

## Japanese Patent Litigation and Its Related Statistics — Current Environment and Future Agenda —

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### 1. Introduction

The globalization of corporate activities has resulted in patent disputes also being increasingly globalized. When a company files a patent infringement lawsuit, it is important to choose a venue not only from a business-based perspective taking into consideration the place of production or sale, but also from the perspective of litigation strategy to gain an upper hand in international litigation.

As of 2014, Japan had the world's

third largest Gross Domestic Product (GDP), following the U.S. and China (US dollar-based)<sup>1</sup>, and as shown in Table 1, Japan is also ranked third in the world in terms of the number of patent applications and registrations.<sup>2</sup>

Despite such a significant market size and a large number of patent applications and registrations, Japan is far behind the U.S. and China in terms of the number of patent infringement lawsuits as shown in Figure 1.

Table 1

(a) Number of Patent Applications at IP5 (JPO/USPTO/EPO/SIPO/ KIPO)

(Year)	2010	2011	2012	2013	2014
China	391,177	526,412	652,777	825,136	928,177
U.S.	490,226	503,582	542,815	571,612	578,802
Japan	344,598	342,610	342,796	328,436	325,989
South Korea	170,101	178,924	188,915	204,589	210,292
Europe	150,961	142,810	148,494	147,869	151,981

(b) Number of Patent Registrations at IP5 (JPO/USPTO/EPO/SIPO/ KIPO)

(Year)	2010	2011	2012	2013	2014
U.S.	219,614	224,505	253,155	277,835	300,678
China	135,110	172,113	217,105	207,688	233,228
Japan	222,693	238,323	274,791	277,079	227,142
South Korea	68,843	94,720	113,467	127,330	129,786
Europe	58,108	62,112	65,687	66,712	64,613

(Notes) U.S.: Utility patents only, China: Invention patents only

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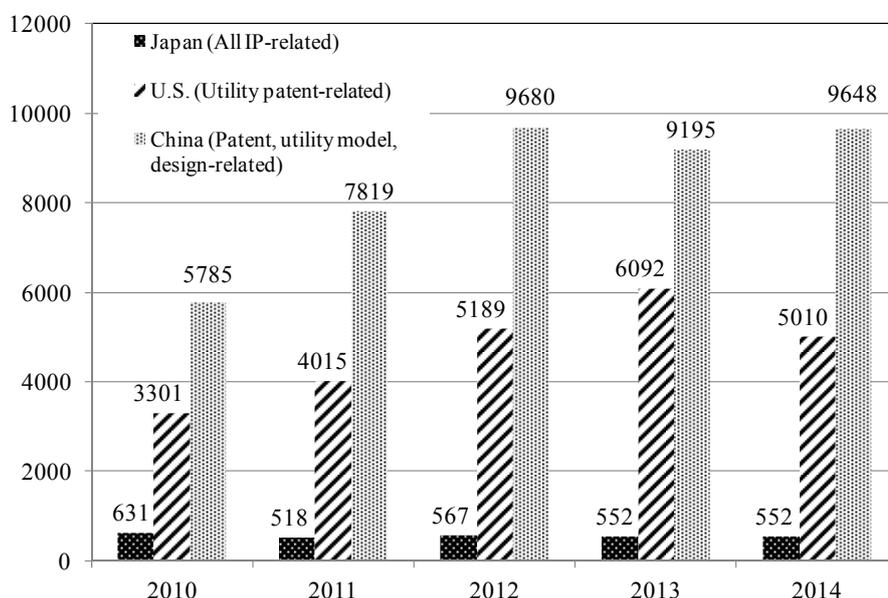
In fact, as shown in Table 2, the number of patent-related lawsuits filed with district courts in Japan<sup>3</sup> is smaller than the number of lawsuits against appeal/trial decisions made by the Japan Patent Office (JPO), which are filed with the Intellectual Property High Court<sup>4</sup>.

On the other hand, according to a report issued by the U.S. Chamber of Commerce<sup>7</sup>, the evaluation of the Japanese IP

system is higher than that of China as shown in Table 3. In terms of patent-related score, Japan is far ahead of China and is slightly behind the U.S. and European countries.

In view of the above facts, this paper analyzes, mostly from a statistical perspective, the current environment for patent litigation in Japan, together with the analysis of first instance judgments<sup>8</sup>

Figure 1: Number of IP-related Lawsuits in Japan, the U.S. and China (First Civil Instance)



(Notes) The above graph was prepared based on the sources indicated in Footnotes<sup>3, 4, 5, 6</sup>.  
Japan: The number of newly filed lawsuits related to intellectual properties in general.  
U.S.: The number of lawsuits related to utility patents only.  
China: The total number of lawsuits related to inventions, utility models and designs.

Table 2

(a) Number of Patent-related Lawsuits in Japan, including Lawsuits other than Patent Infringement

Year	2011	2012	2013
Number of Cases	207 (230)	155 (187)	164 (184)

(Notes) The numbers in parentheses indicate the number of newly filed lawsuits related to patents, utility models and designs.

(b) Number of Suits against Appeal/Trial Decisions made by the JPO

Year	2011	2012	2012	2013
Number of Cases	453	457	353	278

Table 3: IP Index in Japan, U.S., Europe, China and South Korea

	Ranking (among 38 countries)	Total score (out of 30 points)	Patent-related score (out of 7 points)
U.S.	1	28.61	6.50
U.K.	2	27.53	6.50
Germany	3	27.36	6.50
France	4	27.22	6.50
Japan	9	23.34	6.30
South Korea	10	23.32	5.85
China	22	12.64	4.10

handed down by the Tokyo District Court and the Osaka District Court in 2014, made by the author based on various reports and data published by the JPO. This paper also describes the pending issues based on the latest reports by the Intellectual Property Policy Headquarters, which was established in the Cabinet Office, and refers to a possible direction for future legal reforms.

## 2. Analysis of the reasons why the number of patent infringement lawsuits is small in Japan based on a comparison between statistics and the reality

The JPO report presenting the results of an interview survey<sup>9</sup> pointed out the following factors as the reasons why the number of patent infringement lawsuits is small in Japan.

- (1) Difficulty in obtaining an easily enforceable patent right
- (2) High risk of patentee's losing a lawsuit
- (3) Low damages
- (4) High litigation costs
- (5) Tendency of Japanese people to avoid litigation

In the following section, each factor is discussed based on specific statistical

data and find out whether these reasons reflect the reality.

### (1) Is it difficult to obtain an easily enforceable patent right? --- the grant rate of patent applications and the rate of successful requests for patent invalidation

In the past, many law practitioners had the impression that it is difficult to obtain enforceable patent rights in Japan. In fact, the grant rate was around 50% from 2002 to 2009 and 49.1% in 2005. However, since 2010, it increased by 20% when compared to 2005 and reached 69.3% in 2014. As shown in Table 4, currently, the difference of the grant rate between Japan and the U.S. is only 1.6%<sup>2</sup>.

The rise in the grant rate is partially attributable to the series of court judgments handed down from the end of 2008 to 2009 where the court put emphasis on preventing hindsight bias in the inventive step<sup>10</sup>. This attitude has become a norm and, consequently, made it easier for examiners to find an inventive step in a claimed invention.

The same tendency can be observed in a trial for patent invalidation, which is a post-grant procedure in the JPO. Table 5 indicates the sharp decline in the rate of successful requests for patent invalidation in recent years<sup>11</sup>.

Table 4: Grant Rate in Japan, U.S., Europe and South Korea

(Year)	2010	2011	2012	2013	2014
USPTO	61.2%	63.3%	68.9%	70.7%	70.9%
JPO	54.9%	60.5%	66.8%	69.8%	69.3%
KIPO	62.7%	64.5%	65.6%	68.8%	68.6%
EPO	42.5%	47.4%	49.8%	49.0%	47.6%

(Notes) Data for China are not available.

Table 5: Final decisions in trials for patent invalidation in Japan

(Year)	2010	2011	2012	2013	2014
Rate of successful requests for patent invalidation (a)/{(a)+(b)}	44.2%	39.4%	33.6%	23.6%	26.1%
(a) Requests accepted (or partially accepted)	102	91	73	43	37
(b) Requests refused (or dismissed)	129	140	144	139	105
(c) Withdrawal/Abandonment	23	28	32	29	41

These statistics show that it can no longer be said that the acquisition of an easily enforceable patent right is difficult in Japan. On the contrary, the current trend is such that once a patent is granted in Japan, it is unlikely to be invalidated. Though a new “Patent Opposition System (post-grant opposition procedure which was once abolished in 2003)” was introduced on April 1, 2015, the current trend will remain the same because there was no change in the standards for patentability.

## (2) Patentee’s risk of losing a patent infringement lawsuit --- success rate and settlement, reasons for losing

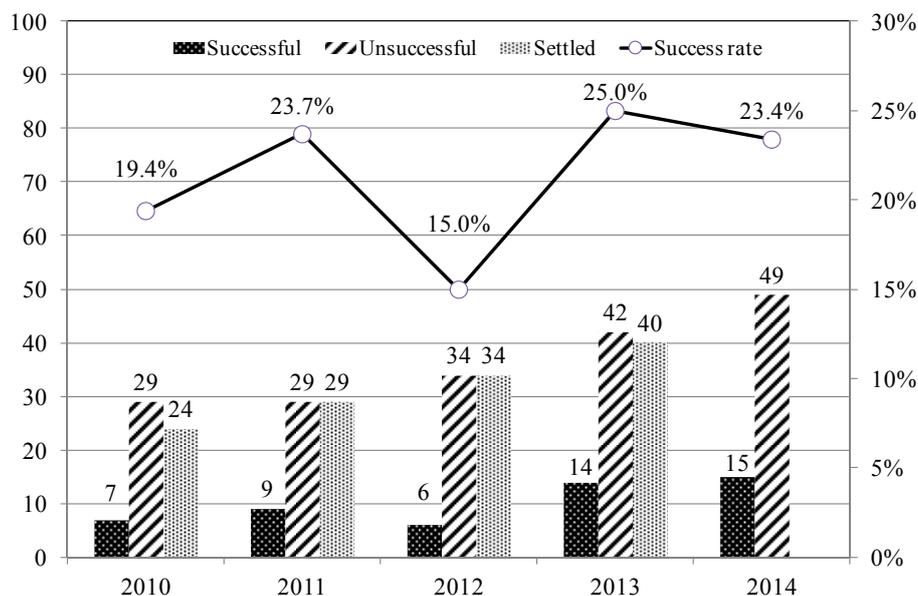
Recent papers that analyzed the decisions to choose Japan as the venue of an international patent infringement lawsuit reported that the success rate of the patentee in the first instance of a patent infringement lawsuit filed with the Tokyo District Court or the Osaka District Court was relatively low at about 20 to

30%.<sup>12,13</sup>

Figure 2 shows the statistical data up to 2014 that was presented in the report<sup>9</sup> in combination with the statistical data about subsequent court judgments and also shows the success rate of the plaintiffs who filed patent infringement lawsuits and managed to complete the judicial proceedings by the rendering of a court judgment (number of successful cases/number of court judgments). This figure shows that the success rate was below 20% in recent years and 23.4% in 2014. These statistics are consistent with the belief that it is difficult for a plaintiff (patentee) to win in Japan.

However, in Japan, many patent infringement cases are resolved through settlements. In many of such cases, a settlement can be interpreted as equivalent to winning a case from the plaintiff’s viewpoint. The patentee may view a settlement as equivalent to winning a case as long as the patentee is satisfied with the outcome. The report<sup>9</sup> analyzed data for three years from 2011 to 2013 and exam-

Figure 2: District Court Judgments in Patent Infringement Lawsuits



ined the reality of lawsuits based on the judgments and records of settlement. As a result of the analysis, it concludes that “if both judgments and settlements are taken into consideration, patent rights were successfully enforced through judicial proceedings in 98 to 108 cases (43 to 47%) out of the total of 229 cases (137 judgments and 92 settlements).”

Furthermore, the success rates are 36% in the U.S. (1995 to 2008) and 63% in the Dusseldorf District Court in Germany (2006 to 2009), and the rate in Japan is 20%, which is almost the same as the rate in the U.K. (2000 to 2008)<sup>9</sup>. If both judgments and settlements are taken into consideration as mentioned above, the rate in Japan would go beyond the rate in the U.S. Though it was not available in the report<sup>9</sup> to find any statistical data for the U.S., Germany or the U.K. that took settlements into consideration, it is not reasonable to use success rates alone to conclude that Japan is an unfavorable venue for patentees.

With respect to the success rate,

another report<sup>14</sup> categorized the plaintiffs (patentees) into three categories, *i.e.*, large companies, small and midsize companies and foreign companies, and analyzed the results of 225 infringement lawsuits concerning patent rights and utility model rights in which district courts handed down judgments during the period from 2009 to 2013. According to this analysis, the success rates differ depending on the type of companies as follows:

- Small and Midsize Companies: 19%
- Large Companies: 32%
- Foreign Companies: 20%

While lawsuits filed by small and midsize companies accounted for 60% of the total, the success rate of small and midsize companies was apparently lower than that of large companies. An analysis of the reasons why small and midsize companies lost lawsuits revealed that non-infringement accounted for 62% (in the case of large companies, non-infringement accounted for 37% of the lost lawsuits). Regarding this point, the report

stated that “small and midsize companies often lose patent infringement lawsuits due to non-infringement defense. This is attributable to the fact that small and midsize companies tend to file lawsuits based on a wrong expectation of success or fail to gather sufficient evidence to prove the occurrence of infringement.”

The success rate among foreign companies is 20% as above, which is the same as the rate of small and midsize companies. Similarly, 58% of lost lawsuits are attributable to non-infringement defense.

As mentioned above, the success rate is not the only factor that determines the satisfaction level of the plaintiff. However, the report suggests that the plaintiff, *i.e.* patentee, (especially in the case of a small or midsize company and a foreign company) is often at a disadvantage relative to the alleged infringer in terms of the capability to gather sufficient evidence, etc. to prove the infringement.

Furthermore, some people point out that the impression that a patentee’s risk of losing a lawsuit is high in Japan was formed partially because of Article 104-3 (104<sup>ter</sup>) of the Patent Act concerning patent invalidation defense. After its implementation on April 1, 2005, it became usual for the courts to rule on patent validity. For example, the aforementioned report<sup>3</sup> presents the results of an interview survey as follows:

“In the interview survey, 4% of the respondents replied that the enforcement of Article 104-3 of the Patent Act made it easier for them to enforce their rights, whereas 24% of the respondents replied that it made it more difficult for them to enforce their rights. This result indicates that the implementation of the provision has caused a power imbalance between

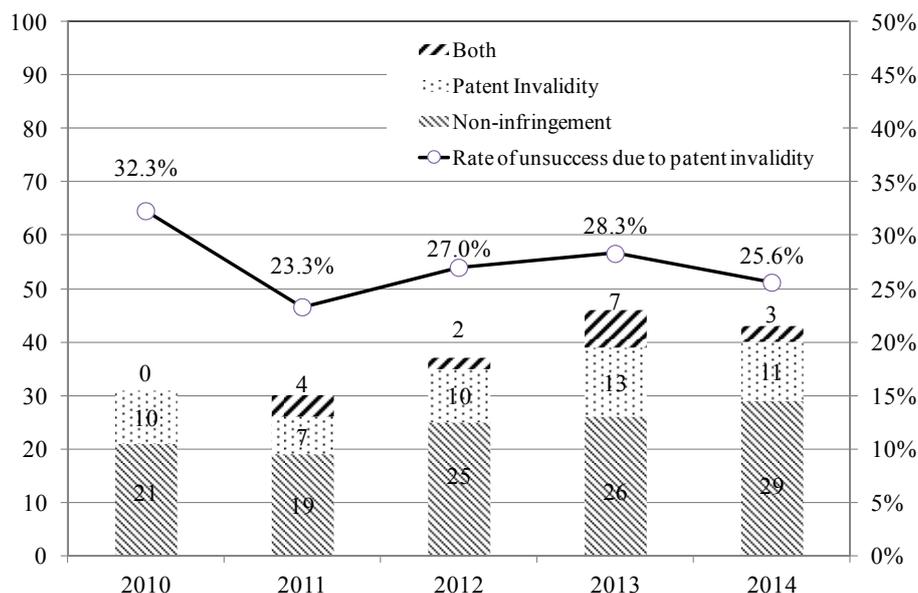
patentees and alleged infringers.”

According to the statistics<sup>9</sup>, in 2006, the year following the year in which Article 104-3 of the Patent Act was implemented, the rate of lost cases due to patent invalidation has increased from 30.4% to 54.1%, and the rate leveled off within the range of 40 to 50% until 2009. This suggests that, the provision had a large effect immediately after the implementation; however, the losing rate has been on decline since 2009, the year when the Intellectual Property High Court handed down judgments that are considered to have affected courts’ determinations on the inventive step, as mentioned in the section about the grant rate of patent applications in Japan and the rate of successful requests for patent invalidation in recent years.

More specifically, as indicated by Figure 3, if the cases in which the patentees lost lawsuits are categorized into three categories, *i.e.*, “patent invalidity,” “non-infringement,” or “both,” the ratio of the cases where the plaintiff lost lawsuits due to the patent invalidity defense decreases to around 20 to 30% during the period between 2010 and 2014. Even if the cases that fall under “both” are taken into consideration, the ratio can be calculated as 30 to 40% during the period from 2010 to 2014, which is lower than 50 to 60% during the period between 2006 and 2009.

On the other hand, according to other statistics compiled by the Secretariat of Intellectual Property Strategy Headquarters, Cabinet Secretariat<sup>15</sup>, in other countries, the patent invalidation rates in patent infringement lawsuits and in trials for patent invalidation, etc. are as shown in Figures 4 and 5.

Figure 3: Reasons why Patentees Lost Patent Infringement Lawsuits



(Notes) Both Figures 2 and 3 were prepared based on the statistic up to 2013 presented in the source specified in Footnote 9 and the statistical data about subsequent court judgments from the source specified in Footnote 8.

In Figure 2, the successful cases include partially successful cases. The number of settlements in 2014 is not publicized and is therefore not covered. In Figure 3, the number of unsuccessful cases includes partially successful cases. Therefore, it does not match with the number of lost cases in Figure 2 (where partially successful cases are excluded).

Regarding Japan, it should be noted that the statistical method for preparing Figure 4 was different from that for preparing Figure 3. Regarding other countries, we should take into consideration not only the difference in statistical methods, but also the differences in the systems (For example, in principle, it is not permitted to raise a patent invalidation defense in a patent infringement lawsuit in Germany.).

Especially, it should also be noted that the recent data<sup>16</sup> published by the USPTO show the changing trend about the statistics of final decisions with regard to the system called “Inter Partes Review,” which took effect on September 16, 2012.

Consequently, the ratio,  $\{(iv)+(v)\}/(ii)$ , which corresponds to the ratio indicated in Figure 5 has declined to 53%. If the total number of petitions since the commencement of this relatively new

system is used as a parameter, the ratio,  $\{(iv)+(v)\}/(i)$ , becomes 26%, which is almost the same as the rate of successful requests for patent invalidation in Japan in 2014.

- |       |   |         |
|-------|---|---------|
| (i)   | Total petitions                                   | = 2,731 |
| (ii)  | Trials instituted based on (i)                    | = 1,359 |
| (iii) | Trials completed (reached final written decision) | = 828   |
| (iv)  | All instituted claims found unpatentable          | = 600   |
| (v)   | Some instituted claims found unpatentable         | = 119   |

[Data as of February 29, 2016]

In either case, it is true that patentees have to face a certain level of risk of losing patent infringement lawsuits in Japan due to the patent invalidity defense. How-

Figure 4: Invalidation Ratio in Patent Infringement Lawsuits

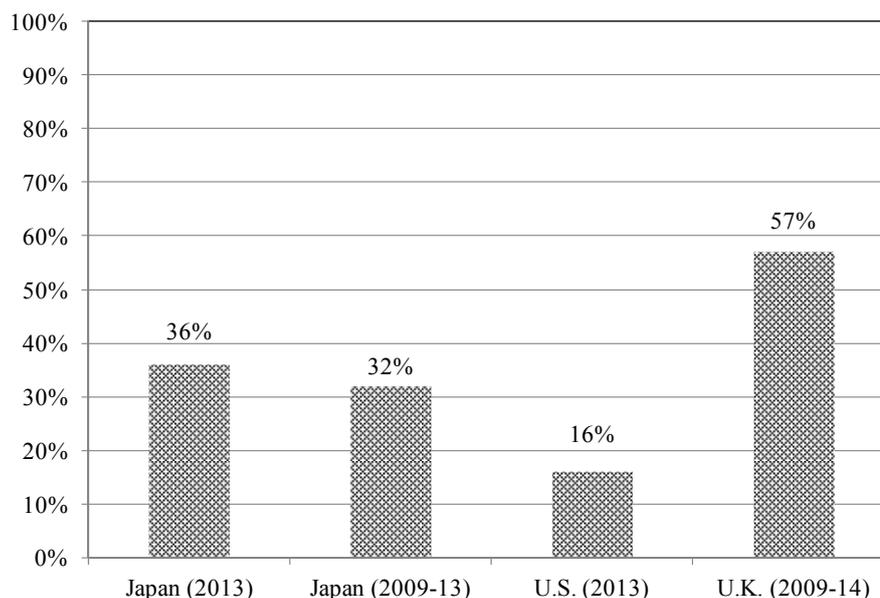
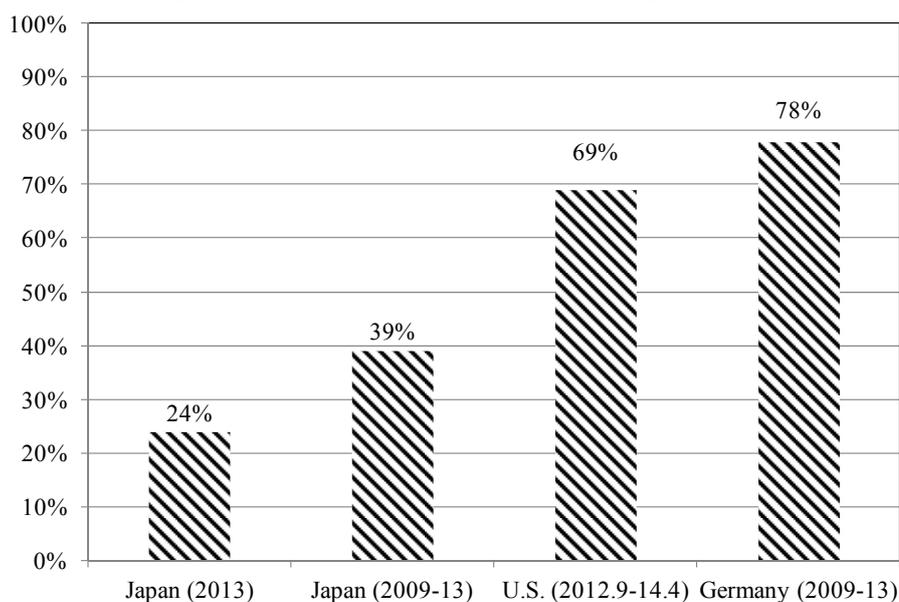


Figure 5: Invalidation Ratio in Patent Infringement Trials, etc.



ever, such risk is relatively low or equivalent to the risk in other countries.

**(3) Is the amount of damages low in Japan? --- Remedies including injunction for patent infringement**

A party who wins a patent infringement lawsuit in Japan will be granted damages, an injunction, or both. Our sur-

vey on the first-instances judgments<sup>8</sup> handed down by the Tokyo District Court and the Osaka District Court in 2014 is shown in Table 6.

In some of the judgments for cases where claims were made for both damages and injunction, the court awarded damages, but dismissed the claim for an injunction on the grounds that the sus-

Table 6: First-instance Judgments in 2014

Number of Judgments	Injunction			Damages		
	(i) Number of Claimed	(ii) Number of Accepted	(ii)/(i) Acceptance Rate	(i) Number of Claimed	(ii) Number of Accepted	(ii)/(i) Acceptance Rate
64	51	8	16%	56	13	23%

pected infringer has already stopped the act of infringement and is not likely to resume such act in the future or on any other grounds.

Regarding damages, provisions regarding the calculation of damages are set forth in the statute (Article 102 of the Patent Act), and the infringer's intent or negligence, which is a prerequisite for demanding damages, will be presumed to exist in such infringement (Article 103 of the Patent Act). The summary of Article 102 is quoted below<sup>17</sup>.

Article 102, Paragraph 1

*In the case in which counterfeits are being sold, if the patentee itself manufactures and sells the patented products or in any other way exercises its patent right, the sum of damages suffered by the*

*patentee can presumably be reached by multiplying the number of counterfeits assigned by the infringer by the amount of profit per unit (generally a so-called marginal profit) of the product which the patentee itself could have sold had there been no such infringements, which is not to exceed the amount corresponding to the ability of the patentee, to exercise its right (basically, if it has a potential ability to sell, its ability to exercise its right is deemed to exist). However, if any circumstance should have prevented the patentee from selling all or a part of the assigned numbers of products, the amount of damages would be calculated by deducting the amount corresponding to the said numbers (Article 102, Paragraph 1).*

Table 7: Top 5 Damages awarded by the District Courts in 2014

	Case No.	Awarded Amount (yen)	Claimed Amount (yen)	Basis for Damages	Patented Technology
1	2011 (Wa) 16885	1,568,040,000	12,433,120,000	Article 102, Paragraph 2	Vibration detector
2	2011 (Wa) 3292	167,510,000	1,000,000,000	Article 102, Para. 1 and 3	Security alarm
3	2011 (Wa) 30098	111,660,000	180,000,000	Article 102, Paragraph 3	Method for manufacturing a substance
4	2011 (Wa) 14227	100,000,000	100,000,000	Article 102, Paragraph 3	Method for manufacturing semiconductors
5	2011 (Wa) 14652	53,260,000	1,326,700,000	Article 102, Paragraph 3	Combo washer dryer

Article 102, Paragraph 2

*If the patentee itself sells the patented products or in any other way exercises its patent right, Article 102, Paragraph 2 provides that demands may be made for damages presuming the profit itself gained by the infringer to be the sum of damages suffered by the right holder.*

Article 102, Paragraph 3

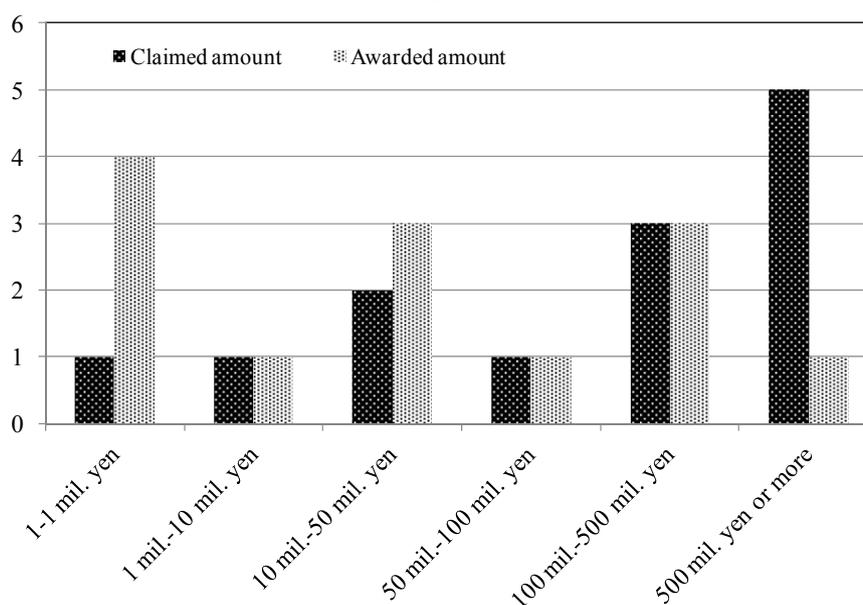
*While the cases [under Paragraphs 1 and 2] above require that the patentee itself should exercise its own patent right, if the patentee does not itself manufacture or sell the patented product but grants licenses to other companies to manufacture the patentee's products, demands for damages may be made against the infringer presuming the amount equivalent to the license fees to be the damages under Article 102, Paragraph 3.*

Table 7 shows the top five judgements in terms of amount of damages awarded by the court. Even in the lawsuit where the largest amount of damages was

awarded in 2014, the ratio of the awarded amount (about 1.5 billion yen) to the claimed amount (about 12.4 billion yen) was 12.6%. In all of the 13 judgements where the court awarded damages in 2014, the lowest ratio of the awarded amount to the claimed amount was 0.2%, the highest ratio was 100%, and the average ratio was 29.7%. From the results shown in Table 7 and the distribution of the claimed amounts and the awarded amounts shown in Figure 6, it can be presumed that the awarded amount is lower than the claimed amount in most cases.

The discrepancy between the amount claimed by the plaintiff and the amount awarded by the court in a lawsuit is partially attributable to the issue of so-called "contributory rate" (If the working part of the infringed patented invention constitutes merely a part of the right holder's product, the amount of damages may be limited to the amount corresponding to the infringed part out of the whole of the patentee's product.)<sup>17</sup> related to Article 102 of the Patent Act. Even in the cases

Figure 6: Claimed and Awarded Damages in the District Court Judgments in 2014



shown in Table 7 where the claims for large amount of damages were awarded, the contributory rate was calculated as 20% at most.

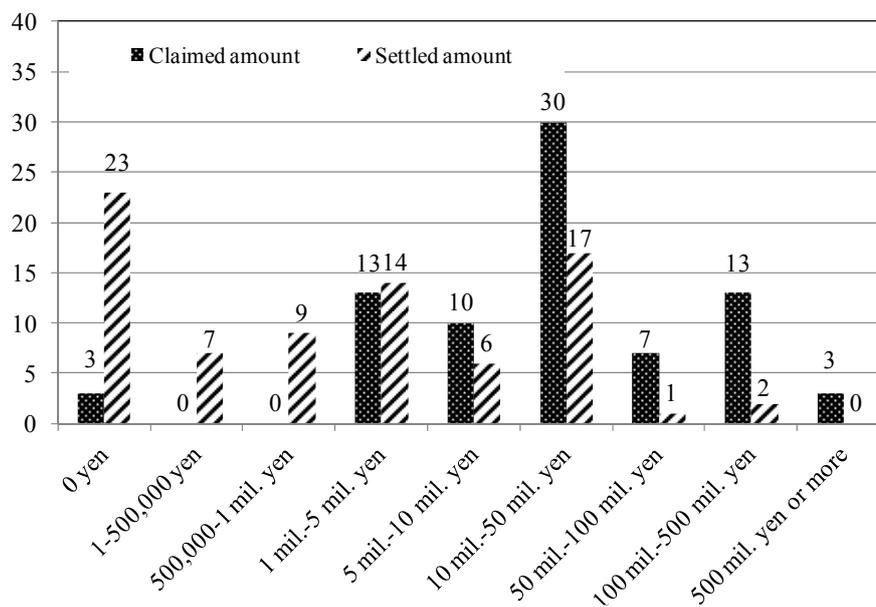
In the case 2012 (Wa) 14227, which was ranked fourth in Table 8, the ratio of the claimed amount to the awarded amount was calculated to be 100% because the amount of damages equivalent to royalties was found to be larger than the amount claimed by the plaintiff.

Furthermore, according to an analysis on the settlements of the infringement lawsuits on patent rights and utility model rights at the district courts<sup>3, 18</sup>, the distribution of the claimed amounts and the settled amounts during the three years from January 1, 2011 to December 31, 2013 was as shown in Figure 7. A note with regard to the analysis stated that “Particularly in case of settlements, there are cases where the claimed amount is significantly different from the settled amount. Therefore, it is difficult to define a ‘win’ because it partially depends on the subjective values of the parties concerned.” However, it is clear that settled

amounts are generally lower than the claimed amounts.

A comparison between patent infringement lawsuits in Japan and those in the U.S. has revealed that, in 2014, a U.S. court awarded US\$ 467 million as damage, which ranked tenth in terms of the amount of damages since 1995, while there was no judgment where the court awarded more than US\$1 billion for damages<sup>5</sup>. Even so, regarding the judgments in 2014, the amount awarded in the U.S. is 33 to 34 times higher than the largest amount awarded by the District Court for 2011 (Wa) 16885, which is shown in Table 7 (calculated based on the exchange rate as of March 2016). Although it is necessary to take into consideration the difference between the Japanese system and the U.S. system such as easy access to evidence in the discovery process, the existence of the jury system and treble damages for willful infringement, if only the total amount of damages is compared, it can be assessed that there is a large difference between Japan and the U.S. in terms of the awarded damages.

Figure 7: Claimed Amounts and Settled Amounts in Settlements from 2011 to 2013



#### **(4) Is the costs for patent litigation high in Japan?**

The aforementioned report<sup>9</sup> cited the following statement<sup>19</sup> and pointed out that “In Japan, attorney costs are one seventh to one eighth of those in the U.S.”

*“In an example case where the plaintiff claimed payment of 100 million yen as damages for infringement of a patent right and underwent judicial proceedings for a dispute over the occurrence of patent infringement and the validity of the patent and waited eight months before the pre-ruling comments (by a judge) since the filing of the lawsuit, and further waited until one year has passed since the filing of the lawsuit, and reached a settlement, the total amount of attorneys’ fee is about 10 million yen consisting of about 2.7 million yen on average as a retainer fee and 7.3 million yen as remuneration (in case of no advisory contract in advance).”*

Accordingly, it should be noted that the costs for patent litigation is not high, but may be reasonable in Japan though additional fees for translation may be required.

#### **(5) Do Japanese people tend to avoid litigation?**

The aforementioned report<sup>9</sup> also presents the following result of the interview survey and indicates that not only the tendency to avoid litigation among Japanese people but also the corporate culture and practices of each company could be a reason.

*“In the domestic interview survey, some respondents attributed the tendency to avoid litigation to the fact that they*

*find a dispute through litigation to be undesirable and that they fear that their parent companies and business partners would not approve a plan for litigation, or that enforcement of a patent right as a plaintiff is considered a bad thing to do. It was also reported that Japanese companies typically avoid lawsuits and try to solve disputes through negotiations. In contrast, U.S. companies do not hesitate to enforce their rights through litigation if necessary<sup>20</sup>”*

### **3. Future of Patent Litigation in Japan**

It has been over 10 years since the Intellectual Property High Court was established in 2005. Its achievement in creating the current system for patent litigation should be considered to be successful in many respects such as efficiency, predictability and economic performance, etc. However, some people point out that its achievements in terms of the number of lawsuits, the success rate, the collection of evidence and the amount of damages should be considered insufficient.

The Intellectual Property Strategy Headquarters in the Cabinet established an IP Dispute Resolution Task Force in February 2015 by stating that “It is important to discuss measures necessary to increase the values of intellectual properties with a focus on the establishment of a patent dispute resolution system suitable for creating an environment where patent rights, etc. are properly granted, protected and utilized in such a way that the creation of innovation is promoted.” In May 2015, the “IP Dispute Resolution Task Force Report” was published.<sup>21</sup> The issues mentioned in the Report were taken into consideration in the “Intel-

lectual Property Strategic Program 2015” announced in June 2015 as one of the three key areas. The Program stated that following measures should be implemented in the future.<sup>22</sup>

- (i) Enhancement of the functions of the IP dispute resolution system
- (ii) Promotion of the use of the IP dispute resolution system
- (iii) Disclosure and global distribution of information about IP dispute resolution

Regarding item (i), the Program stated that it is important to conduct a comprehensive review of the following four issues, i.e., “the procedure to collect evidence,” “the amount of damages,” “the stability of IP rights” and “the right to seek an injunction” and that appropriate measures should be taken if necessary. Regarding these four issues, the IP Dispute Resolution Task Force Report recommended that the following measures should be taken in the future with regard to these issues respectively: “making it easier to prove the occurrence of an act of infringement,” “reviewing the provisions concerning damages,” “modifying the provision concerning the invalidity defense (Article 104-3 of Patent Act)” and “detering excessive exercise of the right to seek an injunction by patent assertion entities (PAEs), which is also called as patent trolls, etc.”

Subsequently, since October 2015, those four issues have been discussed as the “issues concerning the revitalization of the IP dispute resolution system” by the members of the committee on the IP dispute resolution system of the Intellectual Property Policy Headquarters. At the meeting held in March 2016, the members prepared a report titled “How to

Improve the Functions of the IP Dispute Resolution System (draft).” The possible measures listed in the draft are as follows:

- Procedure to collect evidence
  - “Introducing an inspection system (\*A measure that emulates a similar system in Germany)”
  - “Making it easier to issue an order for submission of documents”
- Amount of damages
  - “Making it easier to calculate the amount of damages larger than the regular royalties”
  - “Creating a database, etc. concerning regular royalties”
  - “Making it easier to demand payment of an attorneys’ fee based on the actual costs”
- Stability of IP rights
  - “Introducing a system to seek opinions from the JPO”
  - “Relaxing the requirements for a re-defense based on correction (of a patent)”
  - “Introducing the heightened requirement for the purpose of confirmation (about the validity of a patent)”
- Right to seek an injunction
  - For the time being, no universal restrictions will be imposed by an amendment to the Patent Act. Necessary measures will be taken on a case-by-case basis through the doctrine of abuse of rights and the competition laws.
- Other issues
  - Supporting the efforts of private companies to establish litigation cost insurance in the field of intellectual property that can be used by small and midsize companies

It should be noted that all of these

possible measures would not necessarily result in amendments to the Patent Act (or the related acts) or changes in patent litigation practices. However, these measures are mentioned in the Intellectual Property Strategic Program 2016, which was decided on May 9, 2016, and therefore be subject to continuous concrete discussions. In view of the fact that opinions of the committee members were widely divided over some issues, it is difficult to predict how these possible measures will be brought into shape. However, if the aforementioned measures such as “Introducing an inspection system,” “Making it easier to calculate the amount of damages larger than the regular royalties,” “Making it easier to demand payment of an attorneys’ fee based on the actual costs” and “Relaxing the requirements for re-defense based on correction” are actually implemented, it would affect the patent litigation practices in Japan.

### (Notes)

- <sup>1</sup> International Monetary Fund “World Economic Outlook Database, October 2015” [<http://www.imf.org/external/pubs/ft/weo/2015/02/weodata/index.aspx>]
- <sup>2</sup> Five IP offices “IP5 Statistics Report 2014 Edition” [<http://www.fiveipoffices.org/statistics/statisticreports/2014edition.html>]
- <sup>3</sup> Japan Patent Office, “Tokkyoken tou no hunsou kaiketsuno jittai ni kansuru chōsa kenkyū houkokusho” (Report on the Resolution of Disputes over Patent Rights, etc.), (March 2015) \*Only in Japanese [[https://www.jpo.go.jp/shiryoutoushin/chousa/pdf/zaisanken/2014\\_11.pdf](https://www.jpo.go.jp/shiryoutoushin/chousa/pdf/zaisanken/2014_11.pdf)]
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  - <sup>10</sup> Two examples would be the judgments for the “radar case (Judgment date: December 25, 2008)” and the “circuit connection part case (Judgment date: January 28, 2009)” handed down by the Intellectual Property High Court. An explanation about these judgments is provided in Yoshiyuki Tamura, Chizai kousai 3bu no chousen --- Shinposei youken no handanni okeru atojie boushi” (Challenge by the Third Division of the Intellectual Property High Court --- Prevention of hindsight bias) (March 2011), etc. \* Only in Japanese [<http://www.westlawjapan.com/column/2011/110307/>]
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