

NEWSLETTER

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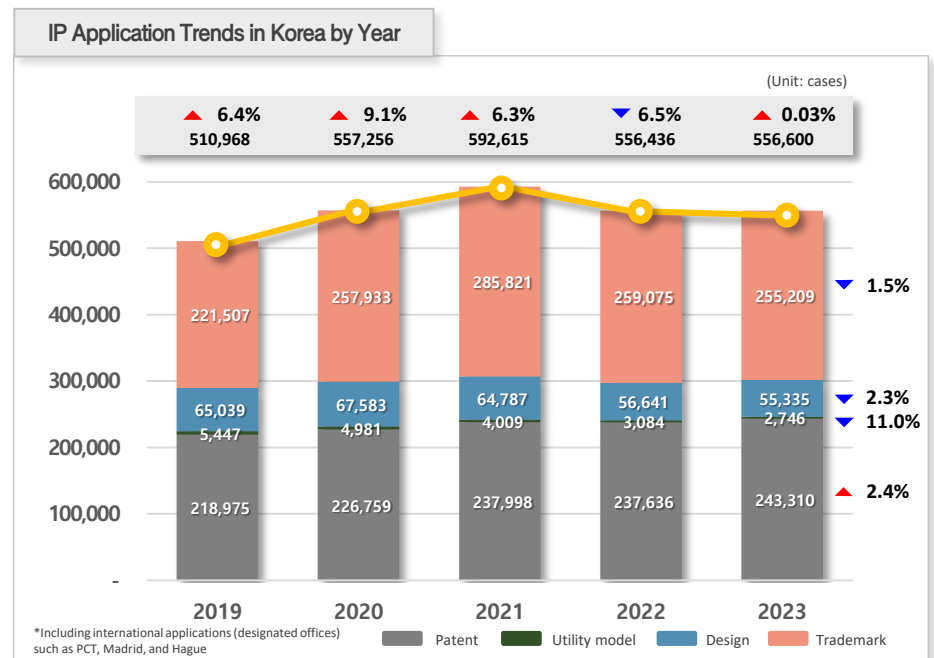
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Statistical Analysis of Domestic Intellectual Property in 2023

We have analyzed domestic intellectual property application statistics and Intellectual Property Trial and Appeal Board (IPTAB) trial statistics for 2023 based on the intellectual property (IP) statistics published by the Korean Intellectual Property Office (KIPO) in January 2024. The number of intellectual property applications filed with the KIPO in 2023 is similar to that of 2022, albeit with a slight decrease in applications by foreign applicants. The cases of the IPTAB, meanwhile, increased compared to the previous year. From the 2022 Annual Report on Intellectual Property Protection Enforcement in Korea published in December 2023 by the Presidential Council on Intellectual Property, we have extracted the statistics regarding revocation actions of IPTAB decisions and civil/criminal litigations for injunction against infringement. The proportion of cases where an IPTAB decision was revoked at the IP High Court in 2022 is similar to that of 2021, and the number of appeals to the Supreme Court against the IP High Court's decisions has been decreasing over the past five years. Regarding infringement injunction litigations, cases based on design rights increased significantly compared to 2021. This will be explored in further detail below.

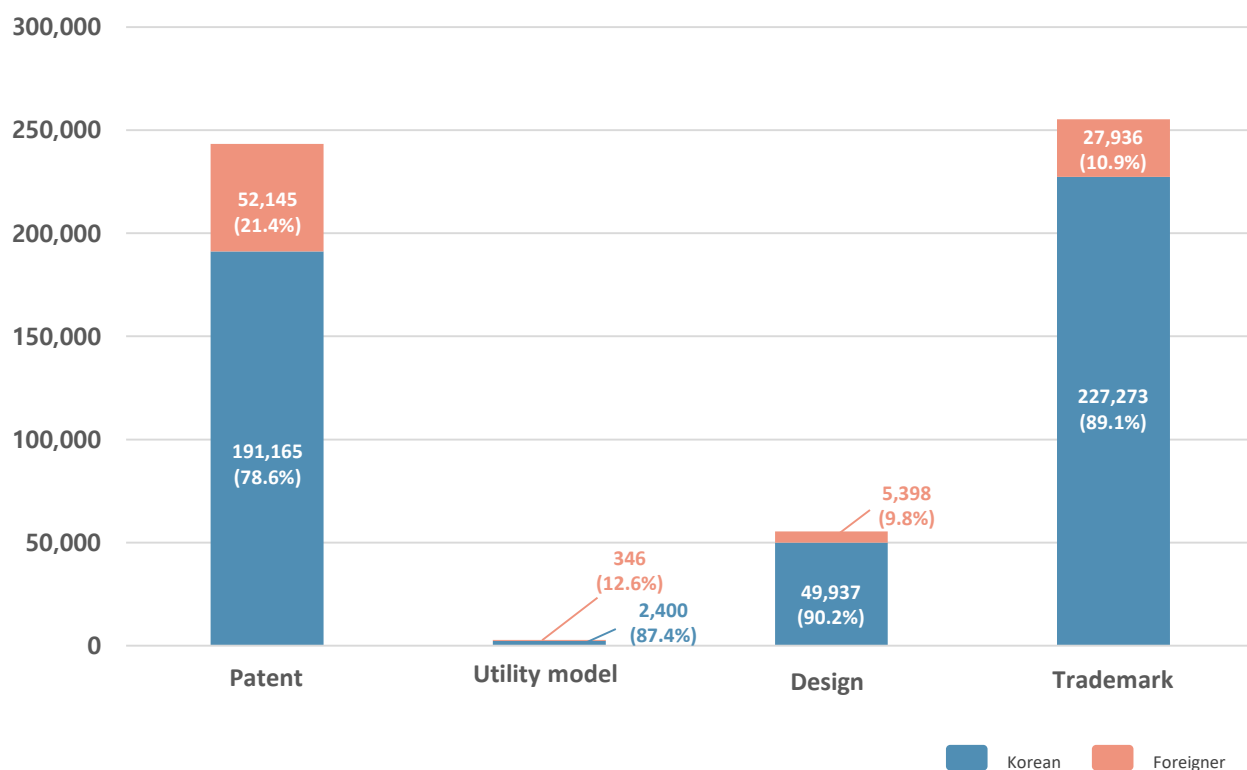
1. Overall Intellectual Property Application Trends

The total number of IP applications, including applications for patents, utility models, designs, and trademarks in 2023 is 556,600 - similar to the 556,436 of 2022 - and represents an increase of 0.03%. Specifically, the number of patent applications increased by 2.4%, while there were decreases in the number of applications for utility models (11.0%), designs (2.3%), and trademarks (1.5%).



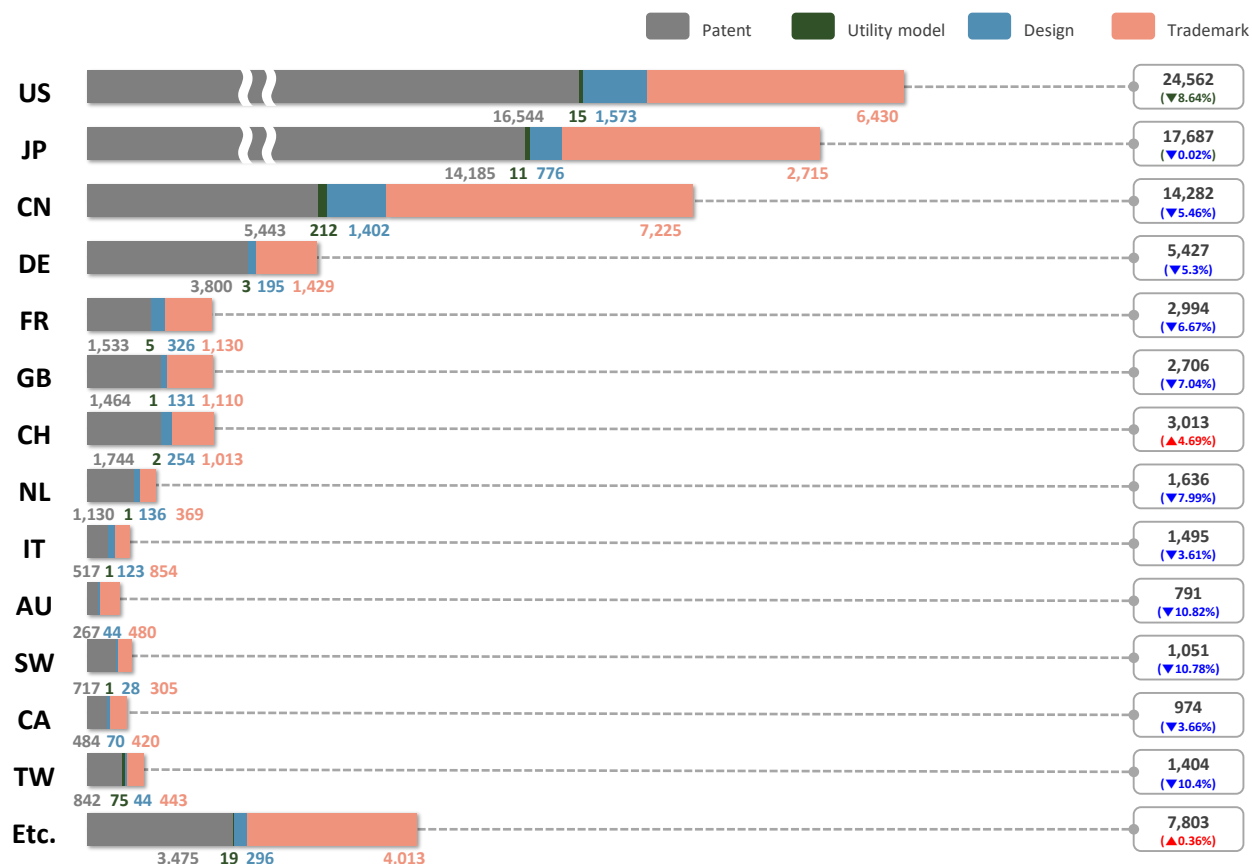
When dividing domestic IP applications into applications by Korean applicants (Korean applications) and those by foreign applicants (foreigner applications), it can be observed that foreigner application cases decreased slightly from 90,157 (16.2%) in 2022 to 85,825 (15.4%) in 2023, while Korean application cases increased slightly from 466,279 (83.8%) to 470,775 (84.6%). In 2023, the proportion of foreigner patent applications was 21.4%, with about 10% to 13% in other IP applications, as shown in the chart below.

Korean and foreigner's domestic applications in 2023



To analyze domestic applications by foreign applicant's nationality, American applications (29.5%), Japanese applications (20.1%), and Chinese applications (16.5%) account for the top ranks. In 2023, there was no significant change in the number of applications by Japanese and other countries' applicants compared to the previous year, with a slight increase in the number of Swiss applications and a slight decrease in the number of applications from other nationalities.

Domestic Applications by Foreign Applicant's Nationality in 2023



2. Patent Application Trends

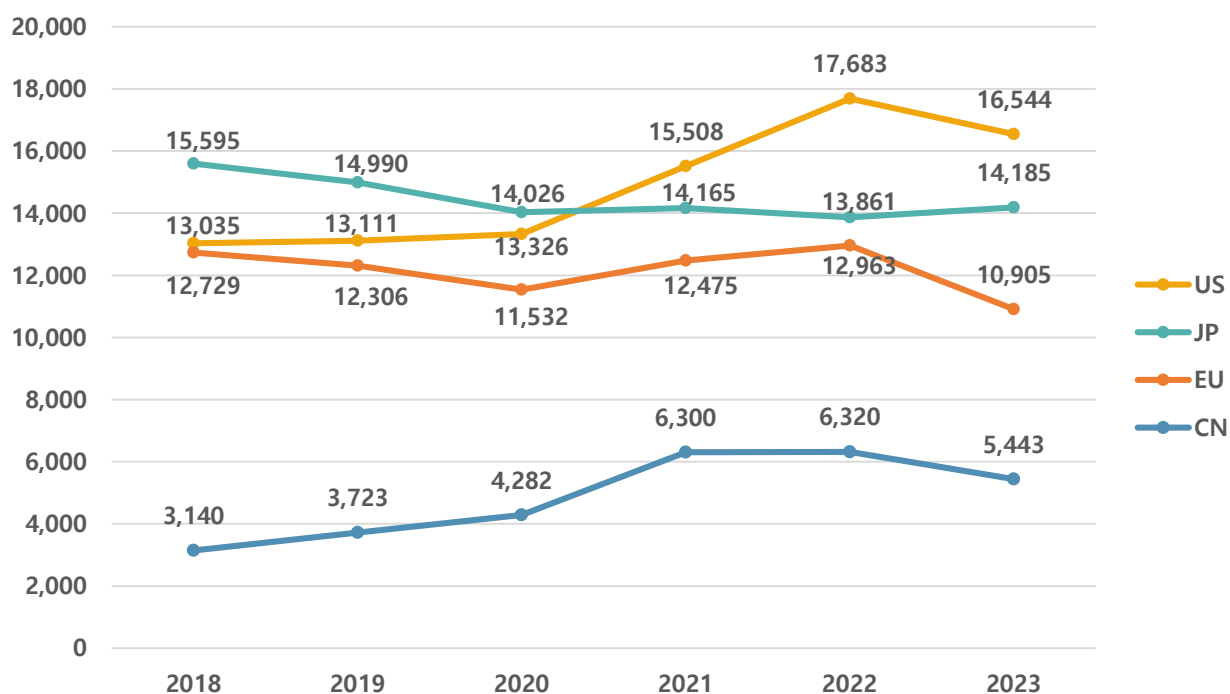
Looking further into patent application trends, the number of domestic patent applications (including PCT applications) was 243,310 in 2023, showing a slight increase compared to 2022. The number of PCT applications with KIPO as the receiving office was 22,166 in 2023, showing an increase of 1.14% compared to 2022. Based on the type of applicants, the number of domestic patent applications increased for major Korean companies (▲7.6%), strong, medium-sized Korean companies (▲0.7%), small and medium-sized Korean companies (▲3.8%), and university/public research institutes (▲9.2%) but decreased for Korean individuals (▼4.0%) and foreigners (▼3.2%).

Patent Application Trends in 2023

Classification	2019	2020	2021	2022	2023	
					Application	Rate of change
Total	218,975	226,759	237,998	237,633	243,310	▲2.4%
Major company	39,623	39,918	40,353	44,970	48,391	▲7.6%
Strong, medium-sized company	10,894	10,860	11,158	10,771	10,842	▲0.7%
Small and medium-sized company	49,569	56,973	62,639	62,970	65,380	▲3.8%
University • Public research institute	26,922	27,870	29,715	28,789	31,441	▲9.2%
Foreigner	47,553	46,315	51,783	53,878	52,145	▼3.2%
Individual	43,124	43,369	40,909	34,924	33,522	▼4.0%
Others	1,289	1,448	1,435	1,330	1,574	▲19.4%

Compared to the previous year, the number of patent applications filed in Korea by foreign applicants by country in 2023 decreased for the US (▼6.4%), Europe (▼15.9%), and China (▼13.9%) but increased for Japan (▲2.3%). Domestic applications by applicants from these four countries/regions account for 89.8% of foreigner applications in Korea. The chart below shows the trends in the number of domestic patent applications filed by applicants in these four countries/regions over the past six years.

Domestic Patent Applications by Foreign Applicants by Major Countries

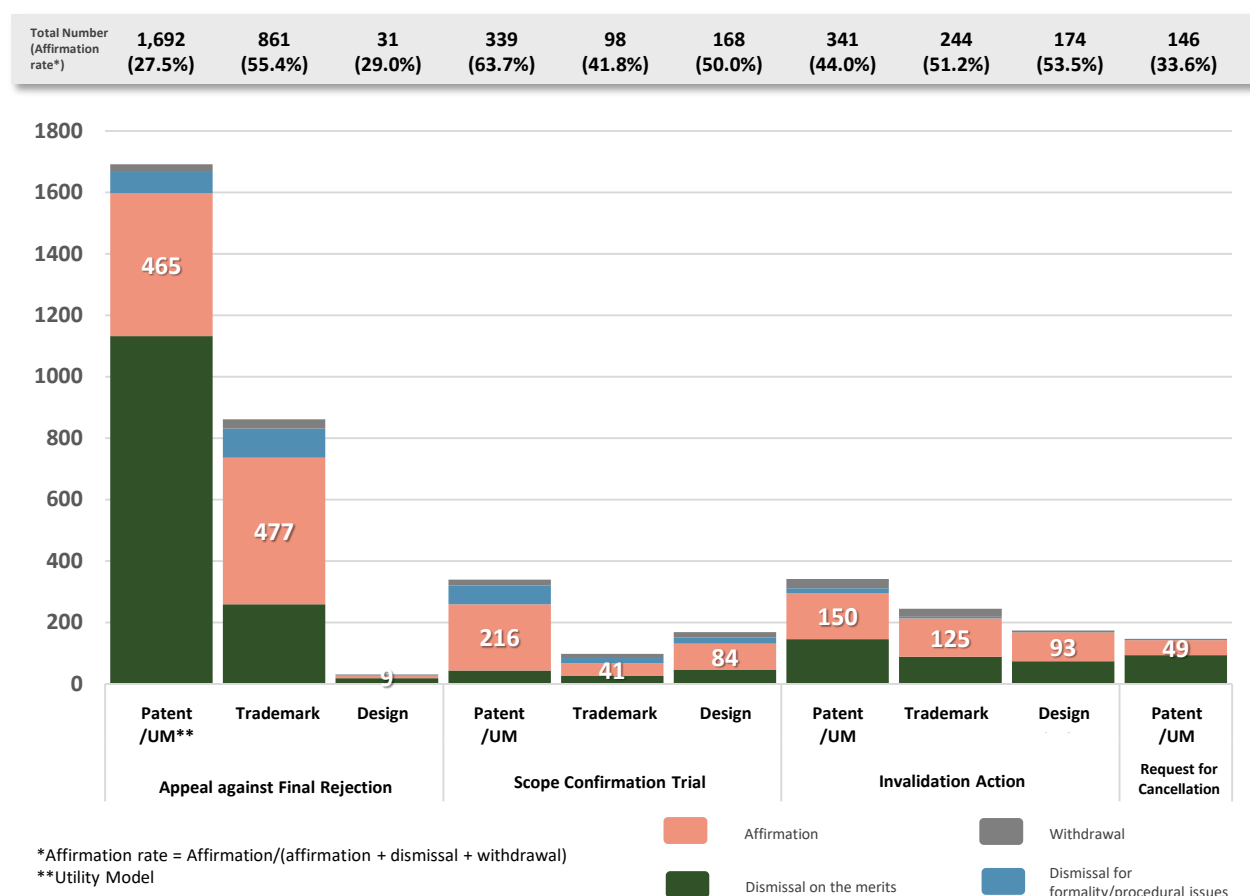


As for domestic applications by technology area, applications increased mainly in electromechanical/energy technology (e.g., secondary cells) (▲11.4%), computer technology (e.g., AI) (▲4.2%), semiconductors (▲12.3%), and electronic (digital) communications (▲10.3%) but decreased in e-commerce (▼6.0%) and audio/video technology (▼6.6%) (Data accumulated for Q3 of 2023 used; technology areas are categorized by reference to WIPO's technology classification with 35 areas).

3. Trends of IPTAB cases and Revocation Actions of IPTAB's Decisions

In 2023, the overall caseload of the IPTAB increased by approximately 15% compared to the previous year. In particular, patent scope confirmation actions as filed increased by about 2.5 times compared to 2022, with the number of cases rising from 300 to 770. The affirmation rates for appeals from rejections of patent • utility model, trademark, and design applications were 27.5%, 55.4%, and 29.0%, respectively. In scope confirmation actions, the affirmation rates for patents • utility models, trademarks, and designs were 63.7%, 41.8%, and 50.0%, respectively. In invalidation actions, the affirmation rates were 44.0%, 51.2%, and 53.5%, respectively. The affirmation rate of requests for cancellation for patents • utility models was 33.6%, which was lower in comparison to invalidation actions.

IPTAB Case Trends in 2023



For revocation actions of IPTAB decisions brought at the IP High Court, the proportion of cases where an IPTAB decision was revoked in 2022 was 25.4%, which is similar to the previous year. Meanwhile, the number of appeals to the Supreme Court against the decisions of the IP High Court has been gradually decreasing, with 126 appeals in 2022 and the reversal rate decreasing to 4.3% in 2022.

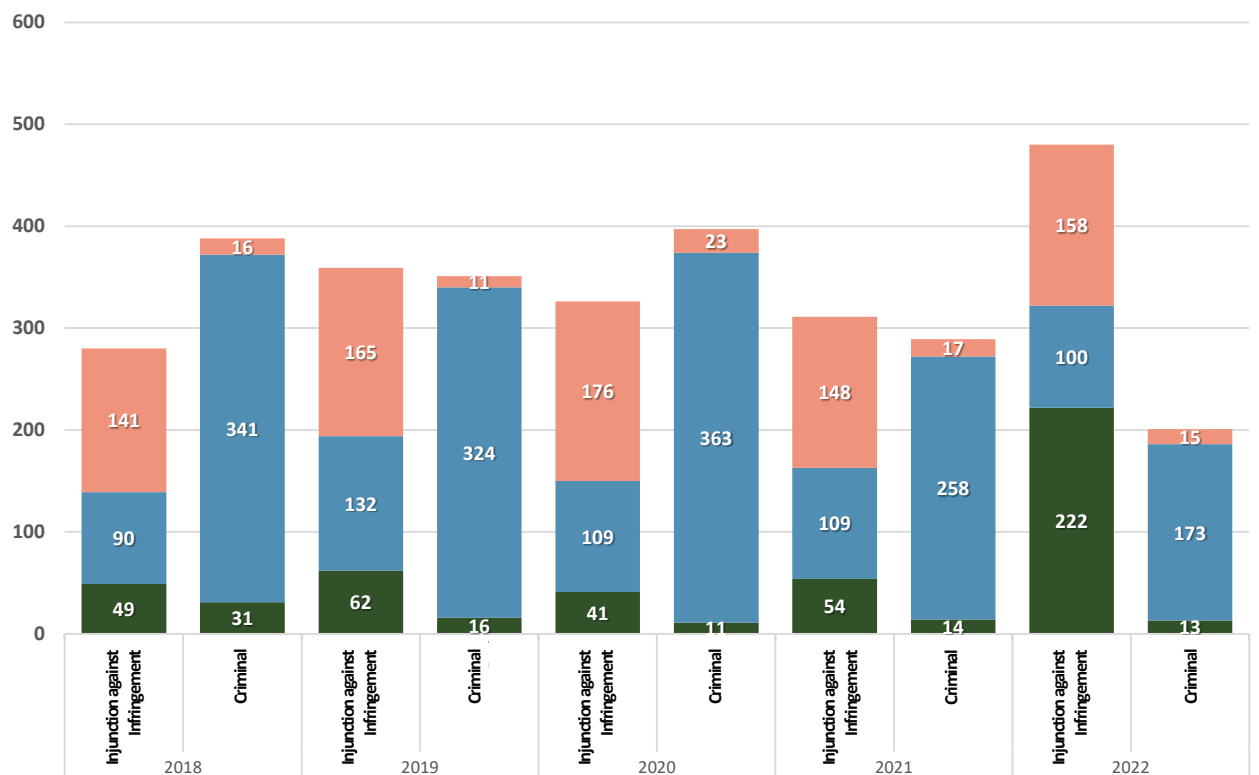
Statistics at the IP High Court and the Supreme Court

Classification		2018	2019	2020	2021	2022
IP High Court	Number of IPTAB Decisions	7,473	8,992	6,064	5,697	4,956
	Number of Appeals	877	841	673	611	562
	Appeal Rate (%)	11.7	9.4	11.1	10.7	11.3
	Number of Decisions	887	798	766	594	613
	Cases Revoked	197	204	210	152	156
	Revocation Rate (%)	22.2	25.6	27.4	25.6	25.4
Supreme Court	Number of Appeals	250	220	211	156	126
	Cases Sentenced	276	242	232	161	138
	Cases Reversed	20	12	12	13	6
	Reversal Rate (%)	7.2	5.0	5.2	8.1	4.3

4. Civil/Criminal Litigations for Injunction against Infringement

Although the overall number of trials for requesting an injunction against infringement has remained steady over the past five years, the number of the above (civil) trials based on design rights increased by approximately four times in 2022 compared to the previous year, with the number of cases rising from 54 to 222. In 2022, the success rates of rights holders in trials requesting an injunction against infringement (merits of civil cases) based on patent and trademark rights, excluding mediation, settlement, and transfer, were approximately 20.3% and 28.1%, respectively. The merits of criminal cases overwhelmingly involve trademark act violations (approximately 89.7%).

Status of IP Disputes from 2018 to 2022



* Injunction against Infringement: Request for injunction against infringement (merits) + Request for preliminary injunction against infringement

**Utility Model

Patent+UM**

Design

Trademark

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Supreme Court's Ruling on the Description Requirements for the Specification of a Parameter Invention

1. Summary of the Case

Company A, the right holder of the patent entitled "Method for Producing Polycrystalline Silicon" (hereinafter, the **patent-at-issue**), filed a lawsuit against Company B with the Seoul Central District Court in 2017 seeking an injunction against patent infringement and compensation for damages. In response, Lee & Ko, the legal counsel of Company B, pleaded that Company A's patent infringement claim was based on a patent right that was clearly invalid and constituted an abuse of rights. To fundamentally resolve the dispute, Lee & Ko filed a petition with the Intellectual Property Trial and Appeal Board (IPTAB) against Company A as the respondent for the invalidation of the patent-at-issue. The invalidation trial proceedings led to a Supreme Court decision where the invalidation of the registration of the patent-at-issue became final and conclusive. Lee & Ko thus successfully resolved a patent dispute that had been ongoing for nearly seven years.

Whether the parameter invention met the description requirements for a specification was magnified as a key issue in the invalidation trial proceedings. In connection with this, the Supreme Court ruled that the registration of the patent-at-issue should be invalidated based on the grounds that a person of ordinary skill in the art (**POSITA**) cannot use a production method specified by a parameter even according to the matters described in the description of the invention (Article 42(3)(i) of the former Patent Act) and that the claims that comprise a parameter of which the measurement method is unclear are not deemed to be clearly described (Article 42(4)(ii) of the former Patent Act)(Supreme Court Decision No. 2020Hu10292 rendered on January 11, 2024).

2. Procedural History of the Invalidation Trial for the Patent-at-Issue

The patent-at-issue is a so-called parameter invention defined by a numerical limitation, which defines (i) a parameter that combines various process variables applied to the manufacture of polycrystalline silicon and (ii) limits the scope of rights to the upper and lower limits of the corresponding parameter value.

The process variables constituting the parameter of the patent-at-issue are generally applied to conventional processes for the production of polycrystalline silicon, and each process variable and its appropriate numerical range are widely known in the industry. However, there was no prior art reference that disclosed the parameter itself to which each of these process variables is reflected and the numerical range thereof. Further, the description of the invention of the patent-at-issue described some working examples and comparative examples that may provide partial support for the invention, making it difficult to deem that the patent-at-issue violated the support requirements (Article 42(4)(i) of the Patent Act).

However, Lee & Ko argued the following as the main invalidation grounds: (i) in the patent-at-issue, the standards, methods, and conditions for measuring some process variables constituting the parameter are unclear, making it impossible for a POSITA to easily practice the invention (insufficient disclosure in the specification under Article 42 (3)(i) of the former Patent Act); (ii) the parameter consisting of such unclear process variables is also unclear, which means the claims are not clearly and concisely described (lack of clarity in claims under Article 42(4)(ii) of the former Patent Act).

In Korean patent practice, it is very unusual for the courts to judge that a registered patent is invalid solely on the grounds of the failure to meet the description requirements for a specification. Lee & Ko actively utilized means of proof, such as technical presentations, expert statements, and witness examinations, to prove that the parameter of the patent-at-issue failed to satisfy the legal requirements set by the Supreme Court for specification descriptions for parameter inventions. In this process, there was a fierce battle between the two parties over various issues existing in the field of parameter inventions. Further, the board of appeals and the judicial panel conducted an in-depth oral hearing and reviewed the related legal principles regarding the corresponding issues for an extended duration.

As a result of the faithful pleadings conducted by Lee & Ko based on these specific grounds, the IPTAB, the IP High Court, and the Supreme Court rendered a final judgment, unanimously holding that the registration of the patent-at-issue should be invalidated on the grounds that the patent-at-issue failed to meet the description requirements for specifications of parameter inventions. The Supreme Court's ruling is summarized as follows.

Supreme Court Decision No. 2020Hu10292 (Invalidation of Registration (Patent)), rendered on January 11, 2024

(1) Article 42(3)(i) of the former Patent Act

The technical feature of the subject patent resides in that a process is performed in a way that a parameter, which is a flow condition in a reactor, exists within a predetermined range through a linked adjustment of each process variable that is closely affected by each other during the reaction, and thereby showing an effect of optimizing the process. Therefore, the value of the process variable during the reaction has a significant technical meaning in the practice of the subject patent.

The specification of the subject patent does not describe a method of measuring some process variables that determine a parameter, and it is difficult to say that a POSITA would have easily identified a measurement method of each of the process variables or a value thereof in light of the state of the art at the time of the priority date of the subject patent, solely based on the materials submitted in the subject case.

Therefore, a POSITA would not have been able to use a production method specified by a parameter based on the matters described in the description of the invention in light of the state of the art at the time of the priority date without undue experiments or the addition of special knowledge. Hence, the description of the invention in the specification of the subject patent is not considered to have been clearly described in detail in such a manner that a POSITA can easily practice the invention.

(2) Article 42(4)(ii) of the former Patent Act

Whether or not the invention is clearly written should be individually determined according to whether a POSITA can clearly identify an invention for which a patent grant is sought from the matters described in the claims in consideration of the description of the invention, drawings, etc., and the technical common knowledge at the time of the patent application.

In the subject patent, the method of measuring some process variables constituting the parameter is not clearly described, and thus, it cannot be deemed that the invention is clearly described in the claims.

3. Implications

The Supreme Court's ruling, drawn by Lee & Ko after approximately four years of hearings beginning in 2020, indicates that "the patentee's appeal filed against the IP High Court's decision holding that the specification of the patent-at-issue fails to meet the description requirements has no merits" and is significant in that it clarifies the legal principles for the description requirements of parameter inventions.

Notably, in order to obtain a patent registration for a conventional manufacturing process that has been commonly practiced, there is a tendency to file a patent application in the form of a parameter invention that appropriately combines process variables applied to the relevant manufacturing process, and the frequency of patent registrations is increasing for the reason of the novelty of the relevant parameter. However, according to the legal principle stated by this Supreme Court's ruling, it should be kept in mind that even in the case of the introduction of a new parameter, if the technical meaning of individual process variables constituting the parameter and the measurement method thereof are not specifically described, a decision invalidating the registration of the patent invention may be rendered in future invalidation trials solely based on the failure to meet the specification description requirements.

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Amendments to the Trademark Act Including the Introduction of a Letter of Consent System

An amendment to the ‘Trademark Act,’ including the so-called ‘letter of consent system,’ which allows a later-filed trademark to be registered if the trademark holder of the prior-registered trademark consents to the registration of the later-filed trademark, was promulgated on October 31, 2023, and is scheduled to take effect on May 1, 2024. The main points of the amendment are as follows. The letter of consent system and other amendments to the Trademark Act will be discussed in detail below.

1. Introduction of the Letter of Consent System

Regarding the registration of identical or similar trademarks to be used for identical or similar goods, the current Trademark Act stipulates that ‘any trademark used on goods identical or similar to the designated goods, which is identical or similar to a prior registered trademark of another person based on first-to-file’ cannot be registered (Article 34(1)(vii) of the Trademark Act). As a consequence, applicants who filed trademarks that are identical or similar to prior-registered or prior-filed trademarks of others faced challenges in obtaining registration for their trademarks, significantly limiting their ability to stably register and use trademarks.

However, with this amendment, even if any trademark application is rejected due to the similarity to a prior-registered or prior-filed trademark of another party, trademark registration can be obtained if the other party consents to the registration of the later-filed trademark. This allows the applicant of the later-filed trademark to continue to use the trademark by voluntary agreement, ensuring business stability and proactively preventing trademark-related disputes. However, in order to prevent confusion among consumers, if the trademarks and designated goods are ‘identical,’ registration cannot be granted even with such an agreement. In addition, the fact that a trademark was registered through the letter of consent system is indicated in the trademark register, and conditional consent agreements that limit the period or region of the agreement are not allowed.

This amendment is also applicable to trademark applications filed prior to the enforcement of the Act if the decision on whether to grant trademark registration is made after the enforcement of the Act.

The revised Act allows for the flexible registration of trademarks but also provides the possibility of cancellation if either the trademark, registered with the consent of the holder of the prior-registered trademark, or the trademark of the person who consented to the registration of the trademark, is used for unfair competition, leading to consumer deception or confusion.

2. Expanded Scope of Recognition of Acquired Distinctiveness through Use

'Acquired Distinctiveness through use' means that, even if a trademark is not originally distinctive, if it acquires distinctiveness as a result of continuous use by an entity for a certain period of time, it can be deemed that it already functions as a source identifier and there is no longer a need in the public interest to ensure free use among competitors. Accordingly, registration of the trademark is allowed, and distinctiveness is subsequently recognized to protect the goodwill of the trademark user and prevent general consumers from misunderstanding the quality or confusing the source of the goods (Article 33(2) of the Trademark Act).

However, under the current Act, marks that are not recognized as source identifiers, marks that must be guaranteed free use, or marks that are deemed inappropriate to be monopolized by a particular person in the public interest fell under the category of 'other non-distinctive trademarks,' as defined in Article 33(1)(vii) of the Trademark Act, and were excluded from the scope of trademarks that can acquire distinctiveness through use stipulated in Article 33(2) of the Trademark Act. However, the acquisition of distinctiveness was recognized in precedents and in practice.

In this amendment, Article 33(2) explicitly stipulates that the 'other non-distinctive trademarks' in Article 33(1)(vii) can also be registered by recognizing the acquired distinctiveness through use. Accordingly, even 'other non-distinctive trademarks' may be registered as a trademark if, as a result of their use, they acquire distinctiveness as a source identifier of a particular entity, thereby clarifying the scope of application of acquisition of distinctiveness by use.

3. Clarification of Rights to Inherited Trademarks if There are No Heirs

In the event of a trademark holder's death, the trademark rights are inherited by their heirs. However, unlike the Patent Act and the Design Protection Act, the Trademark Act does not provide for the lapse of trademark rights in the event of a trademark holder's death without heirs.

The amendment clarified the legal relationship of inherited trademark rights by adding a provision that trademark rights are extinguished if there are no heirs at the time of inheritance of the trademark rights.

4. Recognition of Division of Applications for International Trademark Registration

The current Trademark Act does not permit the division of applications for international trademark registrations, which has caused difficulties for applicants of international trademark registrations, such as having to re-file domestic applications in order to respond to grounds for rejection. However, the revised Act allows the applications to be divided for international trademark registrations, and improves the convenience of applicants, such as by allowing them to respond to grounds for rejection against certain designated goods by dividing the application. However, the division of an application for international trademark registration is possible only after the examiner has issued provisional refusal.

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Revision to the Invention Promotion Act, Including the Introduction of an Employee Invention Automatic Succession System

The Invention Promotion Act Amendment Bill (hereinafter, referred to as the **Amendment Act**), which includes the introduction of an employee invention automatic succession system, as well as the introduction of document production order and confidentiality order systems in the litigation on compensation for employee inventions, will come into force on August 7, 2024. The main contents of the amendment are as follows:

1. Introduction of Employer's Employee Invention Automatic Succession System

(Reason for Amendment) Under the current acts, in order for an employer to succeed the rights to an employee invention from an employee, (i) the employee shall notify the employer of the fact that the employee invention has been completed, and (ii) the employer shall notify the employee within four months as to whether they, the employer, succeed to the rights to the invention.

However, the rights to the employee invention are not transferred to the employer until the employer notifies the employee of their succession. Taking advantage of this nebulous situation, employees may transfer the rights to the employee invention to a third party, referred to as a double transfer.

(Content of Amendment) In a case where an employer has stipulated in a contract or working regulation that the rights to an employee invention are to be succeeded, the rights to the employee invention are automatically succeeded by the employer **upon completion of the invention** (main text of Article 13(1) of the Amended Act). Further, where an employer has decided not to succeed to the rights to an employee invention, the employer shall notify an employee within four months (proviso of Article 13(1) of the Amended Act).

(Time of Enforcement) The Amended Act shall apply to employee inventions made after the Act comes into force, which is on August 7, 2024 (Article 2 of Supplementary Provision of Amended Act).

(Implication) ① In the case of a so-called "pre-arranged succession regulation" that stipulates that the employer will succeed to the rights to the employee invention, the time for the succession of an employee invention will be accelerated by up to four months - from the "time of the employer's succession notification (after the employee's notification of completion of an employee invention)" to the "time of completion of the invention." This helps to finalize the rights surrounding employee inventions as soon as possible.

② The succession process has been streamlined so that employers only need to notify the employees of their intention not to succeed, thereby reducing the procedural burden on employers.

③ It is expected that disputes due to employee's double transfers, etc., will be effectively reduced.

(Notes) It is necessary to amend the pre-arranged succession regulation so that employers can succeed to employee inventions more reliably. The amendment should be made to clearly reveal that "the employer automatically acquires rights to the invention upon completion of the invention and does not succeed if the employer wishes not to do so."

2. The Introduction of Material Production Order and Confidentiality Order Systems in the Litigation on Compensation for Employee Inventions

(Reason for Amendment) Intellectual property laws, such as the Patent Act and the Act on the Prevention of Unfair Competition and Protection of Trade Secrets, provide for a material production order and a confidentiality order to compel parties to produce evidence necessary for judgment in a related lawsuit.

On the other hand, since the Invention Promotion Act does not have such a system, it has been difficult to induce the submission of evidence necessary for trial in the "litigation on compensation for employee inventions," resulting in difficulties in calculating reasonable compensation.

(Content of Amendment) ① **Introduction of a Material Production Order System:** the court may order the counterparty to produce materials necessary for the calculation of the amount of compensation in the litigation on compensation for employee inventions, and even if the materials constitute a trade secret of the party, it is not a justifiable reason to refuse to produce the necessary materials (new Article 55(8) of the Amended Act).

② **Introduction of a Confidentiality Order System:** in the litigation on compensation for employee inventions, the necessity to protect the trade secrets submitted under the Material Production Order System has been emphasized. Accordingly, a confidentiality order system is introduced to prevent the disclosure of trade secrets (new Articles 55(9) to 55(11) of the Amended Act), and a person who violates a court's confidentiality order without a justifiable reason in Korea or abroad shall be punished by imprisonment for not more than five years or a fine of not more than KRW 50 million (new Article 58(1) of the Amended Act).

(Time of Enforcement) The Amendment Act shall apply to litigations on compensation for employee inventions filed after the Act comes into force, which is on August 7, 2024 (Articles 3 and 4 of Supplementary Provision of Amended Act).

(Implication) The material production order and confidentiality order systems introduced by the amendment are the same as those previously introduced in the Patent Act and the Act on Prevention of Unfair Competition and Protection of Trade Secrets.

In comparison between the document production order under the Civil Procedure Act, which has been used in the litigation on compensation for employee inventions, and the material production order under the Amended Act, the targets to be produced have been expanded, the justifications for refusing the production have been reduced, and the sanctions for failing to comply with the production order have been strengthened.

	Document production order	Material production order
Targets to be produced	Documents	Materials including objects other than documents in addition to documents
Justifiable reasons to refuse to produce	Submissions can be rejected for trade secret reasons	Submissions cannot be rejected for trade secret reasons
Sanctions for failing to comply with production orders	A party's assertions about the contents of a document can be recognized as true	In certain cases, the fact a party tries to prove can be recognized as true

(Notes) It is expected that once the Amended Act comes into force, it will be difficult for a party to refuse to produce materials related to the calculation of compensation for employee inventions on the grounds that they constitute trade secrets. Therefore, in the litigation on compensation for employee inventions in the future, employees are likely to be more aggressive in demanding the production of materials necessary to calculate compensation, and thus, employers should be aware of the increased likelihood that they will be required to produce trade secret materials in litigation.

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KIPO Reforms the Patent Application Preferential Examination System

The Korean Intellectual Property Office (KIPO) has reformed the preferential examination system by expanding the scope of preferential examination for advanced technologies, such as displays and secondary batteries, and excluding cases that are no longer in need of urgent processing from preferential examination.

The KIPO already included patent applications for advanced technologies, such as semiconductors (requests for preferential examination filed from November 1, 2022) and displays (requests for preferential examination filed from November 1, 2023), which are significant for economic development, to be subject to preferential examination; now, from the first half of 2024, patent applications for secondary batteries will also be subject to preferential examination. All patent applications of domestic and foreign companies producing or preparing to produce products and devices related to semiconductors, displays, and secondary batteries in Korea are eligible for a preferential examination, and a preferential examination fee of KRW 200,000 must be paid to file a request for preferential examination.

In addition, while patent applications relating to green technology were previously subject to preferential examination only after receiving green technology-related support or certification from the government, this reform has relaxed the requirements so that applications with a green technology-related patent classification are eligible for preferential examination. These green technology-related patent classifications will be posted on the KIPO website.

On the other hand, applications that requested a prior art search by a specialized search organization were previously subject to preferential examination; however, this reform excludes them from the scope of preferential examination. This is to exclude cases that no longer need to be urgently processed in order to concentrate examination capabilities in areas where preferential examination is urgently needed in light of technological change and economic development.

As of 2023, the average processing time (1st OA) in the case of preferential examination is approximately two months, which is about 18 months shorter than the average processing time in the case of normal examination, which is about 20 months, so applicants who wish to acquire patent rights early on should actively consider filing a request for preferential examination.