers that technical evidence is necessary and useful, the party may produce technical evidence, such as experimental reports and technical expert reports.

1.7 How are arguments and evidence presented at the trial? Can a party change its pleaded arguments before and/or at trial?

See the answer to question 1.6. There is no distinction between pre-trial and trial. A party is required to submit its arguments and evidence in a timely manner, so a change in its arguments

in a later stage can be a violation of that requirement and may be disregarded by the court.

1.8 How long does the trial generally last and how long is it before a judgment is made available?

The first hearing is held around six weeks after the filing of a complaint. The following hearings are held around once every two months. The parties are expected to submit briefs and evidence before the hearings. At the hearings, the court asks the parties questions in relation to the briefs and evidence submitted before the hearings, if any, and asks the parties how they want to proceed (whether they want to rebut the other party's arguments or to submit further evidence). A hearing generally lasts around 15 minutes. With respect to the period from the filing of the complaint through the rendition of the first-instance judgment, see the answer to question 1.4.

1.9 Is there any alternative shorter, flexible or streamlined procedure available? If so, what are the criteria for eligibility and what is the impact on procedure and overall timing to trial?

A patent owner may file a request for preliminary injunction against an infringer. A request for preliminary injunction is theoretically available when it is necessary to avoid any substantial loss or imminent danger. When a patent owner files a request for preliminary injunction on the ground that an alleged infringer is infringing the patent, the court usually finds the necessity to avoid any substantial loss or imminent danger. A patent owner needs to show *prima facie* evidence that the alleged infringer infringes the patent or is likely to infringe the patent. This means that the burden of proof in a preliminary injunction action is lower than in a regular litigation case in theory, but there is no material difference between the two proceedings in practice. Also, the period from the filing of a request for preliminary injunction to the rendition of the decision is almost the same as the period from the filing of a complaint to the rendition of a judgment in regular litigation where only injunction is sought.

1.10 Are judgments made available to the public? If not as a matter of course, can third parties request copies of the judgment?

Judgments can be viewed by the public, except for the portions with respect to which the court has issued a viewing restriction decision to protect privacy or trade secrets. Only interested parties can request copies of the judgment, subject to a viewing restriction decision as well. Further, most of the judgments for patent infringement actions, subject to a viewing restriction decision as well, are uploaded on the court's website and any person has access to them.

1.11 Are courts obliged to follow precedents from previous similar cases as a matter of binding or persuasive authority? Are decisions of any other jurisdictions considered persuasive?

Courts are legally bound by the decision of the upper court in the same case. Further, it is generally understood that the precedents of the Supreme Court has *de facto* binding effect on lower courts, i.e. the courts other than the Supreme Court. This means that lower courts should fully respect the precedents of the Supreme Court. This is because lower courts should make the decisions that the Supreme Court would make, and it is usually reasonable to predict that the Supreme Court will follow its precedents. The precedents of other courts, including those of High Courts, do not have such effect. Courts may refer to decisions of other jurisdictions, but they follow such decisions only when they think they are persuasive based on the reasoning of the decisions.

1.12 Are there specialist judges or hearing officers, and if so, do they have a technical background?

No, there is no special qualification to be a judge handling patent cases. There are judicial research officers who have a technical background and act as technical assistants in patent cases. They work full-time at courts. Most of them are seconded by the Japan Patent Office ("JPO") and the others are former patent attorneys (*benrishi*).

1.13 What interest must a party have to bring (i) infringement, (ii) revocation, and (iii) declaratory proceedings?

There is no special requirement on interests to bring infringement actions. When a patent owner brings an infringement action against a party who the patent owner thinks infringes the patent, the patent owner has an interest to bring the action. A revocation proceeding (an invalidation proceeding) can only be brought by interested parties, such as a party who has received a cease-and-desist letter from a patent owner. A declaratory proceeding can be brought when obtaining a declaratory judgment is necessary and reasonable in order to eliminate risks or uncertainties that could destabilise the rights or legal status of the plaintiff.

1.14 If declarations are available, can they (i) address non-infringement, and/or (ii) claim coverage over a technical standard or hypothetical activity?

A plaintiff can request a declaratory judgment that declares non-existence of (i) the claim for injunctive relief against certain acts that allegedly infringe the patents, or (ii) the obligation to pay for damages caused by the alleged patent infringement. Apart from them, a plaintiff cannot request a declaratory judgment that declares non-infringement itself. Further, no one can request courts to determine claim coverage over a technical standard or hypothetical activity without a specific act at issue.

1.15 Can a party be liable for infringement as a secondary (as opposed to primary) infringer? Can a party infringe by supplying part of, but not all of, the infringing product or process?

A party who indirectly infringes a patent can be liable for infringement. Typically, when (i) a party produces, sells, imports or offers to sell a product as part of its business, (ii) the product is used for the production of the patented product, (iii) the product is essential for the resolution of the problem that was solved by the patented invention, and (iv) the party is aware that the invention is a patented invention and that the subject product is used for the implementation of the patented invention, the act constitutes an act of indirect infringement.

1.16 Can a party be liable for infringement of a process patent by importing the product when the process is carried on outside the jurisdiction?

If the claimed invention by the process patent is an invention of "method for production of a product", importing the product produced by implementing the patented process outside Japan constitutes an infringement of a Japanese patent. If the claimed invention by the process patent is not an invention of "method for production of a product", importing a product does not constitute an infringement of a Japanese patent even when the patented process is used.

1.17 Does the scope of protection of a patent claim extend to non-literal equivalents (a) in the context of challenges to validity, and (b) in relation to infringement?

Even when a part of a patent claim does not correspond to the allegedly infringing product and the product does not literally fall within a patent claim, the scope of protection of the patent claim extends to the product if (i) the non-corresponding part is not the essential part of the patented invention, (ii) the purpose of the patented invention can be achieved by replacing this part with a part in the product and an identical function and effect can be obtained, (iii) a person skilled in the art could easily come up with the idea of such replacement at the time of the production of the product, (iv) the product is not identical to the technology in the public domain at the time of the patent application or could have been easily conceived at that time by a person skilled in the art, and (v) there were no special circumstances such as the fact that the product had been intentionally excluded from the scope of the patent claim in the course of the prosecution.

1.18 Can a defence of patent invalidity be raised, and if so, how? Are there restrictions on such a defence, e.g. where there is a pending opposition? Are the issues of validity and infringement heard in the same proceedings or are they bifurcated?

Yes, a defence of patent invalidity can be raised in a patent infringement action by making an argument in a brief. There are no restrictions on such a defence. A defence of patent invalidity can be raised regardless of a pending opposition or invalidation proceedings. In a patent infringement action, the issues of validity and infringement are heard in the same proceedings. The issues of validity can also be heard in a separate opposition or invalidation proceeding.

1.19 Is it a defence to infringement by equivalence that the equivalent would have lacked novelty or inventive step over the prior art at the priority date of the patent (the "*Formstein* defence")?

See the answer to question 1.17. When the product is identical to the technology in the public domain at the time of the patent application or could have been easily conceived at that time by a person skilled in the art, the product does not fall under the patent infringement under the doctrine of equivalence.

1.20 Other than lack of novelty and inventive step, what are the grounds for invalidity of a patent?

Other than lack of novelty and inventive step, a patent can be invalidated on the ground that the patent does not meet (i) the enablement requirement, or (ii) the support requirement. As to the enablement requirement, the specification shall have clear and sufficient description of invention so that a person skilled in the art can implement the invention, and if the specification does not have such description, the patent does not meet the enablement requirement. The fulfilment of the support requirement is determined by considering whether a person skilled in the art can understand, based on the description in the specification or in light of the common technical knowledge at the time of the filing of the patent application, that the invention recited in the claim can solve the problem that is intended to be solved by the invention.

1.21 Are infringement proceedings stayed pending resolution of validity in another court or the Patent Office?

No, they are not stayed.

1.22 What other grounds of defence can be raised in addition to non-infringement or invalidity?

One ground of defence that is sometimes raised is the prior use defence. The prior use defence is available when (i)(a) the defendant, without knowledge of the content of the invention claimed in the patent application, made an invention identical to that invention, or (b) a person, without knowledge of the content of the invention claimed in the patent application, made an invention identical to that invention and the defendant learned the invention from such person, (ii) the defendant was doing or was preparing to do the business of implementing the invention, or (iii) the current implementation is within the scope of the invention and the purpose of the business that were implemented or prepared. Another ground of defence that is sometimes raised is exhaustion. When the owner or a licensee of a patent assigned the patented product in Japan, the patent is exhausted since it has achieved its purpose and thus, the effect of the patent does not extend to the use, transfer, exportation, importation, offer of transfer of that patented product and therefore, the patent owner is not entitled to exercise the patent against that patented product, except for the situation where the patented product, transferred in Japan by the patent owner or the licensee, has been modified or its components replaced, and as a result, it can be regarded as a novel production of the patented product which is not identical to the initial patented product.

1.23 Are preliminary injunctions available on (i) an *ex parte* basis, or (ii) an *inter partes* basis? In each case, what is the basis on which they are granted and is there a requirement for a bond? Is it possible to file protective letters with the court to protect against *ex parte* injunctions?

Preliminary injunctions are available on an *inter partes* basis. As to the basis on which they are granted, see the answer to question 1.9. A bond is required before the court issues a preliminary injunction.

1.24 Are final injunctions available and what is the basis on which they are granted?

Final injunctions are available in regular litigation. When the

court determines that the patent is infringed, the court will issue a final injunction.

1.25 Is a public interest defence available to prevent the grant of injunctions where the infringed patent is for a life-saving drug or medical device?

There is no court precedent in which courts made a ruling on a public interest defence. Instead, a person who intends to implement a patented invention can file a request for an award granting a compulsory licence with the Minister of Economy, Trade and Industry when the implementation of the patented invention is particularly necessary for the public interest. If a compulsory licence is granted, the implementer can use it as a defence. Also see the answer to question 3.2. The implementer may be able to consider raising the "abuse of rights" defence, but there is no court precedent where the court determined that the exercise of a patent against a life-saving drug or medical device is an abuse of right on the ground that it goes against the public interest.

1.26 Are damages or an account of profits assessed with the issues of infringement/validity or separately? On what basis are damages or an account of profits assessed? Are punitive/flagrancy damages available?

Damages are assessed in the same proceedings as the issues of infringement/validity; however, they are assessed in a different phase. In a case where compensation of damages is sought, the court first instructs the parties to provide arguments and submit evidence on infringement/validity, and only after the court has had a preliminary view that the patent is infringed and the patent should not be invalidated, the court instructs the parties to make arguments and submit evidence on the issues of damages. In brief, a patent owner may receive compensation of damages at the amount of (i) the profit per product that the patent owner could have earned from the sale of the patent owner's products multiplied by the number of the products sold by the infringer, (ii) the profit gained by the infringer from the act of infringement, or (iii) a reasonable royalty. A patent owner can choose a calculation method that he/she prefers, or can claim the greatest amount among the amounts obtained from multiple calculation methods. Punitive/flagrancy damages are not available.

1.27 How are orders of the court enforced (whether they be for an injunction, an award of damages or for any other relief)?

An injunction is enforced by way of indirect enforcement. In order to enforce an injunction, the patent owner files a request for indirect enforcement. The court will issue a decision on indirect enforcement in which it sets an amount of sanction. The amount of sanction is typically proportionate to the time period of non-compliance with the injunction, such as a certain amount per day/month for which the defendant did not comply with the injunction. An award of damages is enforced by way of direct enforcement. The plaintiff can file a request of compulsory auction against a real property, a request for enforcement on movable properties, or a request for attachment on a receivable.

1.28 What other form of relief can be obtained for patent infringement? Would the tribunal consider granting cross-border relief?

None. Because of the territoriality of patents, courts cannot grant cross-border relief.

1.29 How common is settlement of infringement proceedings prior to trial?

During litigation, courts often welcome settlement discussions by the parties. Courts often invite the parties to participate in settlement discussions when the parties have completed the submission of arguments and evidence on infringement/validity. Among all the cases for which the judgment of the first instance was rendered or which ended by settlement, from 2015 through 2024, about 29% ended by settlement.

1.30 After what period is a claim for patent infringement time-barred?

Among claims for patent infringement, a claim for injunction is time-barred upon the expiry of the patent. A claim for compensation of damages is time-barred by, in short, the passage of three years from the incurrence of damages.

1.31 Is there a right of appeal from a first-instance judgment, and if so, is it a right to contest all aspects of the judgment?

Yes, any party who loses in the first instance has a right of appeal and the right of appeal from a first-instance judgment is a right to contest all aspects of the judgment.

1.32 What effect does an appeal have on the award of: (i) an injunction; (ii) an enquiry as to damages or an account of profits; or (iii) an order that a patent be revoked?

An appeal has the effect of preventing the judgment from becoming final and binding, regardless of the awards. Once the judgment becomes final and binding, it becomes enforceable.

1.33 Is an appeal by way of a review or a rehearing? Can new evidence be adduced on appeal?

An appeal to the judgment in a patent infringement action is considered as the continuation of the first instance. New evidence may be adduced on appeal, but the court can reject the new evidence on the ground that it is not submitted in a timely manner.

1.34 How long does it usually take for an appeal to be heard?

The average length of intellectual property litigation before the court of second instance for intellectual property infringement actions is 7.1 months (FY2024). This is the average of all intellectual property cases, and patent cases tend to take longer compared to other intellectual property cases.

1.35 How many levels of appeal are there? Is there a right to a second level of appeal? How often in practice is there a second level of appeal in patent cases?

A party who loses in the second instance may file a request to take the case to the Supreme Court as the final appellate court. If the Supreme Court thinks that the case involves material matters on the interpretation of laws or regulations, it can take the case as the final appellate court at its own discretion. The Supreme Court rendered one judgment on a patent infringement case and one judgment on a patent invalidation case in five calendar years from 2019 through 2023.

1.36 What are the typical costs of proceedings to a first-instance judgment on: (i) infringement; and (ii) validity? How much of such costs are recoverable from the losing party? What are the typical costs of an appeal and are they recoverable?

The attorneys' fees for a patent infringement action largely depend on the number of infringed patents, the number of the allegedly infringing products, the complexity of the invention and the number of reasons of invalidity. The typical attorneys' fees for a patent infringement action on infringement and validity for a first-instance judgment would be around JPY 15–25 million. The filing fee to be paid to the court depends on the amount or the value of the claim. When the amount of the claim is JPY 100 million, the filing fee to be paid to the court for the first instance is JPY 320,000. The typical attorneys' fees for patent infringement action after the judgment of the first instance through the rendition of the judgment of the second instance would be around JPY 10–20 million. The winning party can recover the filing fee from the losing party. In a patent infringement action, the patent owner can include a certain amount of attorneys' fees in the damages incurred by patent infringement. The court often awards as attorneys' fees around 10% of the awarded compensation of damages other than attorneys' fees.

2 Patent Amendment

2.1 Can a patent be amended *ex parte* after grant, and if so, how?

Yes, the patent owner can file a request for a correction trial with the JPO after the patent is granted.

2.2 Can a patent be amended in *inter partes* revocation/invalidity proceedings?

Yes, in patent invalidation proceedings, the patent owner can request the correction of the patent.

2.3 Are there any constraints upon the amendments that may be made?

The correction will be limited to one of the following: (i) narrowing of the claims; (ii) correction of errors or incorrect translations; or (iii) clarification of an ambiguous statement. The correction shall be within the scope of the matters disclosed in the initial specification. In addition, the correction shall not substantially enlarge or alter the claims. As to the timing of the correction, a request for a correction trial cannot be filed from the time an opposition or a request for an invalidation trial is filed until the decision or trial decision thereof becomes final and binding. A request for correction in opposition proceedings can be made within a certain period of time designated by the board of trial examiners when the board issues a notice of reasons for cancellation. A request for correction in invalidation proceedings can be made, in brief: (i) within a certain period of time designated by the board of trial examiners as the period for the filing of an answer; or (ii) within a certain period of time designated by the board of trial examiners (a) when the board issues a notice of reasons for invalidation, (b) when the board issues a preliminary notice of a trial decision, or (c) when the Intellectual Property High Court ("IPHC") revokes a trial decision.

3 Licensing

3.1 Are there any laws that limit the terms upon which parties may agree a patent licence?

No, there are not.

3.2 Can a patent be the subject of a compulsory licence, and if so, how are the terms settled and how common is this type of licence?

A compulsory licence is available in the following three situations: (i) if a patented invention is not sufficiently and continuously implemented for three years or longer in Japan; (ii) if a patented invention is used by another person's patented invention; or (iii) if the implementation of the patented invention is particularly necessary for the public interest. In the situation in (i) or (ii) above, a person who would like to obtain a compulsory licence must file a request for an award granting a compulsory licence with the Commissioner of the JPO. The Commissioner of the JPO will hear the opinion of the Industrial Property Council and if it issues an award granting a compulsory licence, will set the terms in the award. In the situation in (iii) above, the Minister of Economy, Trade and Industry will hear the opinion of the Industrial Property Council and if it issues an award granting a compulsory licence, will set the terms in the award. There are no statistics on compulsory licences but there have been no reports of a compulsory licence being awarded in any of the three situations above.

4 Patent Term Extension

4.1 Can the term of a patent be extended, and if so, (i) on what grounds, and (ii) for how long?

There are two types of patent term extensions. One type is a patent term extension for pharmaceutical drugs. When there is a "period during which the patented invention cannot be implemented because the marketing authorisation is necessary to implement the patented invention", the patent term extension is available. A "period during which the patented invention cannot be implemented because the marketing authorisation is necessary to implement the patented invention" is the period from the date of the beginning of the test required for the marketing authorisation or the date of the patent application, whichever is later, to the date on which the marketing authorisation becomes effective. The period of the extension shall not exceed the "period during which the patented

invention cannot be implemented because the marketing authorisation is necessary to implement the patented invention" and cannot exceed five years. Another type is a patent term extension as compensation for the curtailment of the term due to the examination of the patent application by the JPO. In order to calculate the available length of the extension, the "reference date" needs to be determined. The reference date is the date five years after the filing of the patent application or the date three years after the filing of a request for the examination of the application, whichever is later. The maximum permissible length of the extension period is calculated by extracting, in brief, the period attributed to the patent applicant and the period for the appeal proceedings and litigation from the length of the period starting from the reference date and ending on the registration date of the patent.

5 Patent Prosecution and Opposition

5.1 Are all types of subject matter patentable, and if not, what types are excluded?

If the claimed invention lacks industrial applicability, the invention is not patentable. Inventions of methods for performing surgery on humans, providing therapy to humans or diagnosing humans lack industrial applicability.

5.2 Is there a duty to the Patent Office to disclose prejudicial prior disclosures or documents? If so, what are the consequences of failure to comply with the duty?

No, there is not.

5.3 May the grant of a patent by the Patent Office be opposed by a third party, and if so, when can this be done?

An opposition can be filed by any person within six months from the issuance of the patent gazette, which is issued after the grant of the patent. A request for an invalidation trial can be filed by an interested party. A request for an invalidation trial can be filed even after the expiry of the patent.

5.4 Is there a right of appeal from a decision of the Patent Office, and if so, to whom?

If the board of examiners rendered a decision cancelling a patent in its entirety or in part in opposition proceedings, the patent owner can file a suit seeking the revocation of the cancellation decision with the IPHC against the Commissioner of the JPO. On the other hand, the party who filed the opposition does not have a right of appeal even if the board of examiners rendered a decision maintaining the patent. The losing party in invalidation proceedings can file a suit seeking the revocation of the trial decision with the IPHC against the opposing party.

5.5 How are disputes over entitlement to priority and ownership of the invention resolved?

They are resolved in the course of invalidation proceedings or infringement actions. In addition, if a patent is granted to a person who does not have the right to obtain a patent or if a patent is granted to some of the persons who jointly have the right to obtain a patent, the person who has the right to obtain a patent can file a suit seeking the transfer of the patent with a court.

5.6 Is there a "grace period" in your jurisdiction, and if so, how long is it?

Yes, there is. If (i) an invention was disclosed (a) against the will of the person who has the right to obtain a patent, or (b) due to an action by the person who has the right to obtain a patent, and (ii) that person filed a patent application within one year from such disclosure, the patent applicant can file a certificate regarding such facts and avoid losing novelty or inventive step due to such disclosure.

5.7 What is the term of a patent?

The term of a patent is 20 years from the filing date of the patent application unless the patent term is extended.

5.8 Is double patenting allowed?

No, double patenting is not permitted.

5.9 For Member States within the European Union: Can a Unitary Patent, on grant, take effect in your jurisdiction? If your Member State has not yet signed or ratified the Unified Patent Court Agreement, is it likely to do so and, if so, when?

This is not applicable to our jurisdiction.

6 Border Control Measures

6.1 Is there any mechanism for seizing or preventing the importation of infringing products, and if so, how quickly are such measures resolved?

Yes, there is. A patent owner can file an "Application for Suspension of Import/Export" with Customs to request that Customs initiate "Identification Procedures" in the case where Customs detects imported/exported goods suspected of infringing the patent. If it is determined through the "Identification Procedures" that the goods infringe the patent, Customs can confiscate and destroy the infringing goods. The "Identification Procedures" themselves take around two to three months.

7 Antitrust Law and Inequitable Conduct

7.1 Can antitrust law be deployed to prevent relief for patent infringement being granted?

Yes, if the exercise of a patent violates antitrust law, such exercise is considered to constitute an abuse of rights and is denied.

7.2 What limitations are put on patent licensing due to antitrust law?

Since there are various limitations, only a few examples are noted here. From the viewpoint of private monopolisation, when the owner of a patent to essential technology imposes an obligation to obtain a licence for any of its proprietary technology other than that subject to the patent or to purchase any product designated by the licensor without reasonable grounds when granting a licence to other business entities, it may constitute an act of controlling the business activities of the licensees or an act of excluding the business activities of other business entities. From the viewpoint of unfair trade practices, refusing to grant a licence or bringing an action for injunction against a party who is willing to obtain a licence from a FRAND-encumbered standard essential patent holder is considered to constitute unfair trade practices if it tends to impede fair competition, even if the act does not substantially restrict competition in the product market.

7.3 In cases involving standard essential patents, are technical trials on patent validity and infringement heard separately from proceedings relating to the assessment of fair, reasonable and non-discriminatory (FRAND) licences? Do courts set FRAND terms (or would they do so in principle)? Do courts grant FRAND injunctions, i.e. final injunctions against patent infringement unless and until defendants enter into a FRAND licence?

As to the first question, the answer is no. As to the second question, courts set FRAND terms in order to determine whether the exercise of a patent constitutes an abuse of rights. As to the third question, courts will grant injunctions based on standard essential patents if they find that the defendant is not willing to obtain a FRAND licence.

8 Current Developments

8.1 What have been the significant developments, including any leading cases, in patent law and practice in your jurisdiction in the last year?

On March 3, 2025, the Supreme Court rendered two judgments addressing the application of the principle of territoriality of patents to cross-border activities. In one case, the patentee of a patent covering an invention of a program titled "display device, method of displaying comments, and program" sued defendants that transmit their program from a server located in the United States to users in Japan. Article 2(3)(i) of the Patent Act of Japan sets forth the definition of "working" of an "invention of a product", and pursuant to that definition, in the case of an invention of a program, "providing through a telecommunication line" is included in "working". On July 20, 2022, the IPHC held that in the case of an invention of a program that may be transmitted via a network, "an act of transmitting a program can be considered to constitute 'providing' under the Patent Act of Japan when such transmission can be evaluated as having been performed within the territory of Japan from a substantive and overall perspective". The Supreme Court found that: the transmission was performed as a part of the information processing activities when providing the services in Japan; the transmission ensured that the effect of the patented invention was obtained at terminals located in Japan; and in relation to obtaining the effect, the fact that the location of the server is outside of the territory of Japan has no particular significance, and it could not be said that the transmission had no economic impact on the patentee; and held that the act of transmitting the program fell under "providing through a telecommunication line". In the other case, the patentee of a patent covering an invention of a system titled "comment delivery system", which is the plaintiff of the first case, sued defendants that transmit files used for the defendants' services from a server located in the United States to user terminals in Japan, which are the defendants of the first case. Pursuant to the definition of "working" set forth in Article 2(3)(i) of the Patent Act of Japan, "producing" is included in "working". On May 26, 2023, the IPHC held that even if a server, which is part of the components of a network-type system, is located outside Japan, newly producing that network-type system constitutes the act of "producing" under Article 2(3)(i) of the Patent Act of Japan, when such producing can be considered to have been performed within the territory of Japan. The Supreme Court found that making of the system by the transmission was performed as a part of the information processing when providing the services in Japan, the transmission made the system containing terminals located in Japan and ensured that the effect of the patented invention was obtained at terminals located in Japan, and in relation to obtaining the effect of the system, the fact that the location of the server is outside of the territory of Japan has no particular significance, and it could not be said that the transmission and the system made as a result had no economic impact on the patentee, and held that the act of making the system fell under "producing".

8.2 Are you looking forward to any particular developments in patent law or practice in the coming year or two and what effect might they have in your jurisdiction?

The JPO continues to discuss, even after the Supreme Court judgments referred to in the answer to question 8.1, whether to amend the Patent Act of Japan to introduce a provision to expressly state what kind of cross-border acts are covered by Japanese patent law. The JPO is also discussing whether to introduce a provision to address inventorship in inventions where artificial intelligence is used in the course of creating the inventions.

8.3 Are there any general trends in patent practice and the enforcement of patents that have become apparent in your jurisdiction over the last year or so?

In recent years, courts have tended to rule in favour of patent owners on both key issues, i.e., infringement and validity. In addition, courts have tended to award a larger amount of damages in recent years.

8.4 Are there any key issues in relation to patent law or practice that you feel are not addressed by the questions above which are worth mentioning here?

No, there are not.

Kenji Tosaki is a partner at Nagashima Ohno & Tsunematsu. His practice focuses on dispute resolution. He specialises in IP litigation and complex commercial litigation, and he also covers the area of TMT, including data protection matters.
In the area of IP litigation, he handles both IP infringement litigations and IP invalidation litigations before the IP High Court, the Supreme Court, District Courts and the Japan Patent Office. His IP expertise includes a wide variety of IP matters (patents, copyrights, trademarks, design rights, unfair competition and trade secrets) in many areas, such as telecommunications, electronics, social games and pharmaceuticals. He also provides pre-litigation counselling, including infringement/invalidity analysis.
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